



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 78, 79, 80, 82 & 83 OF 2017

1. MICHAEL WAMWEA KARANJA

2. MWANGANGI MUTUA

3. MUTUA WAMBUA

4. PAUL GITUA NGUI

5. PETER NGUGI NJUGUNA.....CLAIMANTS

VERSUS

MARSH VIEW LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants all filed suit against the Respondent asserting unfair/unlawful dismissal from employment, non-payment of dues and compensatory damages and underpayment. The Claimants averred that they were summarily dismissed on 20th August 2016 without any cause. They all claimed that they were underpaid during their entire period of service and thus sought payment of one month notice, withheld salary for August 2016 and their house allowance, leave pay as well as compensatory damages plus costs of the suit. The Claimants averred that they were not provided with housing and were not permitted to go on leave.

2. The Respondent filed the statement of defence on 26th May 2017 and in it denied the Claimants were dismissed unfairly and averred that the dismissal was on account of gross negligence while on duty leading to losses for the Respondent. The Respondent averred that there was theft at the site and the Claimants did not report the theft despite being aware of it. The Respondent stated that the termination was lawful and averred that the Claimants were compensated for any overtime worked. The Respondent averred that the Claimants by settling the matter and entering into an agreement to show the same the Claimants waived their right of claim against the Respondent. The Respondent admitted receipt of the demand and notice of intention to sue and prayed that the Claimants' suits be dismissed with costs.

3. The Claimants filed a reply to the Respondent's statement of defence and averred that they always carried out their duties as required of them and denied that they were aware of the theft or that they were paid for overtime worked. They denied that the dismissal was lawful and denied there was full compensation. They averred that the certificate of payment only related to the August 2016 salary.

4. The Claimants testified on 21st March 2018. In their testimony they reiterated that they were unlawfully dismissed from employment. They denied that they received their compensation in full or that they were paid house allowance or ever went on leave. They admitted that they were paid at the Labour Office, Thika and signed against the payment. They asserted the payment was on a plain piece of paper and not the document headed Certificate of Payment produced by the Respondent bearing the logo and letterhead of the Ministry of East African Community, Labour and Social Protection. The Claimants were cross examined and stated that they went to the Police station and recorded statements. The statements were on account of some machines that the Claimants guarded and that the manager was arrested by the Police. They denied knowledge of the theft and asserted that no machine was lost. They testified that they were told to go home by the Police as there was no wrong doing on their part. They denied signing the document before court bearing their signatures stating that the document they signed was plain. They admitted that they were paid for the work done in August 2016. They denied that anything was stolen during their time of service and that they had not stolen anything hence the fact that they were not charged in court. In his cross examination, Mwangangi Mutua testified that they would sign when they reported to work at 6.00pm and signed off at 6.00am. They asserted that they had been told they would be transferred. In his cross-examination Peter Ngugi Njuguna testified that he did not sign in or off whenever he reported to work and that they worked from 6.00pm till 6.00am. He stated that he went on off once a week making a total of 56 days each year. He stated they were not given any opportunity to defend themselves. He testified that the manager would check the machines and allowed the swaps of items on the machines. He admitted that they signed for payment received in August 2016 but on a plain piece of paper.

5. In re-examination they testified that they were not arrested for the theft and that they were not informed of the reason for the dismissal. They stated that the Police abstract produced did not show when the theft occurred and that the Officer Commanding Station (OCS) said there was no case against them. They sought that the original of the document from the Labour Office be produced as the paper they signed was plain. In re-examination, Mwangangi Mutua denied that he signed in or out.

6. The Respondent did not call any witness and relied on the pleadings, statements and documents on record. The Respondent had filed a defence denying the dismissal was unlawful and that the Claimants were complicit in the theft or concealment of the loss of machinery at the Respondent's business. The Respondent filed a statement by Simon Githae Karuri the property manager. The documents filed included the letter from the Ministry of East African Community, Labour and Social Protection. In it the Claimants had appended their signatures for amounts received. The Respondent also attached a police abstract and a list of items allegedly stolen and their value. In his statement, Simon Githae Karuri stated that the Claimants had been employed as watchmen and that there was no contract of employment. He stated that the Claimants were paid for their services and overtime worked was paid accordingly. He stated that the Claimants were grossly irresponsible leading to the loss of equipment. The Respondent's manager asserted that the Claimants were aware of the theft of parts and did not raise any alarm and that their negligent actions caused the employer to incur losses which would have been avoided had the Claimant reported to his employers of the situation. He stated that at the time of dismissal the Claimants dues had been settled and therefore the Claimants were not owed any monies. He stated that the Claimants signed a certificate of payment to confirm settlement of all dues due and the certificate was witnessed by Mrs. R. W. Kiiru the Thika sub county Labour Officer. A few days after the hearing the Respondent sought to reopen the case but failed to show up on the date set aside for the hearing of the application which was promptly dismissed by the court for want of prosecution.

7. Parties were to file submission and the Claimants filed submissions on 12th April 2018. In their submissions, the Claimants submitted that they were not issued with reasons for the dismissal and that the document they signed for the payment received in August 2016 was plain and not on headed paper. The Claimants submitted that the Respondent adopted the statement of Simon Githae Karuri the property manager of the Respondent and that no evidence was tendered evidencing the overtime, robberies or a series of robberies during the Claimants' employment with the Respondent and no evidence of a disciplinary hearing. The Claimants submitted that the Respondent did not call the Labour Officer (R. W. Kiiru, Mrs.) who was alleged to have witnessed the contested document (certificate of payment) to refute the Claimants evidence of signing on a blank piece of paper. The Claimants submitted that their evidence remained uncontroverted and the allegations by the Respondent remained just that, allegations. The Claimants submitted that under Section 45(2) of the Employment Act 2007, a termination is unfair if the employer is unable to prove that the reason for termination was valid and that the reason for the termination is fair. The Claimants submitted that the termination by the Respondent under the pretence of a transfer was and or reassignment which never materialised was unlawful and unfair in violation of the Employment Act, the Fair Administrative Actions Act and the Constitution of Kenya. The Claimants relied on the case of **Donald Odeke v Fidelity Security Limited [2012] eKLR** where Ndolo J. cited the authority of Koome J. (as she then was) where she held:

...that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

I agree with the learned Judge and add that it does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair.

The Claimants also submitted that in underpayments, the Regulation of Wages (General) (Amendment) Order 2015 Legal Notice No. 116 of 2015 prescribed a night watchman's salary in all former municipalities and councils as Kshs. 11,330/- exclusive of house allowance. The Claimants urged the court to take into consideration the recommended minimum wage as the basis for the entire claim. They placed reliance on the case of **John Maugo v Riley Falcon Security Services Ltd [2016] eKLR** where the Claimant was awarded underpayment on proof of the same. The Claimants submitted that under Section 31(1) of the Employment Act, an employer has a duty to provide reasonable housing accommodation for each of the employees either at or near to the place of employment or shall pay the employee such sufficient sum as rent in addition to the wages or salary of the employee as will enable the employee obtain reasonable accommodation. The Claimants submitted that they were not provided with accommodation and neither were they paid housing allowance for the period of employment. On terminal dues and compensatory damages, the Claimants submitted that the Respondent severed the employment relationship suddenly and without reason or justification and therefore the termination was unfair by virtue of Section 45 of the Employment Act. The Claimants submitted that 12 month salary would adequately compensate the Claimants. They relied on the case of **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR** where the Claimant was awarded 12 months salary as compensatory damages for the employers failure to comply with Section 40 of the Employment Act in termination under redundancy. The Claimants therefore sought the prayers in terms of their claims plus costs and interest.

8. The Respondent did not file any submissions and therefore the court did not have the benefit of counter arguments or authorities for consideration. Be that as it may, the Claimants cases were on dismissal and they had a burden as did the Respondent. Section 47(5) provides as follows: -

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The obligation of the Claimants therefore in terms of Section 47(5) of the Employment Act was the following. They had a burden of proving that an unfair termination of employment or wrongful dismissal has occurred. This burden does not shift. Under the same sub-section, the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal. The Claimants were watchmen and the evidence and testimony they adduced as well as that adduced by the Respondent was that the Claimants were accused of participation in acts of either theft of machine parts or concealing the theft from the employer. The evidence of Peter Ngugi was that the manager allowed for the interchange of parts on machines and that this was done with their knowledge. In my view, this could have been indicative of complicity. Suspicions, however strong they may be, cannot take the place of hard evidence and facts. No evidence was found by the Police to link the Claimants to the theft resulting in no charges being preferred. Granted there was theft reported and the manager incarcerated, there was nothing that tied the Claimants to the theft. In any event, if the theft was grounds under Section 47(5) of the Employment Act, 2007 for

the dismissal of the Claimants, they were entitled to the safeguards under Section 41. As held in the case of **Donald Odeke v Fidelity Security Limited** (*supra*), the Claimants were entitled to be given adequate opportunity to respond to any charges before action is taken against them. The Claimants thus suffered unlawful dismissal at the hands of the Respondent. I would reduce their summary dismissal to normal termination requiring notice. The Claimants failed to prove underpayment or the provision for house allowance. They pleaded the same but did not produce evidence of the underpayments as the bank statements did not properly reflect the sums received in all the months, the applicable minimum statutory wages were not teased out to show the nexus between the sums claimed and the wages actually paid. The Claimants however were not entirely honest when approaching court as they claimed they had not been paid their August salary yet the sum had been settled at the Thika Labour Office. In cross-examination it became clear that they received various sums in payment of the August 2016 salary which they had pleaded had not been paid. Despite there being a challenge during testimony on the certificate of payment, nothing turned on that as they did not make any steps to discredit the document by procuring the production of the original or availing their copy of the document they say they signed. On the part of the Respondent, it failed to produce evidence of waiver of claims as the certificate in question only proved the payment of salaries for August 2016 and in it, the Claimants did not undertake that there would be no further claims from them.

9. In view of the evidence adduced and the findings above, the Claimants would therefore be entitled to payment of one month's salary as notice, compensatory damages for 2 months and also costs of the claim. Interest at court rates on the sums awarded will run from the date of the delivery of judgment till payment in full. The Claimants will also be issued with certificates of service. In the final analysis I enter judgment for the Claimants against the Respondent as follows:-

Michael Wamwea Karanja

- a) Kshs. 7,500/- being one month's salary in lieu of notice,
- b) Kshs. 15,000/- being compensatory damages
- c) Certificate of service

Mwangangi Mutua

- a) Kshs. 7,500/- being one month's salary in lieu of notice,
- b) Kshs. 15,000/- being compensatory damages
- c) Certificate of service

Mutua Wambua

- a) Kshs. 7,500/- being one month's salary in lieu of notice,
- b) Kshs. 15,000/- being compensatory damages
- c) Certificate of service

Paul Gitua Ngui

- a) Kshs. 7,500/- being one month's salary in lieu of notice,
- b) Kshs. 15,000/- being compensatory damages
- c) Certificate of service

Peter Ngugi Njuguna

- a) Kshs. 7,500/- being one month's salary in lieu of notice,
- b) Kshs. 15,000/- being compensatory damages
- c) Certificate of service

The Claimants will also have costs of the claim to be agreed or taxed and interest at court rates on the sums awarded to run from the date of the delivery of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 29th day of May 2018

Nzioki wa Makau

JUDGE