



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 958 OF 2014

BENEDICT MUIINDI MAITHYA.....1ST CLAIMANT
KYALO MUNYITHYA.....2ND CLAIMANT
JOHN KAKUNU.....3RD CLAIMANT
THOMAS MUNYWOKI.....4TH CLAIMANT
ROBERT MUTHANGYA.....5TH CLAIMANT
ALLECE AZENGA.....6TH CLAIMANT
BENARD MUNWYOKI.....7TH CLAIMANT
PATRICK KAVOO.....8TH CLAIMANT
MULWA MWANGANGI.....9TH CLAIMANT
FRANCIS KITHENDU.....10TH CLAIMANT
DAVID MUTUA MARTIN.....11TH CLAIMANT
BONIFACE NZILA.....12TH CLAIMANT

VS

ASHOK UMAKANT J. DAVE T/A DAVES CATERING.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants' claim brought by Statement of Claim dated 10th June 2014 and filed in court on even date is for unlawful termination of employment. The Respondent filed a Memorandum of Response on 28th April 2015.
2. When the matter came up for hearing, the 5th Claimant, Robert Muthangya testified on his own behalf and on behalf of his co-claimants. George Samuel Obiero Mbeya testified for the Respondent.

The Claimants' Case

3. The Claimants were employed by the Respondent on diverse dates and terms. They state that their employment was terminated on 18th April 2014 after their Advocate had written to the Respondent demanding payment of accumulated salary arrears.
4. It is the Claimants' case that the termination of their employment was unlawful and unfair. They further claim that they never went on leave nor were they paid in lieu thereof. Additionally, the Claimants plead that they worked extra hours including on public holidays and during their off days, without any compensation.

5. The Claimants' claims are as follows:

1st Claimant: Benedict Muindi Maithya

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x15).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x15).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x9).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

2nd Claimant: Kyalo Munyithya

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty(509x4x15).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance(100x26x15).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x9).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

3rd Claimant: John Kakunu

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x15).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x15).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x9).....9,162

- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

4th Claimant: Thomas Munywoki

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x15).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x15).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x9).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

5th Claimant: Robert Muthangya

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x15).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x15).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x9).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

6th Claimant: Allence Azenga

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 8 months.....8,144
- c) Off duty (509x4x85).....16,288
- d) Salary underpayment.....20,928
- e) Transport allowance (100x26x85).....20,800
- f) Uniform.....1,000
- g) Public holidays (509x2x5).....5,090

- h) 12 months' salary in compensation.....146,592
- i) Certificate of service

7th Claimant: Benard Munywoki

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 3 months.....3,054
- c) Off duty (509x4x85).....6,108
- d) Salary underpayment.....7,848
- e) Transport allowance (100x26x85).....7,800
- f) Uniform.....1,000
- g) Public holidays (509x2x3).....3,054
- h) 12 months' salary in compensation.....146,592
- i) Certificate of service

8th Claimant: Patrick Kavoo

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x85).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x85).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x3).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

9th Claimant: Mulwa Mwangangi

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x85).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x85).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x3).....9,162

- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

10th Claimant: Francis Kithendu

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x85).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x85).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x3).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

11th Claimant: David Mutua Martin

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x85).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x85).....39,000
- g) Uniform.....1,000
- h) Public holidays (509x2x3).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

12th Claimant: Boniface Nzila

- a) One months' salary in lieu of notice.....Kshs. 12,216
- b) Leave pay for 1 year & 2 months.....12,216
- c) Off duty (509x4x85).....30,540
- d) Service gratuity.....6,108
- e) Salary underpayment.....39,240
- f) Transport allowance (100x26x85).....39,000
- g) Uniform.....1,000

- h) Public holidays (509x2x3).....9,162
- i) 12 months' salary in compensation.....146,592
- j) Certificate of service

6. The Claimants also seek costs of the case plus interest.

The Respondent's Case

7. In its Memorandum of Response dated 24th February 2015 and filed in court on 28th April 2015, the Respondent avers that the Claimants worked as casuals and were appropriately remunerated. While denying the claim for unlawful and unfair termination, the Respondent states that the Claimants staged an illegal sit-in on 18th April 2014.

8. The Respondent pleads that the Claimants failed in their contractual obligations by:

- a) Deserting work;
- b) Habitually reporting to work late despite several warnings;
- c) Failing to perform their duties to the satisfaction of the Respondent despite several warnings;
- d) Disobeying lawful instructions from the Respondent;
- e) Failing to conduct themselves with decorum while at work;
- f) Exposing the Respondent to the risk of losing business in addition to financial losses due to their illegal sit-in;
- g) Unlawfully staging a sit-in at their workplace on 18th April 2014.

9. The Respondent avers that it summoned the Claimants to show cause why disciplinary action should not be taken against them but the Claimants failed to attend the disciplinary hearing and instead continued with their act of desertion.

10. The Respondent reiterates that none of the Claimants was terminated; rather, they all deserted duty after staging an illegal sit-in on 18th April 2014.

Findings and Determination

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

- a) Whether the Claimants deserted duty or were unlawfully terminated;
- b) Whether the Claimants are entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

12. The Respondent claims that the Claimants abandoned their work by staging an illegal sit-in, thus necessitating their termination. The Claimants on the other hand state that their dismissal was triggered by their demand for salary arrears owed to them by the Respondent.

13. Assuming that it is true that the Claimants had indeed staged an illegal sit-in that would be an act of misconduct which ought to have been put to the Claimants at the shop floor. The Respondent's witness, George Obiero who worked as a supervisor at the time, told the Court that he did not know the circumstances under which the Claimants left employment.

14. From the foregoing, the only logical inference is that the Respondent not only failed to prove a valid reason for the Claimants' dismissal as required under Section 43 of the Employment Act, but also violated the procedural fairness requirements set out under Section 41 of the Act. The Court therefore finds that the said dismissal was substantively and procedurally unfair and the Claimants are entitled to compensation.

Remedies

15. In light of the above findings, I award each of the Claimants three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service coupled with the Respondent's conduct in the dismissal process. I further award the Claimants one (1) month's salary in lieu of notice.

16. The Respondent's witness admitted that the Claimants did not go on leave. The claim for leave pay therefore succeeds and is allowed. In

the absence of any evidence that the Claimants were members of any pension scheme, the claim for service gratuity succeeds, in respect of the Claimants who had served for a period of at least one (1) year.

17. The claims for off duty, salary underpayment, transport allowance, uniform and public holidays were not proved and are dismissed.

18. In the end, I enter judgment in favour of the Claimants as follows:

1st Claimant: Benedict Muindi Maithya

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months (12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

2nd Claimant: Kyalo Munyithya

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months (12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

3rd Claimant: John Kakunu

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months (12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

4th Claimant: Thomas Munywoki

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months (12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

5th Claimant: Robert Muthangya

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months (12,216/30x21).....	8,551

d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

6th Claimant: Allence Azenga

a) 3 months' salary in compensation.....	36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 8 months (12,216/30x1.75x8).....	<u>5,701</u>
Total.....	54,656

7th Claimant: Benard Munywoki

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 3 months (12,216/30x1.75x3).....	<u>2,138</u>
Total.....	51,002

8th Claimant: Patrick Kavoo

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months 12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

9th Claimant: Mulwa Mwangangi

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months 12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

10th Claimant: Francis Kithendu

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months 12,216/30x21).....	8,551
d) Service gratuity (12,216/30x15).....	<u>6,108</u>
Total.....	63,523

11th Claimant: David Mutua Martin

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months $12,216/30 \times 21$	8,551
d) Service gratuity $(12,216/30 \times 15)$	<u>6,108</u>
Total.....	63,523

12th Claimant: Boniface Nzila

a) 3 months' salary in compensation.....	Kshs. 36,648
b) 1 month's salary in lieu of notice.....	12,216
c) Leave pay for 1 year & 2 months $12,216/30 \times 21$	8,551
d) Service gratuity $(12,216/30 \times 15)$	<u>6,108</u>
Total.....	63,523

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

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

21. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF APRIL, 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Nyabena for the Claimants

Mr. Masinde for the Respondent