



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 724 OF 2016

**IN THE MATTER OF: THE EMPLOYMENT ACT, 2007 & THE LABOUR INSTITUTIONS
ACT, 2007**

- 1. PATRICK MWANZIA MUTUA**
- 2. LYDIA KITHI**
- 3. ROBERT OSIEKO**
- 4. HOLINESS KIUTE**
- 5. VICTOR OUMA**
- 6. JUSTUS MUTUA**
- 7. JORIM OKOTH**
- 8. FIBIAN CHELANGAT MARU**
- 9. VINCENT ONDECHE**
- 10. GERTRUDE NDIKU**
- 11. PETER OPONDO OTIENO**
- 12. JOEL MUSYOKA**
- 13. MARTIN MWANZUI**
- 14. FREDRICK OCHIENG**
- 15. WYCLIFFE ASHUMA**
- 16. PAUL KILONZO**
- 17. SAMMY KYALO**
- 18. JOHN WAMBUA**

19. SIMON OKOTH

20. JOHNSON MUSEE.....CLAIMANTS

VERSUS

HABO GROUP OF COMPANIES.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought this suit on 29.9.2016 alleging that they were employed by the respondent on diverse dates between the year 2000 and 2014 and worked well until they were unlawfully and unfairly terminated on diverse dates in the year 2016. They averred that the termination was without any justifiable cause and the procedure followed was in breach of the mandatory provisions laid down by the Employment Act. They therefore prayed for terminal dues plus compensation for the unfair termination.

2. The respondent denied any employment relationship between the claimants and herself and averred that the claimants were employed by different entities which they should have sued. She however averred that the termination of the claimants' services was lawful and their terminal dues were paid by their respective employers. She therefore prayed for suit to be dismissed with costs.

3. The claimants called Mr. Patrick Mwanzia Mutua and M/s Gertrude Wavinya Ndiku as their witness but the respondent never availed any witness despite being given the opportunity to do so. During the hearing, the claims by the 12th and 20th claimants were withdrawn.

After the hearing only claimants' counsel filed written submissions.

Claimants' Case

4. Mr. Patrick Mwanzia Mutua testified as Cw1 and he had secured written authority from all the other claimants to testify on their behalf. He told the Court that he joined the respondent as a Port Clerk on 15.2.2011 and after 4 years he was promoted to be Warehouse Manager. He stated that all the other claimants herein were employed by the respondent. He produced a bundle of documents to support the said employment relationship.

5. Cw1 further stated that all the claimants, him included were served with termination letters citing hard economic times as the reason of their layoff. He however denied the validity of the alleged reason for their termination and contended that they were just replaced by new employees and the business continued to operate. Cw1 further faulted the lay off by accusing the employer for laying them off without prior Redundancy Notice and before paying them terminal dues. He therefore contended that the termination was unfair and unlawful and prayed for the reliefs sought by the suit to be granted to the respective claimants.

6. On cross examination Cw1 admitted that some of the claimants were working for different companies but they explained that they were all respondent's subsidiary companies. He further contended that the appointment letters, payslips and their pay came from the respondent.

He further contended that the claimants' were all terminated on account of redundancy but denied the alleged meeting between the employer and the claimants on 19.7.2016. He further admitted that some claimants were going for their annual leave but others were not.

7. M/s Gertrude Wavinya Ndiku testified as Cw2. She was the respondent Internal Auditor from 25.1.2016 earning Kshs.50,000 per month until 4.8.2016 when she was laid off. She denied that the respondent was facing financial challenges. She maintained that as the Internal Auditor she knew very

well that the company was financially stable and up to date it is still running.

8. Cw2 confirmed that all the claimants were terminated on account of redundancy and no prior notices were served on them and no terminal dues were paid.

Analysis and Determination

9. After careful considerations of the evidence and submissions the following issues arise for determination:

- (a) Whether the claimants were employed by the respondent;
- (b) Whether the claimants services were unfairly and unlawfully terminated.
- (c) Whether the reliefs sought should be granted.

Claimants' employer

10. I have carefully perused and considered the various documents filed by the claimants. It is clear that claimant number 1, 5, 9 and 10 were issued with appointment letters by the respondent (Harbo Group of Companies). It is also clear that number 2, 3, 6, 7, 8, 11, 113, 14, 15, 16, 18, and 19 were issued appointment letters by Awanad Enterprises Limited. However all the payslips to the claimants were from the respondent herein and not Awanad Enterprises Limited. Likewise the termination letter to all the claimants were issued by the respondent herein and not Awanad Enterprises. Flowing from the foregoing matters, it appears that the all the claimants were employed by the respondent herein because she is the one who paid their salary and also the one who terminated their services without any input or objection from Awanad Enterprises Limited. On a balance of probability, therefore it is my finding that the respondent herein was the employer of all the claimants herein.

Unfair termination

11. All the claimants were terminated on account of redundancy. The termination letters stated that all the claimants were laid off due to low business and company restructuring. The letters offered to pay terminal dues as provided by the Employment Act and the Labour Standards. Cw2 has however denied that the respondent had financial constraints that warranted job cuts. Being the company's Internal Auditor, Cw1 contended that she was well aware of the financial position of the respondent as stable and maintained that the layoffs were unwarranted. She like Cw1 contended that after the lay off the respondent employed other employees to replace them.

12. After careful consideration of the uncontested evidence by the Cw1 and Cw2, I find that the claimants have proved on a balance of probability that the reason for their termination was not valid and fair. The respondent never availed any witnesses to testify. Even if the witness testified, the written statement filed on 26.9.2017 did not respond to the statement, filed by Cw1 and Cw2 on 20.6.2017 on the issue of economic crises. The respondent also never filed any documentary evidence was filed to support the alleged economic crisis. All what she filed was leave records and letter dated 2.6.2016 notifying the County Labour Officer of the intended redundancy of her employees. No documentary evidence was filed to prove the alleged financial crisis or how the business was doing.

13. As regards the procedure followed, it is clear that the claimants were not served with the redundancy notice served on the Labour Officer. They were only served with the termination letters without any prior notice. There is no evidence that a fair selection was done to identify the claimants as the most suitable for the redundancy. In addition, the claimants were never paid their termination dues as provided by section 40 of the Employment Act before the termination took effect. I therefore find and hold that the termination of the claimant services was not accordance with section 40 of the Act and it amounted to unfair termination within the meaning of section 45 of the Act.

14. Under section 49 of the Act, I award each claimant one month salary in lieu of notice plus 10 months' salary as compensation for unfair termination. In awarding the said compensation I have considered the fact that the claimant never contributed to their termination through misconduct. I have also considered the fact that they were not paid any gratuity after termination. The claim for salary for May and June 2016 is awarded to each claimant as prayed since the claim was not disproved by evidence.

15. The claim for leave is dismissed for want of particulars and evidence. It was admitted in evidence that the claimants took some leave but the same was not factored in their pleadings. The claim for service pay also fail because they were registered NSSF members and their payslips indicate that the employer regularly remitted their NSSF contribution. The said payslips further indicated that the salary paid to the claimants was gross pay and I therefore dismiss the claim for accrued House Allowance.

16. The claimants were deducted SACCO contribution and/or in-house savings from their salaries. They are claiming a refund of the said deductions at double rate as provided for under their appointment letters. I have perused the appointment letters filed by the claimants and I have confirmed that the respondent has a policy of deducting from her employees' salary, Kshs.300 or 200 for in-house savings loosely referred to as SACCO which is refundable to the respective employee upon termination at a double rate. I therefore allow the said claims for in house savings as prayed but not both SACCO and in house the are one and the same items in the appointment letters and the payslips.

17. The following is summary of the awards to each claimant save the two who withdrew their claims:

Patrick Mwanzia Mutua

Notice50,000

Compensation500,000 Salary (May & June)
100,000

In house savings/SACCO 40,200

690,200

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Lydia Kithi

Notice30,000

Compensation300,000

Salary for June & July.....60,000

In house savings/SACCO 25,800

415,800

=====

Robert Osieko

Notice16,000

Compensation160,000

Salary for June & July..... 32,000

In house savings/SACCO 96,600

304,600

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Holiness Kiute

Notice30,000

Compensation300,000

Salary for June & July 60,000

In house savings/SACCO 27,600

417,000

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Victor Ouma

Notice13,000

Compensation130,000

Salary for June & July.....13,200

In house savings/SACCO 13,200

169,400

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Justus Mutua

Notice20,000

Compensation200,000

Salary for June & July.....40,000

In house savings/SACCO 40,200

300,200

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Jorim Okoth

Notice40,000

Compensation400,000

Salary for June & July..... 80,000

In house savings/SACCO 56,400

576,400

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Fabian Chelangat Maru

Notice25,000

Compensation250,000

Salary for June & July.....50,000

In house savings/SACCO 56,400

381,400

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Vincent Ondече

Notice40,000

Compensation400,000

Salary for June & July.....80,000

In house savings/SACCO 36,600

569,600

=====

Gertrude Ndiku

Notice50,000

Compensation500,000

Salary for June & July.....100,000

In house savings/SACCO 4,200

654,200

=====

Peter Opondo Oteino

Notice20,000

Compensation200,000

Salary for June & July.....40,000

In house savings/SACCO 39,600

299,600

=====

Martin Mwanzui

Notice25,000

Compensation250,000

Salary for June & July.....50,000

In house savings/SACCO 24,600

345,600

=====

Fredrick Ochieng

Notice20,000

Compensation200,000

Salary for June & July.....40,000

In house savings/SACCO 19,500

279,500

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Wycliff Ashuma

Notice18,000

Compensation180,000

Salary for June & July..... 36,000

In house savings/SACCO 46,600

280,200

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Paul Kilonzo

Notice17,000

Compensation170,000

Salary for June & July.....34,000

In house savings/SACCO 19,200

240,200

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Sammy Kyalo

Notice13,000

Compensation130,000

Salary for June & July.....13,000

In house savings/SACCO 29,400

185,400

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John Wambua

Notice12,600

Compensation126,000

Salary for June & July.....25,200

In house savings/SACCO 19,200

183,000

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Simon Okoth

Notice22,000

Compensation220,000

Salary for June & July.....44,000

In house savings/SACCO 115,200

401,200

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Each claimant will be issued with certificate of service plus costs and interest on their respective awards from the date hereof until payment in full. The said award, will also be subjected to the relevant statutory deductions.

Signed and dated and at Nairobi this 11th day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 28th day of May, 2018.

LINNET NDOLO

JUDGE