



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

**CAUSE NO 2087 OF 2015**

**CONSOLIDATED WITH**

**CAUSE NO 2089 OF 2015**

**JAMES MBURU CHEGE..... 1<sup>ST</sup> CLAIMANT**

**JOSEPH NJAGI MUGO..... 2<sup>ND</sup> CLAIMANT**

**VERSUS**

**KENYACAM LIMITED..... 1<sup>ST</sup> RESPONDENT**

**CAMUSAT KENYA LIMITED..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This consolidated claim is brought by James Mburu Chege and Joseph Njagi Mugo against Kenyacam Limited and Camusat Kenya Limited. The claim is contained in Statements of Claim dated 24<sup>th</sup> November 2015 and filed in court on 25<sup>th</sup> November 2015. The Respondents filed their responses on 1<sup>st</sup> March 2016.

2. By consent of the parties, the matter proceeded by way of written submissions.

**The Claimants' Case**

3. The 1<sup>st</sup> Claimant, James Mburu Chege states that he was employed by the 1<sup>st</sup> Respondent as a Rigger on 28<sup>th</sup> July 2011. He earned a monthly salary of Kshs. 29,000, exclusive of house allowance and was confirmed upon expiry of a three (3) months' probation period.

4. The 1<sup>st</sup> Claimant states that the 1<sup>st</sup> Respondent refused to pay him house allowance. He further states that between September 2012 and March 2013, he was forced to do construction work, which was not part of his duties under his employment contract. The 1<sup>st</sup> Respondent refused to compensate the 1<sup>st</sup> Claimant for the extra services offered. In addition, the 1<sup>st</sup> Claimant worked from Monday to Sunday without any overtime compensation.

5. The 1<sup>st</sup> Claimant further states that in the month of May 2013, the 1<sup>st</sup> Respondent entered into an agreement with Wananchi Group Limited involving *inter alia* construction, maintenance, installation and

support.

6. The 1<sup>st</sup> Claimant pleads that the 1<sup>st</sup> Respondent unilaterally reviewed his contract, assigning him the position of Field Technician at a gross salary of Kshs. 28,528 plus a daily allowance of Kshs. 200 for food and transport. The 1<sup>st</sup> Claimant was also to be paid Kshs. 2,000 for days spent outside Nairobi.

He avers that the 1<sup>st</sup> Respondent took him for training at the Kenya Power but withheld his training certificate.

7. The 1<sup>st</sup> Claimant alleges that the 1<sup>st</sup> Respondent later merged with Wananchi Group and changed its name to Camusat Kenya Limited, the 2<sup>nd</sup> Respondent herein. The 1<sup>st</sup> Claimant states that after the merger, he was not issued with a new contract of employment. The Respondents continuously made him switch jobs without any formal training and without compensation. The 1<sup>st</sup> Claimant's salary was later increased to Kshs. 33,000 plus a transport allowance of Kshs. 6,000 per month.

8. Sometime in September 2015, the 1<sup>st</sup> Claimant was on his way to work when he received a text message from the Respondents asking him to go for a meeting at the Respondents' Head Office on 1<sup>st</sup> October 2015. When the 1<sup>st</sup> Claimant went for the meeting as instructed, he was issued with a termination letter backdated to 30<sup>th</sup> September 2015. He was also issued with a pay slip showing that he had been paid a total sum of Kshs. 116,286.86, yet he only received Kshs. 33,000.

9. It is the 1<sup>st</sup> Claimant's case that the termination of his employment was actuated by malice and was in breach of the Respondents' statutory duty.

He now claims the following:

- a) 1 months' salary in lieu of notice.....Kshs. 33,000.00
- b) House allowance.....221,850.00
- c) Overtime (normal days).....586,061.28
- d) Overtime (rest days-Sundays).....427,671.20
- e) Service pay..... 33,000.00
- f) 12 months' salary in compensation.....396,000.00
- g. Certificate of service
- h. Costs plus interest

10. The 2<sup>nd</sup> Respondent, Joseph Njagi Mugo states that he was employed by the 1<sup>st</sup> Respondent as a Rigger on 30<sup>th</sup> May 2011. He earned a monthly salary of Kshs. 34,000 exclusive of house allowance and was confirmed upon expiry of a three (3) months' probation period

11. The 2<sup>nd</sup> Claimant states that the 1<sup>st</sup> Respondent refused to pay him house allowance. He further states that between September 2012 and March 2013, he was forced to do construction work, which was not part of his duties

under his employment contract. The 1<sup>st</sup> Respondent refused to compensate the 2<sup>nd</sup> Claimant for the extra services offered. In addition, the 2<sup>nd</sup> Claimant worked from Monday to Sunday without any overtime compensation.

12. The 2<sup>nd</sup> Claimant further states that in the month of May 2013, the 1<sup>st</sup> Respondent entered into an agreement with Wananchi Group Limited involving *inter alia* construction, maintenance, installation and support. The 2<sup>nd</sup> Claimant states that the 1<sup>st</sup> Respondent unilaterally reviewed his contract, assigning him the position of Field Technician at a gross salary of Kshs. 32,129 plus a daily allowance of Kshs. 200 for food and transport. The 2<sup>nd</sup> Claimant was also to be paid Kshs. 2,000 for days spent outside Nairobi. He avers that the 1<sup>st</sup> Respondent took him for training at the Kenya Power but withheld his training certificate.

13. The 2<sup>nd</sup> Claimant alleges that the 1<sup>st</sup> Respondent later merged with Wananchi Group and changed its name to Camusat Kenya Limited, the 2<sup>nd</sup> Respondent herein. The 2<sup>nd</sup> Claimant states that after the merger, he was not issued with a new contract of employment. The Respondents continuously made him switch jobs without any formal training and without compensation. The 2<sup>nd</sup>

Claimant's salary was later increased to Kshs. 40,000 plus a transport allowance of Kshs. 6,000 per month.

14. Sometime in September 2015, the 2<sup>nd</sup> Claimant was on his way to work when he received a text message from the Respondents asking him to go for a meeting at the Respondents' Head Office on 1<sup>st</sup> October 2015. When the 2<sup>nd</sup> Claimant went for the meeting as instructed, he was issued with a termination letter backdated to 30<sup>th</sup> September 2015. He was also issued with a pay slip showing that he had been paid a total sum of Kshs. 150,476.86, yet he only received Kshs. 40,000.

15. It is the 2<sup>nd</sup> Claimant's case that the termination of his employment was actuated by malice and was in breach of the Respondents' statutory duty. He now claims the following:

- a) 1 months' salary in lieu of notice.....Kshs. 40,000.00
- b) House allowance.....270,000.00
- c) Overtime (normal days).....656,287.20
- d) Overtime (rest days-Sundays).....490,775.12
- e) 12 months' salary in compensation.....480,000.00
- f) Certificate of service
- g) Costs plus interest

### **The Respondents' Case**

16. In their responses dated 26<sup>th</sup> February 2016 and filed in court on 1<sup>st</sup> March 2016, the Respondents state that on 27<sup>th</sup> November 2014, the 1<sup>st</sup> Respondent filed a Change of Name under the Companies Act to Camusat Kenya Limited. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore refer to the same person. The 1<sup>st</sup> Respondent denies merging with Wananchi Group.

17. The Respondents admit that the 1<sup>st</sup> Claimant was employed as a Rigger at a gross monthly salary of Kshs. 15,000 from 28<sup>th</sup> June 2011, subject to a three (3) months' probation period. On 1<sup>st</sup> May 2013, the 1<sup>st</sup> Claimant's contract was reviewed under the following terms:

- a. The 1<sup>st</sup> Claimant was employed as a Field Technician;
- b. He earned a gross monthly salary of Kshs. 28,528;

c. He would work on weekdays from 8.00 am to 5.00 pm.

18. The Respondents deny ordering, forcing or compelling the 1<sup>st</sup> Claimant to carry out construction work, installation or driving without prior formal training or pay. They further deny the averment that the 1<sup>st</sup> Claimant worked from Monday to Sunday without overtime compensation and reiterate that the 1<sup>st</sup> Claimant only worked on weekdays and in the event that he worked on Saturday and Sunday, he would be entitled to an extra rest day. The Respondents deny any illegal actions in the review of the 1<sup>st</sup> Claimant's employment contract.

19. The Respondents state that on 1<sup>st</sup> September 2015, the 2<sup>nd</sup> Respondent issued a performance notice to the 1<sup>st</sup> Claimant, outlining performance quotas and parameters for review within a period of 30 days. On 30<sup>th</sup> September 2015, the Respondents held a performance review meeting with the 1<sup>st</sup> Claimant. The 1<sup>st</sup> Claimant's performance was found unsatisfactory against the parameters set out in the performance notice. The 1<sup>st</sup> Claimant was therefore issued with a termination letter.

20. Regarding the 1<sup>st</sup> Claimant's terminal dues, the Respondents aver that he was paid the sum of Kshs. 84,473 net of statutory deductions. The said sum was paid in two (2) installments of Kshs. 26,585 paid on 30<sup>th</sup> September 2015 and Kshs. 57,888 paid on 2<sup>nd</sup> November 2015. On the claim for house allowance, the Respondents state that the 1<sup>st</sup> Claimant was paid a consolidated monthly salary, inclusive of house allowance.

21. In response to the 2<sup>nd</sup> Claimant's claim, the Respondents state that he was employed as a Rigger at a gross monthly salary of Kshs. 20,000 from 30<sup>th</sup> May 2011, subject to a three (3) months' probation period. The 2<sup>nd</sup> Claimant's contract was subsequently reviewed under the following terms:

- a. The 2<sup>nd</sup> Claimant was employed as a Field Technician;
- b. He earned a gross monthly salary of Kshs. 35,129;
- c. He would work on weekdays from 8.00 am to 5.00 pm.

22. The Respondents deny ordering, forcing or compelling the 2<sup>nd</sup> Claimant to carry out construction work, installation or driving without prior formal training or pay. They further deny the averment that the 2<sup>nd</sup> Claimant worked from Monday to Sunday without overtime compensation and reiterate that the 2<sup>nd</sup> Claimant only worked on weekdays and in the event that he worked on Saturday and Sunday, he would be entitled to an extra rest day. The Respondents deny any illegal actions in the review of the 2<sup>nd</sup> Claimant's employment contract.

23. The Respondents state that on 1<sup>st</sup> September 2015, the 2<sup>nd</sup> Respondent issued a performance notice to the 2<sup>nd</sup> Claimant, outlining performance quotas and parameters for review within a period of 30 days. On 30<sup>th</sup> September 2015, the Respondents held a performance review meeting with the 2<sup>nd</sup> Claimant. The 2<sup>nd</sup> Claimant's performance was found unsatisfactory against the parameters set out in the performance notice. The 2<sup>nd</sup> Claimant was therefore issued with a termination letter.

24. Regarding the 2<sup>nd</sup> Claimant's terminal dues, the Respondents aver that he was paid the sum of Kshs. 108,161 net of statutory deductions. The said sum was paid in two (2) installments of Kshs. 31,473 paid on 30<sup>th</sup> September 2015 and Kshs. 76,688 paid on 2<sup>nd</sup> November 2015. On the claim for house allowance, the Respondents state that the 2<sup>nd</sup> Claimant was paid a consolidated monthly salary, inclusive of house allowance.

25. The Respondents maintain that the termination of the Claimants' employment was fair and proper.

## **Findings and Determination**

26. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimants' employment was lawful and fair;
- b. Whether the Claimants are entitled to the remedies sought.

## **The Termination**

27. The termination of the Claimants' employment was effected by individual letters dated 30<sup>th</sup> September 2015, stating as follows:

### **"RE: TERMINATION OF EMPLOYMENT CONTRACT**

We regret to inform you that your employment contract with Camusat Kenya Ltd has been terminated with immediate effect. This decision has been reached as a result of negligence and unsatisfactory work performance which is a breach of the company's standard requirements.

You will be entitled to a Month's pay in lieu of notice, accumulated leave and other allowances entitled to you. We will disburse your final dues as soon as you hand over any company property currently in your possession. Kindly make arrangements to clear with the company accordingly.

We thank you for your service to Camusat Kenya Ltd and wish you all the best in your future endeavours.

Respectfully,

(Signed)

**FRANCIS MACHARIA**

**HR MANAGER"**

28. According to these letters, the termination of the Claimants' employment was caused by poor performance, which is one of the grounds for which an employer may terminate the employment of an employee.

29. Jurisprudence emerging from this Court is to the effect that the procedural fairness requirements set out under Section 41 of the Employment Act, 2007 are fully applicable to cases of poor performance. In *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010)*, **Rika J** held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve.

30. Prior to the termination letters, the Claimants had been issued with performance notices on 1<sup>st</sup> September 2015, citing the following as expectations:

- a. Serving with commitment and completing the jobs within SLA;
- b. Providing lasting solution to the network on both proactive and preventive maintenance;
- c. Accountability of materials and usage of the required materials at the right stage for the right ticket, according to the process;
- d. Adhering to the planned timetable and permanent communication with dispatchers. Information

to transmit are, but are not limited to, arrival time on site, nature of the fault, expected time to repair, material used, test result after completion;

e. Continuous excellence performance on troubleshooting method for both GPON and HFC network.

31. In my view, the foregoing is a list of general statements and aspirations. They do not qualify as either shortcomings or targets against which the Claimants' performance could be gauged. The performance notices issued to the Claimants indicated that a review would be undertaken at the end of September 2015. In their supplementary list of documents the Respondents produced minutes of a performance review meeting held on 30<sup>th</sup> September 2015, the same day when the Claimants' employment was terminated. From this record, the Court did not see evidence of participation by the Claimants in the subject performance review, either by making comments or by appending their signatures. In *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* this Court held that an appraisal of the performance of an employee must involve the active participation of the employee.

32. Moreover, in light of the proximity in time between the performance review meeting and the termination of the Claimants' employment, the Court was unable to find a distinction between the performance review meeting and the disciplinary hearing leading to the termination of the Claimants' employment.

33. Overall, I find and hold that the termination of the Claimants' employment on account of poor performance was unjustifiable and unprocedural and they are entitled to compensation.

## **Remedies**

34. Flowing from the foregoing, I award each of the Claimants eight (8) months' salary in compensation. In arriving at this award, I have considered the Claimants' length of service and the Respondents' conduct prior to the termination.

35. The Claimants also claim house allowance. Section 31(1) & (2) of the Employment Act provides that:

**1. An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.**

**2. This section shall not apply to an employee whose contract of service-**

**a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**

**b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

36. The Claimants' employment contracts as reviewed on 1<sup>st</sup> May 2013 provided for gross monthly salaries, which would ordinarily be inclusive of house allowance. In their Statements of Claim, the Claimants allege that the Respondents did not consult them before reviewing their contracts. There was however no evidence that the Claimants had made any objection prior to filing of this case.

37. In the circumstances, the Court reached the conclusion that the Claimants were fully aware and had acceded to consolidated gross salaries, inclusive of house allowance. The claims for house allowance are therefore without merit and are dismissed.

38. From the evidence on record, the Claimants were paid notice and service pay. These claims are

therefore without basis and are dismissed. The claims for overtime compensation were not proved and therefore fail and are dismissed.

39. In the end, I enter judgment in favour of the Claimants in the sums of Kshs. 264,000 for the 1<sup>st</sup> Claimant, James Mburu Chege and Kshs. 320,000 for the 2<sup>nd</sup> Claimant, Joseph Njagi Mugo, being eight (8) months' salary for unlawful and unfair termination of employment.

40. These amounts will attract interest at court rates from the date of delivery of this judgment until payment in full.

41. The Claimants are also entitled to certificates of service and the costs of the case.

42. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Gomba for the Claimants

Mr. Odhiambo for the Respondents