



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 277 OF 2015**

*(Formerly High Court Civil Suit No. 1306 of 2004)*

**Before Hon. Lady Justice Maureen Onyango**

**SIMON MUNYI MARANGA    1<sup>ST</sup> CLAIMANT**

**JASPER KIAI KIMWELI    2<sup>ND</sup> CLAIMANT**

**VERSUS**

**EXPRESS KENYA LIMITED    RESPONDENT**

**JUDGMENT**

The Claimants filed a Complaint on 29<sup>th</sup> November 2004. The 1<sup>st</sup> Claimant Simon Munyi Maranga at the time of termination was the Manager Warehousing Department while the 2<sup>nd</sup> Claimant, Jasper Kiai Kimweli was the Manager Packaging and Removals Department. They allege that their termination was due to retrenchment as a result of a then on-going restructuring/ reorganisation of the Respondent. That the Respondent however issued them with termination letters dated 9<sup>th</sup> September 2004 on allegations in order to avoid paying them their retrenchment dues as provided under the law.

They seek the following reliefs:

- a. A declaration that the termination of the claimants' employment by the Defendant was not due to gross or other misconduct but due to redundancy laying off and/or retrenchment and was therefore unlawful in the circumstances and manner it was conducted and the claimants are entitled to damages for the same.
- b. Special damages for Kshs.7,324,676.75/= as set out below –
  - **Simon Munyi Maranga – 1<sup>st</sup> claimant**
    1. 15 days' pay for every completed year of service  
204,722 x 30/15 x 17 years Kshs.1,740,562.00
    2. Gratuity pay 15 days' pay for every completed year of service  
204,722 x 30/15 x 17 years Kshs.1,740,562.00
    3. 36 days outstanding leave pay at the time of termination  
204,772 x 36/24 Kshs.1,740,562.00
  - **Jasper Kiai Kimweli – 2<sup>nd</sup> Claimant**
    1. 15 days' pay for every completed year of service

101,402 x 30/15 x 32 years Kshs.1,622,432.00

2. Gratuity pay 15 days' pay for every completed year of service

101,402 x 30/15 x 32 years Kshs.1,622,432.00

3. 69 outstanding days Kshs.291,530.75

• **Total Kshs.3,788,282.00**

c. Costs and interest.

The Respondent filed Defence on 23<sup>rd</sup> December 2004. It denies having unlawfully terminated the Claimants and aver that the said termination was justified due to their gross misconduct.

### **Claimants' Case**

SIMON MUNYI MARANGA (CW1) testified that he worked for the Respondent from 1<sup>st</sup> April 1987 to 4<sup>th</sup> September, 2004. He testified that he was declared redundant but charges were fabricated against him in order to avoid paying him. He contended that the directors decided at a meeting that they were coming up with a reorganised structure. That on 4<sup>th</sup> September 2004, the directors informed him that he was declared redundant. He testified that he received his 3 months' salary in October, November and December and that he was not allowed into the premises thereafter. He testified that he did not go on leave.

He testified that the respondent relied to the allegations made against him and that he received a termination letter stating that he had been terminated on 9<sup>th</sup> September 2004. He testified that he was paid 3 months' salary and his pension contribution. He further testified that the respondent had paid its portion of contributions. He testified that he claims redundancy pay which includes 15 days' pay and gratuity pursuant to the terms of his contract of employment.

In re-examination, he testified that the letter referred to as a show cause letter was a warning letter. He contended that one was to be issued with 2 warning letters before termination but due process was not followed. He testified that he received a warning letter on 7<sup>th</sup> September 2004 and thereafter was terminated. He prayed to the court to order payment for his leave days.

JASPER KIAI KIMWELI (CW2) testified that he was declared redundant but he did not receive any written document declaring him redundant. He further testified that in the letter dated 4<sup>th</sup> September 2004 the board stated that he was incompetent but he denied that he was incompetent.

He contended that the letter of termination issued to him provided that he had been issued 3 months' notice and that in respect of this he was paid 3 months in lieu of notice. He testified that he had 69 accrued leave days and that even though he was not working he received some pay. He testified that he was declared redundant and terminated unfairly. He testified that he seeks to be paid his gratuity. He admitted that he was paid pension of about Kshs.1.5 million.

In re-examination, he testified that he had worked for the Respondent from 1972 to 2004. He contended that his termination letter did not indicate his wrongdoing. He testified that he did not receive a warning letter for the 32 years he had worked for the Respondent and that there were no investigations before his termination.

### **Respondent's case**

JACKLINE NJENGA, RW1, the Respondent's Human Resource Officer testified that she joined the Respondent in 2011.

She testified that the Claimants were lawfully terminated on 9<sup>th</sup> September 2004 due to misconduct. She testified that Simon (1<sup>st</sup> claimant) had invited an unwanted person into the Respondent's compound and was issued with a warning letter on 4<sup>th</sup> September 2004.

She further testified that Jasper (2<sup>nd</sup> claimant) was also issued with a warning letter. It was her testimony that the Claimants were both required to respond to the warning letters within 24 hours which they did. She denied that the Claimants were declared redundant but clarified that they were terminated.

She testified that the Claimants are not entitled to gratuity because they were terminated. That they were not entitled to leave because they were advised to proceed on leave. She further testified that the claimants were given an opportunity to be heard and that they gave their explanations to the allegations.

In cross-examination, she testified that she is aware of the Respondent's current disciplinary policy and not the one that was applicable at the time of termination. She testified that the Claimants were issued with warning letters 4 months after their alleged actions. She testified that it is not a coincidence that the 2 warning letters were issued on the same day because the incidents were interrelated.

She testified that she was not aware that there was a committee that sought to increase productivity and that there was to be a reduction of the number of staff.

She testified that the warning letter to 1<sup>st</sup> claimant did not specify that the packaging department was to do packaging. She testified that the warning letter to the 2<sup>nd</sup> Claimant only raised the issue of his inability to implement a strategy by the Board and restructuring of the department. She testified that the issues in the termination letters were the same as those in the warning letters.

### **Claimants' Submissions**

The Claimants submitted that there was no proof of the alleged misconduct. That they were not served with a reasonable notice before their termination. They submitted that allegations were only stated on the warning letters issued on 7<sup>th</sup> September, 2004 and that there was no document produced by the Respondent demonstrating the allegations of misconduct. They submitted that the minutes of the Board held on 21<sup>st</sup> August 2004 stated that the Claimants were retrenched following a re-organisation of their departments. They relied on the case of **Patricia Wangari Munene v equity Bank Limited [2015] eKLR**.

They submitted that in accordance with the Respondent's Human Resource Procedure a warning letter could not lead to termination. They submitted that the Employment Act Cap 226 placed an onerous legal obligation upon the employers in claims of unfair termination or wrongful dismissal. They submitted that procedural fairness meant that an employee was informed with clarity of the allegations facing him and that the warning letter and termination letter were vague. They relied on the case of **Eddah Anyango Akumu v AAR Insurance Kenya Limited [2019] eKLR** where the Court held that there were valid reasons to terminate the claimants and that she was not accorded due process.

They submitted that the allegations of misconduct were fabricated and that the Claimants were ordered to vacate following the decision to retrench them. They submitted that they were entitled to redundancy pay like all other employees who were retrenched. They further submitted that the respondent's employees were paid gratuity for the services rendered.

They submitted that the termination letters irregularly and unlawfully tried to convert the compulsory leave into annual leave thus they are entitled to leave pay.

### **Respondent's Submissions**

The Respondent submitted that the Claimants did not tender any

evidence to demonstrate that they were terminated on account of redundancy or that their jobs were no longer required, in order to meet the test of termination on account of redundancy. It submitted that no letters of redundancy were issued to the Claimants.

The Respondent submitted that the letters of termination dated 9<sup>th</sup>

September, 2004 do not mention redundancy or allude to it. It submitted that the Claimants having not been declared redundant are not entitled to gratuity. The respondent relied on the case of **Michael Obudho Amondi v United Millers Limited [2016] eKLR**.

They submitted that Claimants are not entitled to leave pay as at the time of applying for their leave there were no leave days carried forward. It submitted that the allegation that the claimants were forced to go on leave is not merited as they signed off their leave days and that while serving their notice period they did not go back to work. They urged the Court to dismiss the suit with costs.

### **Determination**

The Claimants herein aver that in accordance with the minutes of various meetings held by the Respondent's management in the year 2004 that Respondent sought to re-organise and restructure its operations. They aver that despite being informed that they were to be retrenched on 7<sup>th</sup> September 2004 they were issued with warning letters as opposed to retrenchment letters and eventually terminated.

The issues for consideration are:

- a. Whether the Claimants termination was on account of redundancy or misconduct.
- b. Whether the Claimants are entitled to the reliefs sought.

### **Whether the Claimants termination was on account of redundancy or misconduct**

The Claimants letters of termination dated 9<sup>th</sup> September 2004 stated that the board had resolved to terminate their services. This was after the Claimants' meeting with the Directors on 4<sup>th</sup> September 2004 during which they discussed the Claimants' letter of terminations.

These letters did not make any reference to retrenchment. Despite the fact that the Claimants who were in management were aware of the impending restructuring that had been discussed in various meetings, the reason for their termination was different and it was not in respect of the redundancy. The Claimants testified that even though the Respondent did retrench some of its employees, they did not have any letter addressed to them in respect of the redundancy. Further, the minutes of the meeting held on 21<sup>st</sup> August 2004 provided that management had agreed that they would come up with a reorganisation structure/plan for both Warehousing and Packaging Removals in due course. The meeting did not resolve that the Claimants had been declared redundant due to the reorganisation. I therefore find that the reason for the Claimants' termination was not as a result of the restructuring.

The parties herein submitted on the reasons for termination and the right to be heard prior to termination. The cause of action took place in 2004. At that time, the Employment Act 2007 had not been enacted. Thus the provisions of the Act and the case law relied upon which was in respect of actions that took place after the enactment of the Employment Act 2007 are not relevant or applicable. The Employment Act Cap 226 (repealed) which was in force at the time of termination of the employment of the claimants did not require reason to be given prior to termination or for a right to be heard.

I therefore find that there is no proof of unfair termination as alleged by the claimants.

### **Whether the claimants are entitled to the reliefs sought**

#### **Redundancy pay**

Having found that the Claimants' employment was not due to redundancy the claims for severance pay fails.

#### **Gratuity**

Clause 20 of the Respondent's Terms and Condition of Employment

provided:

**a) After five years' service with Express Kenya Limited, an employee shall be entitled to fifteen (15) days pay for every completed year of service by way of gratuity based on the employee's wage/salary at the time of termination of service.**

**b) Express Kenya Limited shall not pay gratuity to an employee who is summarily dismissed for a lawful cause or who terminates his service for any reason other than certified ill health or retirement age.**

The Claimants submitted that their colleagues were paid gratuity and that they are entitled to the same. I find that the Claimants are entitled to gratuity not for reason that their colleagues received gratuity, but for reason that it was provided for under Clause 20 of the terms and conditions of employment at document 4 in the plaintiff's list of documents filed on 26<sup>th</sup> July 2005. This is due to the fact that they were not summarily dismissed by the Respondent but terminated pursuant to Clause 17 of the Human Resource Terms and Conditions, having been issued with 3 months' notice of their termination.

#### **Outstanding leave**

The Claimants in their termination letters were informed that they

were to take their full outstanding leave immediately. The claimants were entitled to both pay in lieu of notice and pay in lieu of leave. The respondent has no justification to force them to take leave to run concurrently with notice.

The respondent has further not shown that either the Employment Act Cap 226 (repealed) or the terms and conditions of employment authorised the employer to force an employee to take leave while serving notice instead of paying the employee for both the notice and the leave where the employer did not wish that the employee serves the notice period.

Clause D4 and D5 of Termination of Employment policy under the respondent's Human Resources Policies and Procedures provided that an employee terminated by the respondent was entitled to both notice and pay in lieu of outstanding leave.

I therefore find that the claimants are entitled to outstanding leave as prayed.

#### **Conclusion**

For the foregoing reasons I enter judgment for the claimants against the respondent as follows –

#### **Simon Munyi Maranga – 1<sup>st</sup> claimant**

1. Gratuity pay 15 days' pay for every completed year of service

204,722 x 17 years Kshs.1,740,562.00

2. 36 days outstanding leave pay at the time of termination

204,772 x Kshs.307,158.00

#### **• Jasper Kiai Kimweli – 2<sup>nd</sup> Claimant**

1. Gratuity pay 15 days' pay for every completed year of service

101,402 x 32 years Kshs.1,622,432.00

2. 69 outstanding days

101,402 x Kshs.291,530.75

• **Total** **Kshs.1,913,962.75**

Interest shall accrue from date of judgment. The respondent shall bear costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**