



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 179 OF 2016

CONSOLIDATED WITH CAUSE NO. 180 OF 2016

(Before Hon. Justice Mathews N. Nduma)

1. CHARLES ABIERO

2. GEOFFREY ODHIAMBO.....CLAIMANTS

VERSUS

ONE ACRE FUND.....RESPONDENT

J U D G M E N T

1. The two Claimants, Charles Abiero, in Cause No. 179 of 2016 and Geoffrey Odhiambo in Cause No. 180 of 2016 were employed by the Respondent as a Repayment Auditor on 5th September, 2013 and Assistant Internal Auditor on 19th September, 2012 respectively.

2. The two filed separate suits. The same were consolidated and heard together.

3. Both Claimants were summarily dismissed for failure to attend and do duties assigned to them on the basis that they had not been facilitated to travel to the site where work was to be conducted.

4. The summary dismissals were in terms of section 44(1) of the Employment Act.

5. The Claimants allege in their respective memorandum of claim that the summary dismissal was unlawful and unfair in that the Respondent disregarded laid down procedures in the Employment Act. That they were not accorded notice nor were they paid in lieu of notice. They were not paid terminal benefits and that the reason for termination was not valid, was unproven and the Claimants were not given a hearing before the dismissal.

6. **Charles Abiero** Claims as follows:-

(i) Payment calculated for five (5) years at the basic salary of Kshs.45,129, per month from February 2015 to March 2020.

(ii) Relocation dues to Kisumu Kshs.50,000.

(iii) Service pay calculated at Kshs.45,192.28 x 15 x 1.5.

(iv) Twelve months compensation.

(v) Three (3) months in lieu of notice.

(vi) Payment in lieu of two (2) months leave.

7. **Geoffrey Odhiambo**

The 2nd Claimant seeks the following reliefs:-

- (i) Payment for five (5) years calculated at Kshs.49,160 per month from February 2015 to March 2020.
- (ii) Relocation dues to Kisumu Kshs.50,000.
- (iii) Service Pay calculated at 49,160.28 x 15 x 3.
- (iv) Twelve months compensation.
- (v) Payment in lieu of three (3) months notice.
- (vi) Payment in lieu of three (3) months leave.

8. Both Claimants seek costs of the suit.

Defence

9. Ms. Makokha Wattanga & Luyali Advocates filed a Memorandum of defence on behalf of the 1st and 2nd Claimants dated 27th July, 2016 on 2nd August, 2016.

10. The Respondent states that the 1st Claimant had only worked for Respondent for one (1) year and four (4) months earning a basic salary of Kshs.22,107 and not as alleged.

11. That the 2nd Claimant has served for two (2) years and five (5) months earning a basic salary of Kshs.22,907 per month and not as alleged.

12. That the two were assigned temporary tasks to assist in Warehouse Counts at Yala but failed and/or neglected to report to the duty station.

13. That both Claimants falsely claimed that they had not been facilitated to go for the assignments, but their pay slips showed that they had been paid transport allowance of Kshs.17,270 and 20,320 respectively indicated in their December 2014 and January 2015. That the transport allowance was payable per month.

14. That this excuse was not tenable hence the summary dismissals.

Service Pay

15. The Claim for service pay and the formula for calculating it is admitted. The only disagreement is on the amount of salary paid to the Claimants per month. The Respondent admits that the Claimants were paid in addition to the basic salary a monthly transport allowance of Kshs.17,270 and 20,320 respectively. The pay slip produced by the Respondent also shows that the Claimants were paid overtime allowance of Kshs.2,500 and housing allowance of Kshs.3,436.05.

16. Gratuity is calculated on the basis of gross salary unless provided otherwise in the contract of service. The gross salary to the 1st Claimant is Kshs.45,883.77 and 49,553.77 respectively. The Claimants are therefore awarded service pay as prayed.

Leave Pay

17. The Respondent states that both Claimants were entitled to leave and both had taken all outstanding leave at the time of dismissal.

Three (3) Months Notice

18. The Respondent states that both were summarily dismissed and are not entitled to payment in lieu of notice.

Certificate of Service

19. It is admitted that Certificate of Service was not issued pending payment of loans owed. This is a dubious reason not to grant Certificate of Service. The Respondent to provide Certificate of Service forthwith.

Disputed Issue

20. The only outstanding issues are:-

- (i) Whether the summary dismissal was for a valid reason and in terms of a fair procedure.

(ii) Whether the Claimants are entitled to the reliefs sought.

Issue i

21. It is not in dispute that the Claimants were assigned out of station duty but they failed to attend because they allege they were not facilitated to go. Respondent states that they ought to have used the monthly transport allowance to attend to the out of station duties. The Claimants testified under oath that the standing procedure at the time was for payment of specific allowance for out of station duty. The Claimants called one Judith Opiyo who was a Senior Expense Audit Manager of the Claimants at the time, she testified that she was responsible for the intended Audit at Yala. That employees to go and do that Audit were supposed to be facilitated to travel. That this was standard practice. That all employees were paid to go for that assignment except the two Claimants.

22. That this was the first time such an omission had occurred. That this amounted to discrimination.

23. The witness was not cross examined due to the absence of counsel of the Respondent. The Claimants case was thus closed. The Respondent's case was also deemed closed due to failure by Respondent to attend hearing without explanation nor justifiable excuse.

24. The case was on 24th July, 2017 re-opened by consent of the parties to allow for cross examination of CW2- Judith Opiyo and presentation of defence case. The matter was set for hearing on 4th December, 2017. Respondent was to pay thrown away costs.

25. On 4th December, 2017 Ms. Aaron for the Respondent sought adjournment on behalf of Mr. Makokha on the basis that Mr. Makokha was before Justice Aroni at Bungoma, in High Court Election Petition No. 324 of 2017. The application was opposed. It became apparent that counsel for the Respondent was misleading the court since it was known that Justice Aroni was on compassionate leave following the death of her mother and therefore Mr. Makokha could not possibly be appearing before her.

26. The court declined the application to adjourn and the Claimants case and defence case were closed once again. The parties were directed to file written submissions which they both proceeded to do.

27. It is the court's considered finding that the Claimants have proved on a balance of probabilities that the Respondent had no valid reason to summarily dismiss the Claimants. The claimants were good employees. The Respondent failed to facilitate them to go and work out of station. That all their colleagues who went on that assignment were facilitated except the two. The dismissal was also not done following a fair procedure. The Claimants were not given a show cause letter nor did they appear before a disciplinary committee. The Respondent violated sections 41, 43 and 45 of the Employment Act.

28. The Claimants are entitled to compensation in terms of section 49(1) (c) as read with subsection 49(4).

29. The Claimants are not entitled to general damages claimed for five (5) years. This claim has no basis.

Compensation

30. The Claimants had served one (1) year four (4) months and two (2) years five (5) months respectively. They were professionals in the finance sector with good career prospects which were nubbed in the bud by unlawful and discriminatory conduct by the Respondent. This conduct is prohibited under section 5 of the Employment Act, as read with section 41 of the constitution of Kenya 2010. The conduct by the Respondent amounts to unfair labour practice and a violation of the right of the Claimants to be treated equally and without discrimination of any nature at the work place.

31. The claimants did not seek reinstatement. The Claimants did not contribute to the summary dismissal. The Claimants lost their work without notice and suffered loss and damage. The claimants were not paid terminal benefits upon dismissal. This is an aggravating factor.

32. Accordingly, the court finds the two were dismissed under similar circumstances, and they both suffered similar loss and damage and awards both equivalent of ten (10) months salary in the sum of Kshs.451,930 and 498,534 respectively.

33. In the final analysis, judgment is entered in favour of the claimants as against the Respondent as follows:-

Charles Abiero

(i) One month salary in lieu of notice in the sum of Kshs. 45,193.05.

(ii) Service gratuity in the sum of Kshs. 36,315.

(ii) Compensation Kshs.451,930.

Total award Kshs.533,438.05

Geoffrey Odhiambo

(i) Notice pay Kshs. 49,853.41

(ii) Service Gratuity	Kshs. 79,007
(iii) Compensation	Kshs.498,534
Total Award	Kshs.627,394.41

(iv) The Respondent to pay costs of the case. No interest was claimed and non is awarded.

Judgment Dated, Signed and delivered this 6th day of June, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Mwasigha for the Claimant

Mr. Makokha Respondent

Chrispo – Court Clerk