



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 130 OF 2017

CONSOLIDATED WITH 34 OTHER CASES

HUSSEIN OSHE MUDE & 34 OTHERS.....CLAIMANTS

VERSUS

JIANXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent for wrongful, unprocedural dismissal from employment and failure to pay terminal benefits. The Claimants averred that they were employed by the Respondent on diverse dates. They filed individual suits but these 35 suits were consolidated for purposes of the hearing and disposal. The 1st Claimant Hussein Oshe Mude on his behalf averred that he was employed on 21st September 2011 as a Tipper/Tanker driver at the Respondent's construction project of the Marsabit – Turbi Road. He averred that on 1st March 2014 he was wrongfully and unprocedurally dismissed without being paid his terminal dues. He averred that his employment together as well as his termination was 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 contended that the Respondent failed to issue the employees with appointment letters, payslips, personal protective gear, payment for public holidays, overtime, 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, the payment of 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 denied each and every allegation of unfair, wrongful and or unlawful termination and put the Claimant to strict proof thereof. It averred that as per the agreement entered into with Kenya National Highways Authority (KeNHA) the contract for upgrading the Marsabit- Turbi Road was for an initial period of 3 years commencing 5th April 2011 to 5th April 2014. The Respondent averred that the Claimants were employed to serve for the period of the contract and that most of them had left the Respondent's employment as at April 2014 since a part of the works had been finalized and no extension had been granted to the Respondent by KeNHA for the remainder of the works. The Respondent averred that sometime in August upon request by the Respondent, KeNHA extended the contract for one year with the new 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. The Respondent averred that it however continued maintaining the road with minimal 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. 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. 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 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 contends that all the prayers in the Claimants' claims should fail as their contracts were terminated following completion of the road works in 2014 and 2015 respectively. 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 clam 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. Parties agreed to adduce evidence through filing affidavits of evidence in addition to hearing the oral testimony of Gideon Boru Gobe the

Claimant in Cause 132 of 2017. Only the Claimants in Cause 133 of 2017 – Roba Jaldesa, 134 of 2017 – Robe Kanchora, 136 of 2017 – Galgalo Malise Jaldesa, 142 of 2017 – Juma Nache Anno, 140 of 2017 – Mohamed Sharif Abdulahi, 143 of 2017 – Mulo Jarso Kateto, 157 of 2017 – Mohamed Abdi Dida and 131 of 2017 – Duba Jarso Dido attended Court. In his affidavit of evidence the Claimant Hussein Oshe Mude averred that he worked diligently and with full commitment until the 1st March 2014 when he was wrongfully, unprocedurally, unfairly, unjustifiably and unlawfully terminated and was not paid his lawful terminal dues. He contended that the Respondent never provided him with any reasonable housing or 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, never allowed him annual leave during the subsistence of employment, never issued him with a notice to terminate his services or any warning prior to termination of his services. He deponed that his services were terminated without the Respondent informing him of the reason for termination, without a notice to show cause and without a hearing. He stated that despite several complaints to the Respondent about its contravention and breach of the law, the Respondent never rectified the situation. He averred that the staff 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 agreement was signed on 27th July 2012. He asserts 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. He deponed that the continued breach of the terms and conditions of the collective bargaining agreement and the contravention of the law by the Respondent was reported to the County Commissioner, who wrote a letter requiring the Respondent to adhere to the law but again this was not followed. 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 per the agreement with Kenya National Highways Authority (KeNHA), 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 KeNHA for the remainder of the works. He deponed that sometime in August KeNHA extended the contract for one year upon request by the Respondent and that the Respondent retained some of the Claimants until April 2015 when they were released following completion of the project. He deponed that the Respondent however continued maintaining the road with minimal staff during the defects liability period between 20th April 2015 and 19th April 2017. He stated 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. He deponed that each of the Claimants' separation was discussed and mutually agreed upon and that the Respondent duly paid the Claimants their lawful dues including payment for leave days not taken, issued the Claimants with recommendation letters to enable them secure alternative employment and that 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. The Gideon Boru Gobe the Claimant in Cause 132 of 2017 testified that he was employed by the Respondent as a leveler. He testified that he was under paid and the Respondent had a worksheet where they signed and no payslips were issued. He stated that he was paid Kshs. 12,400/- instead of 19,233/- and that he was therefore underpaid as the rate used was Kshs. 35/- per hour instead of Kshs. 51/- per hour. He said that he resided near the site and had to rent a house and was not paid house allowance. He stated that he worked for 11 hours and not the 8 hours he expected to work as he worked from 7.00am till 6.00pm. He testified that he was not paid any overtime pay. In cross examination he stated that he worked in conjunction with the surveyor and their role was to ensure the height and the road design complied with the design by the engineers. He stated that it was done between sections. He identified his letter of appointment exhibited and also the card showing the payment was Kshs.60/- per hour. He testified that he rented accommodation but admitted that he had not brought a receipt. In re-examination he confirmed that he had produced evidence that he received Kshs. 60/- per hour. He admitted that he worked till August 2014 as per his letter of retirement.

6. The parties were to file submissions and 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 and ought to be granted. The Claimants relied on the case of **Stephen Kamau Wanderi & Another v Gladys Wanjiku Kungu [2006] eKLR**. They 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 and also on costs.

7. The Respondent's submissions were to the effect that the Claimants were not unfairly terminated from service as alleged. It submitted that 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 year 2015 when the project was handed over to KeNHA. The Respondent submitted that the Claimants in their testimony did not demonstrate any other reason giving rise to the specific separation to rebut the Respondent's assertion to the effect that their contracts were for a specific assignment which upon its 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** 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

produced in support of their evidence. Further, it submitted that 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 one month 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 relied on the case of **Peter Asuka v Mutungati Farmers Co-operative Society [2015] eKLR**. 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 claim by the Claimants is misplaced. I say so because the Claimant in Cause 132 of 2017 Gideon Boru Gobe in his own testimony confirmed that he was paid Kshs. 60/- per hour per the document he produced in support of his case. It therefore showed he was paid in excess of the sum he even claimed being Kshs. 51/- per hour. The Claimants failed to attach or even produce a pay slip showing the underpayment alleged in their claim and instead produced evidence showing compliance by the Respondent. He stated that his role was a leveler and that he worked on sections of the road to confirm the height and design of the road alongside the surveyor and the engineers. This kind of work was therefore not the kind that would entail working beyond daylight hours or in excess of the time assigned for work being the 8 hours he was required to work. The Claimants all assert they were unlawfully dismissed from employment and were not paid any house allowance or housed. This assertion that they were not housed is hollow. None of them produced rent receipts and the fact the area the road was constructed is remote, the Respondent asserts that it had a camp where its staff were housed. There is nothing the Claimants have to show that the Respondent let them travel hundreds of kilometers each day to and from work. If this were so then the hours they worked would even be less than the 8 hours per day as a significant portion of the day would be spent commuting from their homes or the towns where accommodation was readily available. The court finds that there is no dispute that the employment of these 35 Claimants was for a fixed term ending upon completion of the project. In view of the taking over certificate showing that the project was completed on 20th April 2015, the Respondent has established that the reason for termination was valid as per Section 43 of the Employment Act. The termination was not unfair as the contract came to an end on effluxion of time and upon completion of the various stages of the project. The Claimants are therefore not merited in seeking relief since there was no undertaking that they would remain in employment indefinitely. They did not attach proof of non payment of statutory deductions either and the claims thus fail on this score as well. The upshot is the claims before me are devoid of merit and are thus dismissed. I order that each party bears their own costs.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar