



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 217 OF 2017**

**JOHN MWENGEA.....1<sup>ST</sup> CLAIMANT**

**JAFRED ALUSA LIAKONGA.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**IN-TIME MANPOWER SOLUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Claimants herein sued the Respondent seeking recompense for the alleged unfair, unlawful and wrongful termination and non-payment of terminal dues. The Claimants averred that they were employed as general labourers in January 2015 and March 2014 respectively. They averred that they earned an hourly rate of Kshs. 61/- and 57/- respectively. The Claimants averred that the Respondent did not issue them with any written contracts of service but their employment could be inferred from the written correspondence between them and the Respondent. The Claimants averred that they diligently served the Respondent a fact that was acknowledged by the Respondent's directors. They averred that on 1<sup>st</sup> July 2016, they were unceremoniously dismissed by the Respondent without notice or cause. The Claimants averred that on that day they reported to work as usual and wore their work overalls but before they could commence their daily routines they were called by the Respondent's director and informed that their services were no longer required. The Claimants thus claimed statutory underpayments, one month's salary in lieu of notice, payment in lieu of untaken leave, service pay, compensation for unfair termination. The 1<sup>st</sup> Claimant sought Kshs. 423,395.20 made up of statutory underpayments – Kshs.130,478.40, one month's salary in lieu of notice – Kshs. 20,363.20, payment in lieu of untaken leave – Kshs. 16,447.20, service pay – Kshs. 11,748/-, and maximum compensation for unfair termination – Kshs. 244,358.40. The 2<sup>nd</sup> Claimant sought Kshs. 550,806.40 made up of statutory underpayments – Kshs. 229,694.40, one month's salary in lieu of notice – Kshs. 20,363.20, payment in lieu of untaken leave – Kshs. 32,894.40, service pay – Kshs. 23,946/-, and maximum compensation for unfair termination – Kshs. 244,358.40. They also sought a declaration that their dismissal was unfair, wrongful, and wrongful, terminal benefits and compensatory damages, general damages as expounded above, punitive damages for victimization of the Claimants by the Respondent, interest on the sums above, certificates of service and costs of the suit.

2. The Respondent in its defence averred that as a body corporate was not in existence in 2014 to employ anybody. The Respondent averred the claims by the Claimants were bad in law and not supported by any factual basis. The Respondent sought the dismissal of the claim with costs.

3. The suit was dismissed for non-attendance but was on application reinstated after hearing the Claimant's counsel and considering the consent filed by the parties. At the hearing the Respondent did not attend despite service.

4. The 1<sup>st</sup> Claimant testified that he was employed from 8<sup>th</sup> January 2015 till 1<sup>st</sup> July 2016 when he was dismissed. He stated that they used to receive payslips and that his salary was Kshs. 12,630/-. He testified that he was paid Kshs. 61/- per hour and received accolades for his service. He stated that on 1<sup>st</sup> July 2016 he reported to work and donned his overalls but before he could commence work was called by the managing director and told to remove his overalls. He was terminated alongside the 2<sup>nd</sup> Claimant. He stated that they were not notified of the reason for termination and they were not paid any dues. He testified that prior to dismissal he was not given a hearing and was distraught due to the termination. He stated that he has not had any income from then on. He stated that he was not given any notice of intended termination and was not issued with any certificate of service. The 2<sup>nd</sup> Claimant was called and he too testified that he was employed by the Respondent from March 2014. He stated that he was not issued with a contract of employment but would get payslips. He stated that he was paid Kshs. 11,957/- and was paid an hourly rate of Kshs. 57/-. He stated that he never went on leave for the duration of his service and was praised for his work. He testified that on 1<sup>st</sup> July 2016 he was about to start working when he was told to remove his overalls and leave. He stated that he was terminated alongside the 1<sup>st</sup> Claimant and not told the reason for termination. He stated that he was not given notice prior to that day of his intended termination. He testified that he was not offered an opportunity to defend himself and thus was not heard prior to dismissal. He sought payment of the dues on his claim.

5. The Claimants submitted that they had proved their case and that the Respondent's defence was that they were not its employees. The Claimants submitted that the termination of their services was unfair, unlawful and wrongful. They called in aid Section 45(2) of the Employment Act and argued that for a termination to be fair there must be validity and fairness in the reasons advanced to have caused the termination and the reasons must relate to the employees conduct, capacity or compatibility and that a fair process must be followed. The Claimants submitted that the Respondent neither proved the Claimants' termination was valid or fair, neither did it give the basis upon which the same was done. The Claimants submitted that the Respondent gave a general defence of denial but contradicts itself by annexing documents alleging that the Claimants were paid some benefits after dismissal. The Claimants submit that the dismissal was therefore unfair and unlawful. The provisions of Section 41 of the Employment Act were cited for the fair procedure in termination and they cited the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR**. The Claimants submitted that the burden of proving the unlawful dismissal lay on the employee and the employer had the burden of rebutting the same in terms of Section 47(5) of the Employment Act. The Claimants submitted that they had put forth a strong case for unfair termination and that they were entitled to the reliefs sought.

6. The Claimants assert they were dismissed for no cause. The Respondent on its part denied employing the Claimants but attached documents indicating there was an employee-employer relationship. At the hearing there was no appearance from the Respondent duly served and the Claimants' testimony remained uncontroverted. The Claimants were terminated on 1<sup>st</sup> July 2016 as narrated to court and they were not notified prior to the dismissal of the intent to terminate their services. They sought underpayments but failed to provide any basis for the allegations that they were underpaid. They managed to prove the termination was without any hearing and without any notice therefore unlawful and unfair. The Respondent had a duty to show the termination was for a valid reason. No reasons were advanced for the termination of employment as required. The Claimants were unable to prove that they never went on leave as no denied requests for leave were produced. They were not declared redundant and therefore were not entitled to service pay. The Claimants were thus only able to recover the following:-

i) 1<sup>st</sup> Claimant

- a. One month's salary in lieu of notice – Kshs. 20,363.20
- b. 6 months salary as compensation for the unlawful dismissal – Kshs. 122,179.20

ii) 2<sup>nd</sup> Claimant

- a. One month's salary in lieu of notice - – Kshs. 20,363.20
- b. 6 months salary as compensation for the unlawful dismissal – Kshs. 122,179.20

The Claimants are also entitled to

- 1) Costs of the suit
- 2) Interest on the sums in a) and b) above for each Claimant at court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**