



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 231 OF 2017

CONSOLIDATED WITH CAUSE NOS. 232-240 OF 2017

SALESA GUYO BORU & 9 OTHERS.....CLAIMANTS

VERSUS

JIANXI ZHONGMEI ENGINEERING CONSTRUCTION COMPANY LIMITED...RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent for the alleged wrongful and unprocedural dismissal from employment and for the Respondent's alleged failure to pay terminal benefits. The Claimants averred that they were employed by the Respondent on diverse dates and had filed 10 individual suits but these suits were consolidated for purposes of the hearing and disposal. The Causes were No. 232 of 2017 – Abudo Boku Masara, 233 of 2017 – Abdub Bibu Tuyo, 234 of 2017 – Guyo Rege Tacho, 235 of 2017 – Kana Tore Liban, 236 of 2017 – Adan Kampicha, 237 of 2017 – Dida Liban, 238 of 2017 – Galgalo Halake, 239 of 2017 – Godana Fora Shonka and 240 of 2017 – Wario Jarso Wario. The Claimants sought to have the lead file being this case No. 231 of 2017. The Claimant in Cause 231 of 2017 on his own behalf averred that he was employed on 15th June 2011 as a concrete mixer at the Respondent's project of the construction of the Marsabit – Turbi Road. He averred that he was wrongfully and unprocedurally dismissed on 19th September 2014 and that the Respondent refused to pay his terminal dues. He averred that his employment together as well as his termination were marred with gross and blatant contravention of the Employment Act. The Claimant asserts that the Respondent failed to accord him due process and that there was no valid reason for dismissal. The Claimant further averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management. The Claimant averred that the Respondent failed to pay for public holidays, overtime, and also failed to adjust wages as agreed by the Union and the employer in the agreement, as well as failure to submit NSSF and NHIF deductions. The Claimants thus seek declarations that the termination process as carried out by the Respondent was unlawful; for a declaration that during the employment the Claimant was not remunerated as required by law and thus sought payment of 2 month's salary in lieu of notice, gratuity/service benefits, compensation for unfair termination, underpayment, annual leave dues, unpaid house allowance, Sundays' underpayments plus costs of the suits and interest.

2. The Respondent in its defence admitted employing the 10 Claimants in various capacities but denied that the termination of employment was unfair, wrongful or unlawful. It averred that as per the agreement dated 11th October 2010 entered into with Kenya National Highways Authority (KeNHA) the Respondent was awarded the contract for upgrading to bitumen standards the multinational Kenya/Ethiopia corridor development project known as the Marsabit- Turbi (A2) Road. The Respondent averred that as at April 2014, a substantial part of the project had been completed and between April and September 2014, the Respondent relieved the Claimants depending on the month when the Claimants completed their specified assignments. It averred that sometime in August 2014 upon request by the Respondent, KeNHA extended the contract from April 2014 with the completion date being 20th April 2015. The Respondent averred that it retained some of the Claimants until April 2015 when they were released following completion of the project works. The Respondent averred that the Claimants served as follows:- in Cause No. 232 of 2017 – Abudo Boku Masara a security guard worked between July 2012 and July 2014, in Cause No. 233 of 2017 – Abdub Bibu Tuyo a mason worked from December 2011 to September 2014, in Cause No. 234 of 2017 – Guyo Rege Tacho a general worker served from July 2012 to September 2014, in Cause 235 of 2017 – Kana Tore Liban a general worker served from January 2012 to September 2014, in Cause No. 236 of 2017 – Adan Kampicha a lab attendant worked between July 2011 – September 2014, in Cause No. 237 of 2017 – Dida Liban a truck driver worked between July 2012 – September 2014, in Cause No. 238 of 2017 – Galgalo Halake a security guard worked from October 2013 – September 2014, in Cause No. 239 of 2017 – Godana Fora Shonka a security officer worked between May 2013 – July 2014 and in Cause No. 240 of 2017 – Wario Jarso Wario a tipper driver worked between November 2013 – October 2014. The Respondent averred that it however continued maintaining the road with lean staff between 20th April 2015 and 19th April 2017 during the defects liability period. The Respondent averred therefore that the Claimants contracts were for a fixed term and as at April 2015 none of them had a legitimate expectation that they would continue working for the Respondent indefinitely as their contracts automatically lapsed upon the completion of the project. It averred that it also issued the Claimants with recommendation letters to enable them secure alternative employment. The Respondent averred that the Claimants' contracts lapsed upon completion of their respective assignments for purposes of the road construction and the Respondent further averred that it complied with the provisions of the Employment Act with regard to the issuance of an appointment letter, protective gear, remittance of statutory deductions and adherence to the minimum

wage requirement. The Respondent averred that each of the Claimants' separation was discussed and mutually agreed upon and it duly paid the Claimants their lawful dues including payment in lieu of leave days not taken. The Respondent averred that no leave days are due as the Claimants were paid all accumulated leave days, salary over and above the basic minimum wage and that therefore the claim for underpayment was misconceived and that the claim for house allowance lacks merit as the Claimants were provided with accommodation within the project site, the claim of unpaid overtime is unmerited as there is no justification in the form of evidence was produced to show number of days worked and not paid for, and finally service pay is does not lie as the Respondent remitted all statutory deductions in accordance with Section 35(6) of the Employment Act.

3. The parties agreed to adduce evidence through filing affidavits of evidence in addition to hearing the oral testimony of the Claimant in Cause No. 231 of 2017 Salesa Guyo Boru. At the hearing only Kana Tore Liban , Guyo Tacho and Galgalo Halake attended Court. In his affidavit of evidence the 1st Claimant in the combined suit Salesa Guyo Boru averred that he was a mixer operator from 15th June 2011 and that he served the Respondent diligently until 19th September 2014 when the Respondent terminated his services wrongfully, unprocedurally, unfairly, unjustifiably and unlawfully. He asserts that he was not paid his lawful terminal dues and that during his service the Respondent never provided him with any reasonable housing nor paid him any house allowance. He deponed that the Respondent paid him wages less than what is prescribed by law at Kshs. 35/- per hour instead of Kshs. 51/- per hour. He deposed that the Respondent made him work overtime, on public holidays and even on rest days without payment and never allowed him annual leave during the duration of his employment. He stated that the Respondent never issued him with a notice to terminate his services or any warning prior to termination of his services and that he was not informed of the reason for termination and that he was not issued a notice to show cause and that the dismissal was without a hearing. He deposed that despite severally complaining to the Respondent about its contravention and breach of the law, the Respondent never rectified the situation. He averred that the staff of the Respondent were forced to complain to the Kenya Building Construction Timber and Furniture Union (KBCTFU) and the Union approached the Respondent and brokered a collective bargaining on behalf of employees on one side and the Respondent on the other and that the said agreement was signed on 27th July 2012. He deponed that despite the existence of the collective bargaining agreement, the Respondent failed to comply with the terms therein and the employees reported to the Union which took up the matter with the County Government of Marsabit and that the County Commissioner wrote a letter requiring the Respondent to adhere to the law but again this directive was not heeded. The Claimant sought a declaration that the termination of employment by the Respondent as illegal, unlawful, unfair, unjustified and thus order the Respondent to pay the reliefs as sought in the claims.

4. The Respondent also filed an affidavit of evidence sworn by Zhang Jiaying a project administrator of the Respondent. He deponed that the Respondent won the contract for upgrading the Marsabit- Turbi Road for an initial period of 3 years from 5th April 2011 to 5th April 2014. He stated that the Claimants were employed to serve for the period of the contract and that as at April 2014 most of the Claimants had left the Respondent's employment since most of the works had been finalized and no extension had been granted to the Respondent by the Kenya National Highways Authority (KeNHA) for the remainder of the works. He deponed that sometime in August 2014, on application by the Respondent, KeNHA extended the contract for one year and that the Respondent retained some of the Claimants until April 2015 when these staff were released following completion of the project. He deponed that the Respondent however continued maintaining the road with a lean compliment of staff during the defects liability period between 20th April 2015 and 19th April 2017. He stated that the Claimants' before court had fixed term contracts and that as at April 2015 none of them had a legitimate expectation that they would continue working for the Respondent beyond the contract period or indefinitely. He deponed that their contracts automatically lapsed upon the completion of the project and that each of the Claimants' separation was discussed and mutually agreed upon. He stated that the Respondent duly paid the Claimants their lawful dues including payment for leave days not taken and issued the Claimants with recommendation letters to enable them secure alternative employment and that further, the Respondent complied with the provisions of the Employment Act with regard to the issuance of an appointment letter, protective gear, remittance of statutory deductions and adherence to the minimum wages guidelines. He stated that the claim for house allowance lacked merit as the Claimants were provided with accommodation within the project site and that service pay does not lie as the Respondent remitted all statutory deductions in accordance with the law. He stated that the Claimants were paid salary over and above the basic minimum wage and that the claim for underpayment was thus misconceived.

5. Salesa Guyo Boru testified that he was employed by the Respondent as a mixer operator and that during his employment he was under paid. In cross examination He testified that he was underpaid as the rate used was Kshs. 65/- per hour instead of Kshs. 90/- per hour. The Respondent did not call any witness but relied on the affidavit evidence filed as did the other 9 Claimants some of whom were in court.

6. The parties were to file submissions and in their submissions filed 27th March 2019 the Claimants submitted that they had proved their claims on a balance of probability as required. The Claimants submitted that the Respondent having failed to file any affidavit of evidence and having failed to call any witness to testify should be deemed to have had no evidence to tender to controvert the Claimants' evidence and that the Claimants' claims are therefore uncontroverted, the Respondent held 100% liable and the claims granted. The Claimants relied on the case of **Stephen Kamau Wanderi & Another v Gladys Wanjiku Kungu [2006] eKLR** where the court held that *Although the appellants indicated that they would call evidence to challenge the respondent's version of events, they were unable to do so and thereafter closed their case without calling any evidence. The evidence as to the circumstances of the accident that led to the injuries that the respondent sustained was therefore uncontroverted.* The Claimants also prayed that costs be awarded in each file separately before consolidation and in the lead file after consolidation. They also prayed for interest on the awards.

7. The Respondent's submissions filed on 27th March 2019 were to the effect that the Claimants were not unfairly terminated from service as alleged. It submitted that to the contrary, they were employed on fixed term contracts and upon completion of the construction of the road they were discharged from their respective duties and there was no legitimate expectation that they would continue working for the Respondent indefinitely. The Respondent submitted that in the premises none of the Claimants worked after December 2014 when the first phase of the project was completed. The Respondent submitted that the Claimants contracts were for a specific assignment which upon completion the contracts automatically lapsed. The Respondent submitted that the separation was mutually agreed and as such the claim for unfair termination does not arise. It relied on the case of **Ali Kulo Godana & 8 Others v Jiangxi Zhongmei Engineering Construction Co. Ltd [2017] eKLR** where Ongaya J. held *"the court has considered that the claimants had served for an average of about two to three years. They desire to continue in employment but also knew that the tenure of employment was as long as the period of upgrading of the Marsabit-Turbi Road so that in the court's opinion the claimant's legitimate expectation would be to serve until the end of the road construction as opposed to a permanent service spanning over several future years."* The Respondent also relied on **Yusuf Jirmo Wario v Jiangxi Zhongmei Engineering Construction Co. Ltd, ELRC No. 58 of 2016 (unreported)** where the court held *"the court finds that there is no*

dispute that the employment was for a fixed term ending on completion of the project and further finds that in view of the taking over certificate that the project was completed on 20th April, 2015, there would be no reason to doubt that position, the court returns that the respondent has established that the reason for termination was valid as per s. 43 of the Employment Act, and the court returns that the termination was not unfair". The Respondent submitted that the court should find as in the above cases and hold that it had established that the reason for termination was fair based on the Taking Over Certificate dated 20th April 2015. Further, it submitted that without prejudice to the foregoing, in the event the court finds for the Claimants, the court should find that an award of between 2 to 3 months salary will be sufficient and reasonable compensation and placed reliance on the case of **Boniface Mulandi v Ali Barbours Restaurant Limited [2016] eKLR**. On the issue of 2 month's pay in lieu of notice, the Respondent submitted that the Claimants were aware of the term of the project, the completion and handover and therefore they had sufficient notice to seek alternative employment. The Respondent submitted that if the court finds this portion of the claim merited then the award should be limited to one month's salary in lieu of notice as provided under Section 35 of the Employment Act. On underpayment the Respondent submitted that the Claimants did not provide any evidence to show their actual salaries and as that the claim for underpayment was not proved. It relied on the case of **Chege Jeremiah & 9 Others vs Jiangxi Zhongmei Engineering Construction Co. Ltd [2019] eKLR** where the court held "*the claimants failed to attach or even produce a pay slip showing the underpayment alleged. The fact that there was an agreement at the ministry was not disputed. However, the claimants had a burden to prove that the agreement was not honoured*". The Respondent relied on Section 90 of the Employment Act and submitted that the claim of underpayment is a tort of a continuing nature and it cannot be sustained after the lapse of 12 months from the date the Claimants left employment or the date the claim is said to have arisen. It submitted that the Claimant's claims in this regard are statute barred and ought to be dismissed. The Respondent additionally relied on the cases of **Peter Asuka v Mutungati Farmers Co-operative Society [2015] eKLR**, **Maurice Otieno Oluny v Mombasa Container Terminal Limited & Another [2016] eKLR** and **Kenya Hotels & Allied Workers Union v Sportsman's Arms Hotel [2015] eKLR** on the aspect of continuing injury claim and the time within which to initiate claims which is 12 months from the time of cessation of the breach. The Respondent submitted on the issue of annual leave there was no proof and that the claim for annual leave was statute barred within Section 90 of the Employment Act. On the issue of unpaid house allowance, the Respondent submitted that it had provided the Claimants with housing within the project site as was confirmed by the Claimants' witness during cross-examination. It relied on the case of **Chege Jeremiah & 9 Others v Jiangxi Zhongmei Engineering Construction Co. Ltd (supra)** where the court was held "*the claimants were not candid as the area the project was sited is remote and there was no evidence that they had accommodation other than at the respondent's camp. In the final analysis, I dismiss the claim as they were unproved and order each party to bear their own costs*". The Respondent also submitted that the claim on housing allowance is time barred and that the Claimants did not demonstrate the specific days or number of hours they allege to have worked overtime and there is no basis for the court to award this claim and it should be dismissed relying on the case of **Felix Munyoto v Tea Warehouses Limited [2016] eKLR**. The Respondent further submitted that the Claimants are not entitled to severance pay as it had dutifully remitted all statutory deductions to the authorities and on the issue of costs it submitted that in case the court is inclined to award costs then it should award the costs in respect to the consolidated file and not separately. It relied on the case of **Grace Wangui Ngenye v Wilfred Kiboro & Another [2013] eKLR** and submitted that it would amount to duplicity and unjust enrichment to award costs on the thirty-nine claims separately as opposed to a single item under the consolidated suit. Finally, it submitted that the Claimants' claims lack merit and ought to be dismissed with costs to the Respondent.

8. The Claimants herein worked for the Respondent on the Marsabit – Turbi Road which is part of the multinational corridor between Kenya and Ethiopia. An extension was granted to the Respondent by the Kenya National Highways Authority (KeNHA) sometime in August 2014. It is in evidence that the Respondent continued maintaining the road upon completion of the project with a lean compliment of staff during the defects liability period between 20th April 2015 and 19th April 2017. None of the Claimants before Court were in employment after December 2014. They assert their dismissal was unlawful, unfair and without adherence of the safeguards in law. The Claimants could not conceivably remain employed on a road construction project indefinitely. The Claimants had a duty to prove their dismissal was unlawful and they assert the Respondent relieved them of duty unfairly. The Respondent despite stating that the Claimants were issued with letters of appointment and payslips did not avail these. The Claimants were therefore correct in their surmise that the Respondent had flouted the Employment Act. Section 9(1)(b) of the Employment Act provides that a contract such as the one the Claimants had should be in writing. Section 20 of the Act makes provision for an itemized pay statement also known as payslip. The Respondent failed to avail these given the provisions of Section 74 and in terms of Section 43 of the Act, the court finds that the Respondent failed to prove the reason for termination was a fair or valid reason. Each of the 10 Claimants will thus recover 3 month's salary each as compensation for unlawful dismissal and the non-adherence to the law by the Respondent. The Claimants however failed to prove their claims for house allowance, overtime, public holidays and severance pay. None of them acted within time as the claims on overtime, house allowance are continuing wrongs in terms of Section 90 of the Act. Continuing injury or damage must be actioned within twelve months next after cessation thereof. Having left employment in 2014, the Claimants ought to have moved the court within 12 months. They filed the suits in 2017 almost 3 years from the date of termination of employment. The cases of **Peter Asuka v Mutungati Farmers Co-operative Society [2015] eKLR**, **Maurice Otieno Oluny v Mombasa Container Terminal Limited & Another [2016] eKLR** and **Kenya Hotels & Allied Workers Union v Sportsman's Arms Hotel [2015] eKLR** are instructive on the issue of continuing injury.

9. In the final analysis I find that the Claimants only proved that their dismissal was unlawful and unfair and award each 3 month's compensation. Each will have costs which I cap at Kshs. 15,000/- per suit/claim as they could have filed a single suit instead of 10 replicas. There will be no costs in addition to these upon consolidation of the 10 suits. I enter judgment for the Claimants as follows:-

- i. Cause No. 231 of 2017 – Salesio Guyo Boru – Kshs. 56,160/-
- ii. Cause No. 232 of 2017 – Abudo Boku Masara – Kshs. 42,042/-
- iii. Cause No. 233 of 2017 – Abdub Bibu Tuyo – Kshs. 38,376/-
- iv. Cause No. 234 of 2017 – Guyo Rege Tacho – Kshs. 31,824/-
- v. Cause 235 of 2017 – Kana Tore Liban – Kshs. 31,824/-
- vi. Cause No. 236 of 2017 – Adan Kampicha – Kshs. 35,802/-
- vii. Cause No. 237 of 2017 – Dida Liban – Kshs. 40,326/-

viii. Cause No. 238 of 2017 – Galgalo Halake – Kshs. 51,182/-

ix. Cause No. 239 of 2017 – Godana Fora Shonka – Kshs. 42,042/-

x. Cause No. 240 of 2017 – Wario Jarso Wario – Kshs. 51,182/-

xi. Consolidated costs of Kshs. 150,000/-

It is so ordered.

Dated and delivered at Nyeri this 4th day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar