



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 490 OF 2017

(CONSOLIDATED WITH CASE NO. 491-499 OF 2017)

BONAYA KAMBICHA ABDALA & 9 OTHERS.....CLAIMANTS

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION CO. LTD.....RESPONDENT

**JUDGMENT**

1. The Claimants sued the Respondent for wrongful, unprocedural dismissal from employment and failure to pay their terminal benefits. The Claimants aver that they were employed by the Respondent in various capacities for the construction of the Marsabit–Turbi Road. They aver that they were wrongfully/unprocedurally dismissed. The Claimants aver that their employment together with the termination/dismissal was marred with gross and/or blatant contravention of the Employment Act and other provisions of the law. The Claimants aver that the Respondent failed to accord them due procedure at the time of dismissal thus violating Sections 41 and 45 of the Employment Act. The Claimants seek a declaration that the termination process as carried out by the Respondent was unlawful, two months pay in lieu of notice, gratuity/service benefits, compensation for unfair termination at the full extent of 12 months, underpayment of wages, annual leave dues, unpaid house allowance, payments for Sundays worked. They also sought costs of the suit.

2. The suit was undefended despite leave being granted for the filing of a defence out of time. The Claimants filed affidavits of evidence relied on for purposes of testimony. In his affidavit of evidence, the Claimant in Cause No. 490 of 2017 averred that he worked diligently and with full commitment until 15<sup>th</sup> September 2015 when he was wrongfully, unprocedurally, unfairly, unjustifiably and/or unlawfully terminated and was not paid his lawful and/or terminal dues. He deponed that the Respondent never provided him with any reasonable housing and/or paid him any house allowance and paid him wages less than what is required by law at Kshs. 35/- per hour instead of Kshs. 51/- per hour. He deponed that the Respondent made him work overtime, on public holidays and even on rest days without payment, it never allowed him annual leave during the subsistence of employment, it never issued him with a notice to terminate his services and/or any warning and it terminated his services without informing him of the reason for termination, without a notice to show cause and without a hearing. The Claimant deponed that despite several complaints to the Respondent about i's contravention and breach of the law, the Respondent never rectified the situation. He deponed that they complained to the Kenya Building, Construction, Timber and Furniture Union (KBCTFU) and that the Union approached the Respondent and brokered a collective bargaining on behalf of employees and the parties entered into an agreement signed on 27<sup>th</sup> July 2012. He deponed that despite the existence of the collective bargaining the Respondent failed to comply with the terms therein and that the employees reported to the Union which informed the County Government of Marsabit of the Respondent's continued breach of the terms and conditions of the collective bargaining agreement and the contravention of the law. The Claimant deponed that the County Commissioner wrote a letter requiring the Respondent to adhere to the law but again this was not followed. The Claimant prays the court to declare the termination of employment as illegal, unlawful, unfair, unjustified and order the Respondent to pay.

3. The Claimants submitted that the dates of employment and those of termination are not disputed and that the issue of underpayment is not controverted nor was there any contest to the averment that the Claimants used to work overtime and on Sundays contrary to Section 27(3) of the Employment Act. The Claimants submitted that no evidence was adduced by the Respondent to controvert the averment that they were neither provided with housing nor paid housing allowance as envisaged under Section 31 of the Employment Act as read together with Regulation 3 of the Labour Institutions (Building and Construction Industry) Wages Order 2012. The Claimant submitted that the Respondent did not produce any document to confirm that it issued notice to the Claimants or that it actually paid them in lieu of notice of termination hence violating Sections 35 and 36 of the Employment Act. The Claimants submitted that the termination failed to meet the requirements of both substantive and procedural justice as envisaged in Sections 43, 44, 45 and 46 of the Employment Act. The Claimants submitted that they proved their cases on a balance of probabilities as required by law and they deserve a grant of the prayers sought in their statements of claim. The Claimants relied on the case of **Cleaver Hume Ltd v British Tutorial College Ltd [1975] EA 323** where it was held that *failure to file a defence operates as an admission of all allegations in the plaint except as to damage* as well as the case of **Regina**

**Mwikali Wilson v Stephen M. Gichuhi & Another [2015] eKLR** where it was held “*the plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the plaintiff is required to do is to prove damages*” and lastly on the case of **Lake Flowers Ltd v Cila Francklyn Onyango Ngonga & Another [2008] eKLR** where the Court of Appeal stated that *without the appellant adducing evidence at the trial to counter the respondent, it was difficult to contest (a) liability blamed on it (b) ownership of motor vehicle subject cause of accident. The respondent’s evidence was never controverted and it was the only evidence upon which the trial court could make it’s finding.* The Claimants thus urged the court to grant the prayers in the claims.

4. The issues that lend themselves for determination are

- a. Whether the claimant’s termination was wrongful, unprocedural, unjustifiable and /or unlawful
- b. Whether the claimant is entitled to the remedies sought.
- c. Whether the claimant’s termination was wrongful, unprocedural, unjustifiable and /or unlawful

5. Regarding the issue of fair hearing, the Claimants assert that they were not given a fair hearing and a surmise would be that their right to be heard was violated. They were not given any notice for termination of their employment. Section 43 of the Employment Act, 2007 provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. Section 45 of the Employment Act provides that no employer shall terminate the employment of an employee unfairly and a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is a fair reason which related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. The Respondent herein ought to have informed the employees the reason for their termination and also accord them a fair hearing in order to comply with the procedure envisaged under Section 41 of the Employment Act. For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination and where an employer fails to prove procedural fairness or valid reasons, the termination is unfair within the meaning of the Employment Act. In the instant suit, the termination of service was not shown to have complied with the law. The Claimants having been dismissed in such manner they are entitled to remedies as the Claimants’ evidence remains uncontroverted.

6. As to whether the Claimants are entitled to the remedy sought, the Claimants did not attach payment slips or bank statements to show the under payment of salary or the lack of housing allowance. On the issue of underpayment the Claimants relied on the Labour Institutions Act, 2007 and Legal Notice No. 197 of 2013. The Claimant in Cause No. 490 of 2017 Banaya Kambicha Abdala was working as a general worker in Marsabit County in the constructing of the Marsabit-Turbi road. The Claimant therefore falls under the category of ‘all other areas’ as provided for in the Legal Notice. Under that category a general worker is supposed to be paid basic minimum monthly wages (exclusive of housing allowance) of Kshs. 5,218/-. In the instant suit the Claimant asserts that he used to be paid Kshs. 10,608/- a month. This amount is higher than what is provided for by the law and the Claimants were therefor not paid less than what was provided for in law. None of them earned less than Kshs. 5,218/- a month. The Claimants are therefore estopped from asserting that they were underpaid. In view of the foregoing the claim of underpayments, Sundays underpayments and house allowance all fail for they were catered for in the Claimants’ monthly payments. The Claimants therefore would only be entitled to one month’s salary as notice, two months salary as compensation and costs of Kshs. 20,000/- on each of the 10 files making a total of Kshs. 200,000/- in costs.

It is so ordered.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**