



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 657 OF 2016

MWARUA YAWA NZAO.....1ST CLAIMANT
TABITHA TABU MAGIO.....2ND CLAIMANT
MARK KIMUTAI.....3RD CLAIMANT
PHILIP MALUKI.....4TH CLAIMANT
LUCAS GIMASE.....5TH CLAIMANT
BENEDICT MWANURYA.....6TH CLAIMANT
HALUWA CHARO.....7TH CLAIMANT
ROBERT KAZUNGU.....8TH CLAIMANT
KAHINDI PETER.....9TH CLAIMANT
GEORGE OMBOGO.....10TH CLAIMANT
ANDREW MUTENGO.....11TH CLAIMANT
MARY BOKE NYAHIRI.....12TH CLAIMANT
CANICUS MWITA JOSEPH.....13TH CLAIMANT
MBARU MWANYAMBA.....14TH CLAIMANT
MICHAEL YAA NGOKA.....15TH CLAIMANT
TOM KERARIU MICHAEL.....16TH CLAIMANT
GABRIEL CHACHA.....17TH CLAIMANT
FURAHA CHARO MENZA18TH CLAIMANT
SAMUEL NYAHILI NCHORE.....19TH CLAIMANT
GRACE OTIENO MBEJA20TH CLAIMANT

VERSUS

BABS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants were employed by the Respondents on diverse dates between January 2013 and October 2015 and worked until 14.1.2016

when their services were terminated on account of redundancy without any prior notice. It is the Claimants' case that the redundancy was unlawfully done and it amounted to unfair termination of their employment. They have therefore brought this suit claiming one month salary in lieu of notice, compensation for unfair termination, salary underpayment, service pay, gratuity, accrued leave and public holidays worked, salary for December 2015 and January 2016, costs and interest.

2. The Respondent never entered appearance and as such, the suit proceeded ex parte by way of formal proof on 27.9.2017 when the 5th testified for Claimants as CW1 and adopted the written witness statement by the first Claimant as his testimony. Thereafter the Claimants filed written submissions, which I have carefully considered herein.

Claimants' case.

3. CW1 testified that he was employed by the Respondent as a security guard from November 2013 and his salary was Kshs.6000. He further testified that all the other Claimants were also employed as security guards for the same salary of Kshs.6000 per month. On 14.1.2016 CW1 and the other Claimants reported to work at their places of assignment as usual but they found instructions from the Respondent that they should go home because she had closed her operations. The following day the Claimants called their boss to verify the instructions and they were told that the outsourcing contract had lapsed and she had closed the Mombasa office.

4. CW1 contended that the termination was unfair because no prior termination notice was served upon them and they were not paid their accrued benefits under their contract of employment. He therefore prayed for the reliefs sought in the suit contending that all the Claimants had their salary underpaid during their employment and prayed for payment of the arrears. He further contended that as at the time of the termination, all the Claimants had not yet been paid their salary for December 2015 and January 2016.

5. The first Claimant echoed the testimony by the CW1 that the Claimants were employed by the Respondents until 14.1.2016 when they found that their employment had been terminated without prior notice and the Respondent's Mombasa offices closed. He further stated that as at the time of the termination, the Claimant had not yet been paid their salary for December 2015 and January 2016. He clarified that the Respondent's Head office at Nairobi was still operational.

Analysis and Determination

6. There is no dispute that all the Claimants were employed by the Respondent as security guards and posted to various assignments in Mombasa until 14.1.2016 when they were terminated following closing the Respondent's Mombasa office. The issues for determination arising from the material presented to the Court are:

- a) Whether the termination of the Claimants' contract of service was unfair; and
- b) Whether the Claimants are entitled to the reliefs sought.

Unfair termination.

7. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was redundancy and the procedure followed was sudden termination without prior notice and payment of accrued terminal benefits. The reason for the termination has not been contested by the Claimants who stated that they were informed by their bosses that the outsourcing contract had lapsed and when they visited the Respondent's Mombasa office they found that it was indeed closed. Consequently, I find that the Respondent had valid reason to terminate the services of the Claimants due to her operational requirements.

8. The Claimants have however taken issue with the procedure followed and I agree with them that the procedure followed before their lay off was unfair. It is also clear from the facts of the case that the mandatory procedure for terminating employment contract on account of redundancy prescribed by section 40 of the Employment Act was not complied with in this case. The said provision requires in mandatory terms that before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and Labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy. The failure to comply with the said mandatory procedure rendered the termination of the Claimants' services unfair within the meaning of section 45 of the Act, and I so hold.

Reliefs

9. The Claimants have prayed for one month salary in lieu of notice, compensation for unfair termination, salary underpayment, service pay, gratuity, accrued leave and public holidays worked, salary for December 2015 and January 2016.

Notice and compensation for unfair termination

10. In view of the finding herein above that the services of the Claimants were unfairly terminated, I proceed to award each of them one month salary in lieu of notice plus compensation of 6 months' salary under section 49 and 50 of the Act. In awarding the said small compensation, I have considered the fact that the Claimants worked for the Respondents for a fairly short period and also the fact that they never contributed to their termination through misconduct. The award will be based on the minimum wage published vide Legal Notice No.117 of 2015 being kshs.12221 as prayed.

Underpayment and the unpaid salary

11. There is no dispute that the Claimants were earning between Kshs.6000 gross salary per month. Considering the minimum wages published vide Legal notice No.197 of 2013 and Legal Notice No. 117 of 2015, it is obvious that the Respondents did underpay all the Claimants' their rightful salaries as demonstrated by pleadings, evidence, and submissions. I therefore allow the claim for the salary arrears occasioned by the said underpayment to each Claimant. In addition, I award the claim for salary for December 2015 and 14 days worked in January 2016.

Service pay and gratuity

12. The claim for service pay is also granted at the conventional rate of 15 days pay per completed year of service. The claim for gratuity is however dismissed for lack of legal or contractual basis.

Accrued leave & public holidays

13. The Claimants evidence that they never went for annual leave has not been contested. However, I only allow one year's leave because the Claimants never proved that they had permission to accumulate leave. However, the claim for the public holidays worked is dismissed for want of particulars and evidence.

14. The summary of award for each claimant is as follows:

Mwarua	Yawa	Nzao						
Notice						Kshs.		12,221.00
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		174,200.00
Leave						Kshs.		12,221.00
Service	pay					Kshs.		18,332.50
						Kshs.		308,633.00
Tabitha	Magio							
Notice						Kshs.		12,221.00
Compensation						Kshs.	73,326.00	
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		174,200.00
Leave						Kshs.		12,221.00
Service	pay					Kshs.		18,332.50
								Kshs. 308,633.00
Mark	Kimutai							
Notice						Kshs.		12,221.00
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		174,200.00
Leave						Kshs.		12,221.00
Service	pay					Kshs.		18,332.50
								Kshs. 308,633.00
Philip	Maluki							
Notice						Kshs.	12,221.00	
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		174,200.00
Leave						Kshs.		12,221.00
Service	pay					Kshs.	18,332.50	
								Kshs. 308,633.00
Lucas	Gimase							
Notice						Kshs.	12,221.00	
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		127,701.90
Leave						Kshs.	12,221.00	
Service pay						<u>Kshs.</u>	<u>12,221.00</u>	
								Kshs. 256,024.40
Benedict	Mwanarua							
Notice						Kshs.	12,221.00	
Compensation						Kshs.	73,326.00	
Unpaid	salary					Kshs.	18,332.50	
Salary		underpayment				Kshs.		127,701.90
Leave						Kshs.	12,221.00	
Service	pay					<u>Kshs.</u>	<u>12,221.00</u>	
								Kshs. 256,024.40

Haluwa	Charo							
Notice				Kshs.	12,221.00			
Compensation						Kshs.		73,326.00
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		127,701.90
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>12,221.00</u>			
								<u>Kshs. 256,024.40</u>
Robert	Kazungu							
Notice				Kshs.	12,221.00			
Compensation						Kshs.		73,326.00
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		127,701.90
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>12,221.00</u>			
								<u>Kshs. 256,024.40</u>
Kahindi	Peter							
Notice				Kshs.	12,221.00			
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		127,701.90
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>12,221.00</u>			
								<u>Kshs. 256,024.40</u>
George	Ombogo							
Notice				Kshs.	12,221.00			
Compensation				Kshs.	73,326.00			
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		115,259.90
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>12,221.00</u>			
								<u>Kshs. 243,581.40</u>
Andrew	Mutengo							
Notice				Kshs.	12,221.00			
Compensation				Kshs.	73,326.00			
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		115,259.90
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>12,221.00</u>			
								<u>Kshs. 243,581.40</u>
Mary	Boke	Nyahiri						
Notice				Kshs.	12,221.00			
Compensation				Kshs.	73,326.00			
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		105,436.00
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>6,111.50</u>			
								<u>Kshs. 227,648.50</u>
Mbaru	Mwanyamba							
Notice						Kshs.		12,221.00
Compensation						Kshs.		73,326.00
Unpaid	salary					Kshs.		18,332.50
Salary		underpayment				Kshs.		105,436.00
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>6,111.50</u>			
								<u>Kshs. 227,648.50</u>
Canicus	Mwita	Joseph						
Notice				Kshs.	12,221.00			
Compensation				Kshs.	73,326.00			
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment				Kshs.		105,436.00
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>6,111.50</u>			
								<u>Kshs. 227,648.50</u>
Michael	Yaa	Mgoka						
Notice						Kshs.		12,221.00
Compensation						Kshs.		73,326.00
Unpaid	salary			Kshs.	18,332.50			
Salary		underpayment		Kshs.	56,319.50			
Leave				Kshs.	12,221.00			
Service	pay			<u>Kshs.</u>	<u>6,111.50</u>			
								<u>Kshs. 178,531.50</u>
Tom	Kerariu	Michael						
Notice						Kshs.		12,221.00

Compensation				Kshs.	73,326.00
Unpaid	salary			Kshs.	18,332.50
Salary		underpayment		Kshs.	56,319.50
Leave				Kshs.	12,221.00
Service	pay		Kshs.	6,111.50	
				Kshs.	178,531.50
Gabriel	Chacha				
Notice				Kshs.	12,221.00
Compensation				Kshs.	73,326.00
Unpaid	salary			Kshs.	18,332.50
Salary		underpayment		Kshs.	37,326.00
Leave				Kshs.	4,935.40
				Kshs.	146,140.90
Furaha	Charo	Menza			
Notice				Kshs.	12,221.00
Compensation				Kshs.	73,326.00
Unpaid	salary			Kshs.	18,332.50
Salary		underpayment		Kshs.	18,663.00
Leave				Kshs.	2,467.70
				Kshs.	125,010.20
Samuel	Nyahili	Nchore			
Notice				Kshs.	12,221.00
Compensation				Kshs.	73,326.00
Unpaid	salary			Kshs.	18,332.50
Salary		underpayment		Kshs.	24,884.00
Leave				Kshs.	3,290.30
			Kshs.		132,053.80
Grace	Otieno	Mbeja			
Notice				Kshs.	12,221.00
Compensation				Kshs.	73,326.00
Unpaid	salary			Kshs.	18,332.50
Salary		underpayment		Kshs.	24,884.00
Leave				Kshs.	3,290.30
			Kshs.		132,053.80

Disposition

15. For the reasons stated above, I enter Judgment for each Claimants in the respective sums indicated above plus costs and interest from the date hereof. The awards will be subjected to statutory deductions.

Dated and signed at Nairobi this 23rd day of February, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 2nd day of March, 2018

LINNET NDOLO

.....

JUDGE