



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 104 OF 2017

CONSOLIDATED WITH 13 OTHER CAUSES

WARIO HARO & 13 OTHERS.....CLAIMANTS

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION CO. LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent for the alleged wrongful and unprocedural dismissal from employment and failure to pay them their terminal benefits. Wario Haro the Claimant in Cause No. 104 of 2017 averred that he was employed by the Respondent on 1st July 2012 as a guard in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent until 8th October 2014 when he was wrongfully/unprocedurally and unfairly dismissed without being paid his terminal dues. The Claimant avers that his employment and the termination/dismissal were marred with gross and/or blatant contravention of the Employment Act and other enabling provisions of the law. The Claimant asserts that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid hence violating Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management. The Claimant therefore seeks a declaration that the termination process as carried out by the Respondent was unlawful, and prays for one month's salary in lieu of notice – Kshs. 12, 411/-, gratuity/service benefits – Kshs. 12,411/-, maximum compensation for unfair termination – Kshs. 128,232/-, underpayment – Kshs. 185,874/-, annual leave dues – Kshs. 21,372/-, unpaid house allowance – Kshs. 46,575/-, overtime for the Sundays worked – Kshs. 58,212/- all totaling to Kshs. 465,625/- plus costs and interests of the suit.

2. In the case of Abdi Kampicha Abdala the Claimant in Cause No. 105 of 2017, the Claimant averred that he was employed on 8th March 2011 as a guard in the project for the construction of the Marsabit – Turbi Road until 11th April 2015 when he was wrongfully terminated. The Claimant seeks for a declaration that the termination process as carried out by the Respondent was unlawful and unfair. He seeks one month's salary in lieu of notice – Kshs. 29,753/-, gratuity/service benefits – Kshs. 30,184/-, maximum compensation for unfair termination – Kshs. 168,168/-, underpayment – Kshs. 422,786/-, annual leave dues – Kshs. 56,056/-, unpaid house allowance – Kshs. 82,800/-, overtime for the Sundays worked – Kshs. 206,976/- all totaling to Kshs. 996,723/- plus costs and interests of the suit.

3. The Claimant in Cause No. 106 of 2017 is Halkano Halakhe Abudo. He averred that he was employed in 2011 as a labourer for the Construction of the Marsabit-Turbi until June 2015 when he was wrongfully terminated. The Claimant seeks for a declaration that the termination process as carried out by the Respondent was unfair and unlawful. He thus sought one month's salary in lieu of notice – Kshs. 23,097/-, gratuity/service benefits – Kshs. 23,016/-, maximum compensation for unfair termination – Kshs. 128,232/-, underpayment – Kshs. 338,754/-, annual leave dues – Kshs. 42,744/-, unpaid house allowance – Kshs. 82,800/-, overtime for the Sundays worked – Kshs. 117,504/- all totaling to Kshs. 756,147/- plus costs and interests of the suit.

4. The Claimant in Cause No. 107 of 2017 is Adan Guyo Tadi. He averred that he was employed on 6th December 2013 as a guard in the project for the construction of the Marsabit- Turbi Road where he worked until 15th December 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process that was carried out by the Respondent against him was unfair and unlawful. He thus claims one month's salary in lieu of notice – Kshs. 31,965/-, gratuity/service benefits – Kshs. 16,283/-, maximum compensation for unfair termination – Kshs. 362,880/-, underpayment – Kshs. 216,000/-, annual leave dues – Kshs. 30,240/-, unpaid house allowance – Kshs. 20,700/-, overtime for the Sundays worked – Kshs. 96,768/- all totaling to Kshs. 774,836/- plus costs and interests of the suit.

5. Abdul Kadir Katello the Claimant in Cause No. 108 of 2017 averred that he was employed on 15th February 2012 as a general worker in the project for the construction of the Marsabit- Turbi Road. The Claimant averred that he worked until 7th October 2014 when he was

wrongfully terminated. The Claimant seeks for a declaration that the termination carried out by the Respondent was unlawful and unfair. He prays for relief being one month's salary in lieu of notice – Kshs. 12,411/-, gratuity/service benefits – Kshs. 15,344/-, maximum compensation for unfair termination – Kshs. 128,232/-, underpayment – Kshs. 222,274/-, annual leave dues – Kshs. 28,496/-, unpaid house allowance – Kshs. 55,200/-, overtime for the Sundays worked – Kshs. 137,984/- all totaling to Kshs. 999,941/- together with costs and interests of the suit.

6. In Cause No. 109 of 2017 is Isacko Abudo Salesa a.k.a Isacko Elema Gorje. The Claimant averred that he was employed on 20th March 2013 as a general worker in the project for the construction of the Marsabit-Turbi until 15th September 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process as carried out by the Respondent was unlawful, and claims for one month's pay in lieu of notice – Kshs. 12,411/-, gratuity/service benefits – Kshs. 4,316/-, maximum compensation for unfair termination – Kshs. 128,232/-, underpayment – Kshs. 54,834/-, annual leave dues – Kshs. 8,015/-, unpaid house allowance – Kshs. 15,525/-, overtime for the Sundays worked – Kshs. 19,404/- all making a grand total of Kshs. 242,737/- as well as costs and interests of the suit.

7. The Claimant in Cause No. 110 of 2017, Abudo Boku Masara averred that he was employed on 1st July 2012 as a guard at the project for the construction of the Marsabit- Turbi Road. He averred that he worked until 10th May 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process carried out by the Respondent was unfair and unlawful. He therefore claims one month's salary in lieu of notice – Kshs. 15,739/-, gratuity/service benefits – Kshs. 13,834/-, maximum compensation for unfair termination – Kshs. 168,168/-, underpayment – Kshs. 186,186/-, annual leave dues – Kshs. 25,692/-, unpaid house allowance – Kshs. 37,950/-, overtime for the Sundays worked – Kshs. 47,432/- totaling to Kshs. 542,433/- plus costs and interests of the suit.

8. The Claimant in Cause No. 111 of 2017 – Jillo Huka Isako averred that he was employed on 17th January 2014 as a security officer in the construction project Marsabit-Turbi Road. He averred that he was employed until 15th July 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process meted out by the Respondent was unfair and unlawful. He thus seeks one month's salary in lieu of notice – Kshs. 27,114/-, gratuity/service benefits – Kshs. 5,572/-, maximum compensation for unfair termination – Kshs. 298,044/-, underpayment – Kshs. 111,185/-, annual leave dues Kshs.10,349, unpaid house allowance Kshs. 11,385, overtime for the Sundays worked – Kshs. 124,185. Totaling to Kshs. 587,834 plus costs and interests of the suit.

9. The Claimant in Cause No. 112 of 2017 is Richard Bukuno Guyo. He averred that he was employed on 15th March 2014 as a guard in the project for the construction of the Marsabit- Turbi Road. The Claimant averred that he worked for the Respondent in this capacity until 15th July 2014 when he was wrongfully terminated. He seeks a declaration that the termination process as carried out by the Respondent was unlawful, and claims one month's salary in lieu of notice – Kshs. 15,739/-, gratuity/service benefits – Kshs. 2,515/-, maximum compensation for unfair termination – Kshs. 84,084/-, underpayment – Kshs. 22,386/-, unpaid annual leave dues – Kshs. 4,671/-, unpaid house allowance – Kshs. 6,900/-, overtime for the Sundays worked – Kshs. 10,368/- all amounting to Kshs. 289,823/- as well as costs and interests of the suit.

10. The Claimant in Cause No. 113 of 2017 is Nura Wario. The Claimant averred that he was employed on 19th August 2013 as a tipper driver at the site for the project to construct the Marsabit- Turbi Road. He averred that he worked until 15th April 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination carried out by the Respondent was unfair and unlawful. He claims one month's pay in lieu of notice – Kshs. 44,625/-, gratuity/service benefits – Kshs. 15,400/-, maximum compensation for unfair termination – Kshs. 514,800/-, underpayment – Kshs. 141,828/-, annual leave dues – Kshs. 28,600/-, unpaid house allowance – Kshs. 13,800/-, overtime for the Sundays worked – Kshs. 91,520/- totaling to Kshs. 824,773/- plus costs and interests of the suit.

11. The Claimant in Cause No. 114 of 2017 is Dub Gonicha Katello. The Claimant averred that he was employed on 8th March 2011 as a security officer in the project for the construction of the Marsabit - Turbi Road until 3rd September 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process meted out by the Respondent was unlawful and unfair. He thus claims one month's salary in lieu of notice – Kshs. 50,228/-, gratuity/service benefits – Kshs. 46,808/-, maximum compensation for unfair termination – Kshs. 298,044/-, underpayment – Kshs. 513,954/-, annual leave dues Kshs. 86,929/-, unpaid house allowance Kshs. 95,634/-, overtime for the Sundays worked – Kshs. 904,067/- all totaling to Kshs. 1,995,664/- together with the costs and interests of the suit.

12. The Claimant in Cause No. 115 of 2017 is Salesa Kombola Dida and he averred that he was employed in February 2014 as a guard in the project for the construction of the Marsabit - Turbi Road until until 2nd February 2015 when he was wrongfully terminated. The Claimant seeks a declaration that the termination carried out by the Respondent was unfair and unlawful. He seeks one month's salary in lieu of notice – Kshs. 15,739/-, gratuity/service benefits – Kshs. 7,546/-, maximum compensation for unfair termination – Kshs. 168,168/-, underpayment – Kshs. 95,186/-, annual leave dues – Kshs. 14,014/-, unpaid house allowance – Kshs. 20,700/-, overtime for the Sundays worked – Kshs. 25,872/- all making a total of Kshs. 442,411/- plus costs and interests of the suit.

13. The Claimant in Cause No. 116 of 2017 is Boru Duba Dala. The Claimant averred that he was employed in October 2013 as a guard in the project for the construction of the Marsabit - Turbi Road until 31st August 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination by the Respondent was unfair and unlawful and claims one month's salary in lieu of notice – Kshs. 15,739/-, gratuity/service benefits – Kshs. 6,288/-, maximum compensation for unfair termination – Kshs. 168,168/-, underpayment – Kshs. 49,140/-, annual leave dues – Kshs. 11,678/-, unpaid house allowance – Kshs. 17,250/-, overtime for the Sundays worked – Kshs. 21,560/- all totaling to Kshs. 289,823/- plus costs and interests of the suit.

14. The Claimant in Cause No. 117 of 2017 is Halkano Wata Darge. The Claimant averred that he was employed on 12th June 2013 as a guard in the project for the construction of the Marsabit - Turbi Road until 12th May 2014 when he was wrongfully terminated. The Claimant seeks a declaration that the termination process carried out by the Respondent was unlawful and unfair. He thus claims one month's salary in lieu of notice – Kshs. 15,739/-, gratuity/service benefits – Kshs. 6,917/-, maximum compensation for unfair termination – Kshs. 168,168/-, underpayment – Kshs. 86,086/-, annual leave dues – Kshs. 12,846/-, unpaid house allowance – Kshs. 18,975/-, overtime for the Sundays worked – Kshs. 23,716/- making a total of Kshs. 332,447/- plus the costs and interests of the suit.

15. To the claims, the Respondent filed responses in which it denied each and every allegation of unfair, wrongful and/or unlawful termination and put the Claimants to strict proof thereof. The Respondent contended that as per the agreement dated 11th October 2010 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 and the Claimants were to serve for the period of the contract. It was averred that consequently as at April 2014 most of the Claimants had left the employ of the Respondent as a major part of the works had been finalized and no extension had been granted by KeNHA for the remainder of the works. It was averred that however, upon request by the Respondent sometime in August 2014, the contract was extended by KeNHA for one year and that the Respondent retained some of the Claimants until April 2015 when they were released following completion of the project. The Respondent averred that as such, as at April 2015, none of the Claimants had a legitimate expectation that they would continue working for the Respondent indefinitely as their contracts automatically lapsed with the completion of the project. The Respondent averred that each of the Claimants' separation with the Respondent was discussed and mutually agreed upon and the Respondent duly paid their lawful dues and issued them with recommendation letters to enable them secure alternative employment. The Respondent averred that it complied with all the provisions of the Employment Act with regard to the issuance of an appointment letter, protective gear, remittance of statutory deductions, adherence to the minimum wage requirement and as such the Claimants' allegations are misconceived and untrue. The Respondent thus contends that the Claimants are not entitled to the orders prayed for and that the Claimants' claims in their entirety lack merit and ought to be dismissed with costs to the Respondent.

16. In their affidavits of evidences the Claimants averred that they worked diligently and with full commitment until their services were wrongfully, unprocedurally, unfairly, unjustifiably and/or unlawfully terminated and that they were not paid their lawful terminal dues. The Claimants contended that the Respondent never provided them with any reasonable housing nor paid them any house allowance. It was deponed that the Respondent paid them wages less than what is required by law, made them work overtime, on public holidays and even on rest days without payment, never allowed them annual leave during the subsistence of employment, never issued them with a notice to terminate their services or any warning. They deponed that the Respondent terminated their services without informing them of the reason for termination and never issued them without notices to show cause and that the dismissals were without a hearing. The Claimants deponed that despite several complaints to the Respondent about its contravention and breach of the law, the Respondent never rectified the situation. The Claimants deponed that they 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 signed on 27th July 2012 on behalf of employees on one side and the Respondent on the other. It was 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 which led to the County Commissioner writing a letter requiring the Respondent to adhere to the law but again this was not followed. The Claimants pray the court declares the termination of employment as illegal, unlawful, unfair, unjustified and order the Respondent to pay the Claimants the sums sought in their claims with costs.

17. The Respondent filed an affidavit of evidence sworn by Zhang Jiaying and which he deponed that the Claimants services were not unlawfully or unprocedurally terminated. He deponed that as per the agreement dated 11th October 2010 entered into by the Respondent and Kenya National Highways Authority (KeNHA), the parties entered into a contract for upgrading the Marsabit- Turbi Road. He deponed that the contract was for an initial period of 3 years commencing 5th April 2011 to end on 5th April 2014. He deponed that the Claimants were to serve for the period of the contract and consequently as at April 2014 most of the Claimants had left the employ of the Respondent as the major part of the works had been finalized and no extension had been granted by KeNHA for the remainder of the works. He deponed that sometime in August 2014 upon request by the Respondent, the contract was extended by KeNHA for one year and that the Respondent retained some of the Claimants until April 2015 when they were released following completion of the project. He deponed that as such, as at April 2015, none of the Claimants had a legitimate expectation that they would continue working for the Respondent indefinitely as their contracts automatically lapsed with the completion of the project and that in each of the Claimants' separation with the Respondent, the separation was discussed and mutually agreed upon and the Respondent duly paid the Claimants their lawful dues and issued them with recommendation letters to enable them secure alternative employment. He deponed that it complied with all the provisions of the Employment Act with regard to the issuance of appointment letters, protective gear, remittance of statutory deductions, adherence to the minimum wage requirement and as such the Claimants' allegations against the Respondent are misconceived and untrue. He deponed that the Claimants are not entitled to the orders prayed for and that the Claimants' claims against the Respondent in their entirety lack merit and ought to be dismissed with costs to the Respondent.

18. The Claimant's suits were consolidated and the lead file being Cause No. 114 of 2017 and the Claimant in Cause No. 114 of 2017 Dub Gonicha Katelo testified on behalf of all other Claimants and the Respondent relied on its affidavit of evidence. Dub Gonicha Katelo testified that he knew that the work was to come to an end but confirmed that by the time they left employment the road construction work was still ongoing up until the year 2017. He however had no document to show in regard to this contention. He stated that he used to stay 18 km away from work and he denied that they used to stay at site houses maintaining that they were never paid house allowances. He stated that they worked from Monday to Sunday and that they were not paid any overtime allowance. He testified that they were never issued with notice nor reasons for termination ever given. He denied that they were given any recommendation.

19. The Claimants' submissions were that their testimony was not controverted as the Respondent had failed to call any witness to support its defence. The Claimants submitted that they had proved their case on a balance of probabilities as required by law and that they deserve the Court to grant them all the prayers sought in their statements of claim being payment in lieu of notice, unlawful/unfair termination, the claim for underpayment, unpaid house allowance, annual leave, and Sunday underpayment. The Claimants also prayed for costs of the suit separately in each individual cause before consolidation because each claim is diametrically different as each Claimant gave separate instructions, each case involved different causes of actions and each cause arose on a different date. They also prayed for costs on the lead file. The Respondent did not file any submissions.

20. The Claimants each assert unfair dismissal and underpayment for their service at the project of the construction of the Marsabit-Turbi Road. In the response to the claims the Respondent asserted that the Claimants were engaged in a road construction project and that they knew it was coming to an end in 2014. The contract for the construction of the project was extended until 20th April 2015 and the defects liability period was until 19th April 2017. Perhaps this is the date the Claimants had in mind when they assert that the project went on until 2017. Section 45(2) of the Employment Act provides that termination by an employer is unfair if the employer fails to prove

- i) That the reason for termination is valid
- ii) That the reason for termination is a fair reason –
 - a. Related to the employee's conduct, capacity, compatibility or
 - b. Based on the operational requirements of the employer and
 - c. That the employment was terminated in accordance with fair procedure.

The completion of the project meant 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 me demonstrated that they worked during the defects liability period. None of them therefore anticipated work beyond the life of the project as to do so would be asinine. The Claimants could not conceivably remain employed on a road construction project indefinitely. The Claimants failed to attach or even produce pay slips showing the underpayments alleged in their respective claims. The Respondent has established that the reason for termination was valid as per Section 45 and 43 of the Employment Act as the project contract extension clearly shows the contract came to an end in April 2015. 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 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 14th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar