



**REPUBLIC OF KENYA**

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

**AT NYERI**

**CAUSE NO. 8 OF 2018**

**CONSOLIDATED WITH CAUSE NO. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 AND 19 OF 2018**

**MICHAEL MOLU KOSICHA & 11 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. The 1<sup>st</sup> Claimant who is the Claimant in Cause No. 8 of 2018 averred that he was employed by the Respondent on 7<sup>th</sup> September 2013 as a Lab Attendant in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 24<sup>th</sup> January 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid thus 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 averred that the Respondent failed to remit NSSF and NHIF dues as required in law. 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. 21,556/-, gratuity/service benefits – Kshs. 14,238/-, maximum compensation for unfair termination – Kshs. 237,972/-, underpayment – Kshs. 146,569/-, annual leave dues – Kshs. 26,441/-, unpaid house allowance – Kshs. 27,600/-, overtime for the Sundays worked – Kshs. 97,664/- all totaling to Kshs. 572,040/- plus costs and interests of the suit.

2. The 2<sup>nd</sup> Claimant for purposes of the suit is the Claimant in Cause No. 9 of 2018 Somo Said Halake. He averred that he was employed on 1<sup>st</sup> July 2014 as a labourer in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 26<sup>th</sup> November 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 12,333/-, gratuity/service benefits – Kshs. 13,804/-, maximum compensation for unfair termination – Kshs. 127,296/-, underpayment – Kshs. 120,432/-, annual leave dues – Kshs. 15,912/-, unpaid house allowance – Kshs. 31,050/-, overtime for the Sundays worked – Kshs. 58,752/- all totaling to Kshs. 379,579/- plus costs and interests of the suit.

3. The 3<sup>rd</sup> Claimant herein is the Claimant in Cause No. 10 of 2018 Mio Boru Tadicha and he averred that he was employed on 1<sup>st</sup> January 2015 as a general worker in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 29<sup>th</sup> September 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and

the Respondent's management and 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. 12,333/-, gratuity/service benefits – Kshs. 13,804/-, maximum compensation for unfair termination – Kshs. 127,296/-, underpayment of wages – Kshs. 54,912/-, annual leave dues – Kshs. 7,956/-, unpaid house allowance – Kshs. 15,525/-, overtime for the Sundays worked – Kshs. 29,376/- all totaling to Kshs. 261,202/- plus costs and interests of the suit.

4. The 4<sup>th</sup> Claimant herein is the Claimant in Cause No. 11 of 2018 Mamud Hassan Harsama and he averred that he was employed on 9<sup>th</sup> November 2012 as a general worker in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 30<sup>th</sup> March 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 12,333/-, gratuity/service benefits – Kshs. 13,804/-, maximum compensation for unfair termination – Kshs. 127,296/-, underpayment – Kshs. 193,232/-, annual leave dues – Kshs. 24,752/-, unpaid house allowance – Kshs. 48,300/-, overtime for the Sundays worked – Kshs. 91,392/- all totaling to Kshs. 419,771/- plus costs and interests of the suit.

5. The 5<sup>th</sup> Claimant in this case is the Claimant in Cause No. 12 of 2018 Boya Guyo Buriya. He averred that he was employed on 1<sup>st</sup> May 2014 as a security guard in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 20<sup>th</sup> August 2016 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 19,119/-, gratuity/service benefits – Kshs. 14,049/-, maximum compensation for unfair termination – Kshs. 208,728/-, underpayment – Kshs. 113,646/-, annual leave dues – Kshs. 26,091/-, unpaid house allowance – Kshs. 31,050/-, overtime for the Sundays worked – Kshs. 96,336/- all totaling to Kshs. 509,019/- plus costs and interests of the suit.

6. The 6<sup>th</sup> Claimant in this case is the Claimant in Cause No. 13 of 2018 Abdinasir Sura Jaldesa and he averred that he was employed on 1<sup>st</sup> May 2013 as a general worker in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 22<sup>nd</sup> August 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 12,333/-, gratuity/service benefits – Kshs. 13,804/-, maximum compensation for unfair termination – Kshs. 156,832/-, underpayment – Kshs. 156,832/-, annual leave dues – Kshs. 21,216/-, unpaid house allowance – Kshs. 39,675/-, overtime for the Sundays worked – Kshs. 72,072/- all totaling to Kshs. 446,228/- plus costs and interests of the suit.

7. The 7<sup>th</sup> Claimant in this case is the Claimant in Cause No. 14 of 2018 Kusu Dima Ramadhan. He averred that he was employed on 1<sup>st</sup> September 2012 as a lab attendant in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 2<sup>nd</sup> December 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and the Claimant therefore seeks a declaration that the termination process as carried out by the Respondent was unlawful, and prays for two month's salary in lieu of notice – Kshs. 41,387/-, gratuity/service benefits – Kshs. 33,814/-, maximum compensation for unfair termination – Kshs. 237,972/-, underpayment – Kshs. 375,369/-, annual leave dues – Kshs. 62,798/-, unpaid house allowance – Kshs. 65,550/-, overtime for the Sundays worked – Kshs. 231,952/- all totaling to Kshs. 1,048,842/- plus costs and interests of the suit.

8. The 8<sup>th</sup> Claimant in this case is the Claimant in Cause No. 15 of 2018 Siba Aila Boru. He averred that he was employed on 6<sup>th</sup> October 2011 as a chainman in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 8<sup>th</sup> May 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and the Claimant therefore seeks a declaration that the termination process as carried out by the Respondent was unlawful, and prays for two month's salary in lieu of notice – Kshs. 26,269/-, gratuity/service benefits – Kshs. 23,679/-, maximum

compensation for unfair termination – Kshs. 390,208/-, underpayment of wages – Kshs. 390,208/-, annual leave dues – Kshs. 43,975/-, unpaid house allowance – Kshs. 74,175/-, overtime for the Sundays worked – Kshs. 196,768/- all totaling to Kshs. 902,338/- plus costs and interests of the suit.

9. The 9<sup>th</sup> Claimant herein is the Claimant in Cause No. 16 of 2018 Adan Katelo Wario. He averred that he was employed on 1<sup>st</sup> March 2012 as a security guard in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 27<sup>th</sup> September 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and the Claimant therefore seeks a declaration that the termination process as carried out by the Respondent was unlawful, and prays for two month's salary in lieu of notice – Kshs. 36,513/-, gratuity/service benefits – Kshs. 32,781/-, maximum compensation for unfair termination – Kshs. 208,728/-, underpayment of wages – Kshs. 287,826/-, annual leave dues – Kshs. 60,879/-, unpaid house allowance – Kshs. 74,450/-, overtime for the Sundays worked – Kshs. 224,784/- all totaling to Kshs. 923,961/- plus costs and interests of the suit.

10. The 10<sup>th</sup> Claimant in this case is the Claimant in Cause No. 17 of 2018 Molu Gufu Doti. He averred that he was employed on 1<sup>st</sup> September 2012 as a security guard in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 30<sup>th</sup> April 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 19,119/-, gratuity/service benefits – Kshs. 14,049/-, maximum compensation for unfair termination – Kshs. 208,728/-, underpayment of wages – Kshs. 207,746/-, annual leave dues – Kshs. 44,934/-, unpaid house allowance – Kshs. 53,475/-, overtime for the Sundays worked – Kshs. 165,912/- all totaling to Kshs. 713,963/- plus costs and interests of the suit.

11. The 12<sup>th</sup> Claimant in this case is the Claimant in Cause No. 18 of 2018 Duba Boru Wario. He averred that he was employed on 1<sup>st</sup> September 2013 as a security guard in the project for the construction of the Marsabit – Turbi Road. He averred that he worked for the Respondent with loyalty, diligence and full dedication and commitment until 30<sup>th</sup> August 2015 when he was wrongfully/unprocedurally and unfairly dismissed and the Respondent refused to pay 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 averred that the Respondent failed to accord him due procedure and also failed to prove that the reason for dismissal was valid therefore in violation of Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent failed to remit NSSF and NHIF dues as required in law. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent's management and 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. 19,119/-, gratuity/service benefits – Kshs. 14,049/-, maximum compensation for unfair termination – Kshs. 208,728/-, underpayment of wages – Kshs. 156,786/-, annual leave dues – Kshs. 34,788/-, unpaid house allowance – Kshs. 41,400/-, overtime for the Sundays worked – Kshs. 128,448/- all totaling to Kshs. 603,318/- plus costs and interests of the suit.

12. 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 11<sup>th</sup> 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 5<sup>th</sup> April 2011 to 5<sup>th</sup> 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.

13. In their affidavits of evidence, the Claimants deponed 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 deponed 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 27<sup>th</sup> 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.

14. The Claimants' submissions were that their testimony was not controverted as the Respondent had failed to appear and defend the suit. 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, compensation for the unlawful/unfair termination, the payment of the sums due on underpayment of wages, payment of the unpaid house allowance, annual leave, and underpayment for Sundays worked. The Claimants also sought costs of the suit separately in each individual cause before consolidation because each claim was 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 after consolidation. The Respondent did not file any submissions.

15. Each of the Claimants 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 averred that the Claimants were engaged in a road construction project which they knew was coming to an end in 2014. The Respondent averred that the contract for the construction of the project was extended until 20<sup>th</sup> April 2015 and the defects liability period ran up until 19<sup>th</sup> April 2017. This perhaps may be the date the Claimants had in mind when they assert that the project continued until 2017 and the position they took on the termination of their contracts before this date. 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 reduced compliment of staff during the defects liability period between 20<sup>th</sup> April 2015 and 19<sup>th</sup> April 2017. None of the Claimants before me demonstrated that they worked during the defects liability period and none of them therefore anticipated work beyond the life of the project. The testimony of Michael Molu Kosicha referred to the letter he called a testimonial issued by the Respondent. The letter from the Respondent was in the form of a recommendation letter and as such if the dismissal was abrupt why was this issued on 28<sup>th</sup> January 2015 after the alleged dismissal on 24<sup>th</sup> January 2015? Had the separation been as stated by the Claimant would he have gone back to pick the letter on 28<sup>th</sup> January 2015 without any official of the Union or his lawyer in tow? 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. I find that 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 9<sup>th</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**