



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU
CAUSE NO.170 OF 2018

Formerly NYERI CAUSE NO.431 & 432 OF 2017

- 1. NDERITU KAGUU GITHAE**
- 2. JAMES KARURU NJURUGUNA**
- 3. DOMINIC MURANI KANTAI**
- 4. KONCHELLAH KEVIN NKEPEN**
- 5. JEREMIA KIPLIMOLEMISO**
- 6. NTIMAMA MERERU**
- 7. BEATRICE MUKAMI WERU**
- 8. LISPER WAMAITHA GITHAIGA**

AND

9. WAWERU KAGUU GITHAE.....CLAIMANTS

VERSUS

LLOITA HILLS SPRINGS LIMITED.....1ST RESPONDENT

LETAN LIMITED.....2ND RESPONDENT

LEDEMA OLE MESOPIR.....3RD RESPONDENT

JUDGEMENT

1. The claimants filed their claims under Nyeri Cause No.431 and 432 of 2017.

By ruling dated 14th May, 2018 the court at Nyeri, ELRC transferred the same to this court.

2. On 11th June, 2018 parties attended for hearing directions where the causes [Nyeri Cause No.431 and 432 of 2017] were herein consolidated under Nakuru Cause No.170 of 2018. Parties were also directed to apply Rules 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 with regard to the 9 claimants under the consolidated file.

3. A hearing date was allocated for 31st October, 2018.

4. The claimant had filed two statements in their evidence – Nderitu Kiguu Githae and Waweru Kagwe Githae.

5. Despite close of pleadings, the respondents only replied to claims made by the 9th claimant. There remains no defence to all the other claims.

6. On the due date for hearing only the claimants attended. Noting the hearing date was allocated by consent, the court heard the claimants' case and matter closed for judgement.

Claim

7. The claimants were employed by the 1st respondent and the 2nd and 3rd respondents are the Directors thereof. At the time of filing suit, the 1st claimant was still in the employment of the respondent while the 2nd to the 9th claimants had been dismissed from employment and communicated orally.

8. While the claimants served the respondents, their salaries were paid in bits and pieces and the due balances remain unpaid.

1st claimant, Nderitu Kaguu Githae was employed by the respondents in October, 2014 and is claiming the following dues;

(a) *Unpaid salary arrears Ksh.488,010.00;*

(b) *Accrued leave Ksh.50,000.00;*

(c) *Personal funds used for the benefit of respondents Ksh.27,500.00*

2nd claimant, James Karuru Njuruga was employed in November, 2015 at a monthly salary of Ksh.25,000.00 and is claiming the following;

(a) Salary arrears Ksh.45,000.00;

(b) Compensation for unfair termination of employment Kshs.300,000.00

3rd claimant, Dominic Murani Kantai was employed in November, 2015 at a salary of Kshs.25,000.00 per month and is seeking the following dues;

(a) Salary arrears Ksh.100,000.00;

(b) Compensation for unfair termination of employment Ksh.300,000.00.

4th claimant, Konchella Kevin Nkepen was employed in December, 2015 at a monthly salary of Ksh.16,000.00 and is claiming the following;

(a) Salary arrears Ksh.52,200.00;

(b) Compensation for unfair termination of employment Kshs.192,000.00

5th claimant, Jeremia Kiplimo Lemiso was employed in June, 2017 at a monthly salary of Ksh.18,000.00 and is claiming the following;

(a) Salary arrears Ksh.96,000.00;

(b) Compensation for unfair termination of employment Kshs.218,000.00

6th claimant, Ntimama Mereru was employed in May, 2017 at a monthly salary of Ksh.8,500.00 and is claiming the following;

(a) Salary arrears Ksh.51,000.00;

(b) Compensation for unfair termination of employment Kshs.102,000.00

7th claimant, Beatrice Mukami Weru was employed in December, 2015 at a monthly salary of Ksh.10,000.00 and is claiming the following;

(a) Salary arrears Ksh.32,000.00;

(b) Compensation for unfair termination of employment Kshs.120,000.00

8th claimant, Lisper Wamaitha Githaiga was employed in September, 2015 as a Sales and Marketing Representative at a monthly salary of Ksh.25,000.00 and is claiming the following;

(a) Salary arrears Ksh.237,000.00;

(b) Compensation for unfair termination of employment Kshs.300,000.00

9. The 9th claimant, Waweru Kaguu Githae was employed by the respondents in the year 2009 as Procurement and Logistics Officer and earning a monthly salary of Ksh.50,000.00 and was then promoted to General Manager on 1st August, 2011 earning Ksh.70,000.00 per month. In May, 2017 the 3rd respondent terminated the employment of the claimant on the grounds that his services were no longer required. At the time of such summary action the claimant had salary arrears unpaid, had worked overtime and not paid and is seeking the following terminal dues;

(a) 2011 salary arrears Ksh.255,500.00;

(b) 2012 Ksh.496,650.00

(c) 2013 Ksh.396,300.00;

(d) 2014 Ksh.210,000.00;

(e) 2015 Ksh.680,000.00;

(f) 2016 Ksh.716,100.00;

(g) 2017 Ksh.118,000.00;

10. The 9th claimant had also an employment benefits which were not paid and accumulated over the years due to non-payment as follows;

(a) Monthly provision of Ksh.3,500.00 for phone use and which was not paid and accumulated to Ksh.346,500.00;

(b) Hire of motor vehicle Ksh.135,000.00;

(c) Personal funds used for the business Ksh.200,000.00;

(d) Accrued leave from the year 2009 to 2016 Kshs.520,000.00.

11. Despite the claimants brining their claims to the attention of the respondents such were not paid at the time of termination of employment and despite demands, such claims have remained unpaid.

12. The claimants claim that the termination of employment was not justified, they were not issued with notices and despite such conduct, their terminal dues remain unpaid. Such was unfair and should be compensated, paid costs and issued with Certificates of Service.

13. The 1st claimant filed his witness statement on 11th June, 2018 and sets out the claims by all the claimants. He also testified that he is still in the employment of the respondent and working in the maintenance department at a salary of ksh.25,000.00 per month. His employment has been checkered with payment of salaries in bits and pieces and owing dues have accumulated over the years unpaid.

14. The statements filed outline the owing dues in salary arrears, personal funds expended for the respondent business but not reimbursed, he has not taken leave for the period in the service of the respondents and payment in lieu thereof is due.

15. The claimant also set out the claims with regard to the 2nd to the 8th claimants.

16. The 9th claimant also field his witness statement and testified in support of his claims. upon employment the claimant worked diligently and was promoted from a Procurement and Logistics officer to the General Manager in August, 2011 earning Ksh.70,000.00 per month. In May, 2017 the claimant was informed that his services were not required for reasons not stated. He was then dismissed from his employment.

17. The claimant also testified that the respondents are involved in the construction works, building water factory and the claimant was responsible for all the work and purchase of material, payment of workers and other duties as assigned. The respondents would therefore transfer huge sums of cash to his account with instructions on how to disburse it. He would then give an account. Such resulted in the claimant using his own funds where there was a shortfall but was not reimbursed. There were salary arrears, work benefits were not paid and despite these being brought to the attention of the respondents they have failed to make good.

Defence

18. In response the respondents' deny all the claims by the 9th claimant. The claimant was not employed in the year 2009 as alleged and there is no evidence of promotion. The claimant as the general manager run down the respondents' company. There was no dismissal from employment and during employment the claimant had an all-inclusive salary of ksh.70,000.00 and the claims with regard to leave dues is time barred.

The respondent filed witness statements of the 3rd respondent and the audit report with regard to the 1st respondent. No evidence was called. The respondents failed to attend at the hearing.

Determination

20. The respondents entered appearance upon service of suits by the claimants. As noted above there were Nyeri Causes No.431 and 432 of 2017. The respondent only filed defence in Nyeri Cause No.431 of 2017. Objections were also filed in both matters. The court addressed objections made with regard to the claims being filed at Nyeri and ruling has since been delivered.

21. Despite taking hearing direction and parties allocated time to close pleadings on 11th June, 2018 No defence was filed in the consolidated file. The only defence for the court to consider is to claims made by Waweru Kagwe Githae, the 9th claimant.

22. The claimants have filed their contracts of employment issued by the respondents upon employment. The 1st claimant was employed on 5th January, 2015 as a Factory Maintenance at a salary of Ksh.25,000.00;

3rd claimant was employed on 1st March, 2015 as a Production Supervisor at a salary of Ksh.25,000.00 per month;

The 4th claimant was employed on 2nd February, 2016 as a Production Assistant at a salary of Kshs.13,000.00 per month;

The 5th claimant was employed on 2nd June, 2014 as a Sales Agent at a salary of Kshs.8,000.00 per month; and The 8th claimant was employed on 5th January, 2016 as a Sales and Marketing Representative at a salary of Ksh.25,000.00 per month.

23. Sections 8 and 10 of the Employment Act, 2007 (the Act) place the duty of issuing a contract of employment on the employer. Such contract and other work records are to be kept by the employer in accordance with section 10(7) of the Act. Once suit has been filed, whether the employer is the claimant or the respondent, the duty is vested upon the employer to produce work records.

24. In this case, the claimants have only submitted some of the employment contracts. The respondent entered appearance but has failed to abide the provisions of section 10 of the Act. No work records have been filed. On this basis, the oral evidence and pleadings by the claimants must be taken at the truth with regard to the subsisting terms and conditions of employment.

25. The respondents admit that the 9th claimant was employed and paid Ksh.70,000.00 per month as a consolidated pay. On the pleadings and evidence on record, the claims made shall be assessed on their merits and based on the applicable law.

26. Section 43 of the Employment Act, 2007 requires an employer before effecting termination of employment to have and prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act. Notice should also issue to the employee before employment is termination. Such notice should indicate the reason(s) leading to the same and in accordance with sections 35 and 41 of the Act.

27. The defence that the 9th claimant was running the day to day operations of the respondents' company and run it down, such are matters which ought to have been addressed before termination of employment. Where the claimant's work performance was the issue, such are matter(s) which should have been addressed in accordance with section 41 of the Act. The fact that the respondents were aware that the claimant run down the business is not sufficient to justify termination of employment.

28. In the case of **Alex Wainaina versus Kenya Airways Limited, Cause No.430 of 2016**, in addressing the question of work performance as a ground for terminating employment it was held that;

*It is trite; the burden of proof in employment termination cases rests on the employer. Where the claimant is stated to be of poor performance, the grounds being that he failed in the performance of his duties, then as set out in **Jane Mkala case**, cited above, it does not stop at the allegations but effort must be shown and demonstrated as to how such poor performance was identified and addressed. Where the claimant remained of good performance since his employment in 2008 to October, 2015 he cannot have so suddenly and quickly changed without the notice of his controlling supervisor and CEO and Board to a point that on 8th January, 2016 the board found the sudden urgency to invite him to an otherwise disciplinary hearing and leading to his contract termination. See **Abdi Halake Garamboda versus Fidelity Security Services Limited [2015] eKLR**.*

29. Without a genuine reason that is valid and justified by the respondents for the termination of the claimants' in their employment, such resulted in unfair termination of employment. Compensation is due in terms of section 49 of the Act.

30. The 9th claimant, Waweru Gagu Githae worked for the respondent from the year 2009 to May, 2017 when his employment was terminated. This is a period of over seven (7) years. Compensation for unfair termination is awarded at 7 months gross salary of Ksh.70,000.00 all being Ksh.490,000.00.

31. On the claims for salary arrears, without proof of full payment of salaries due to the claimant, the respondent should pay the same as service has been rendered. Such pay cannot be withheld without any justifiable cause. The claimant is awarded Ksh.2,872,850.00.

32. On the claim for phone use for the business, travel expenses and facilitation reimbursements, use of personal funds, these expenses were brought to the attention of the respondents and the reasons for incurring them set out. Such expenses were incurred by the claimant in the course of his employment. Without challenge to these dues, the same should be paid to the claimant. The claimant is awarded Ksh.1,417,500.00

33. Section 28 of the Act requires an employer to ensure every employee has taken leave. Such leave is due to the claimant for the last

eighteen months in employment al assessed at 21 days each year all 42 days paid in lieu of taking such leave and amounting to ksh.98,000.00.

34. The 1st claimant is still in the service of the respondents. The owing salary arrears are payable all being Ksh.448,010.00 Use of personal funds which have been brought to the attention of the respondents should also be reimbursed all being Ksh.27,500.00. As the claimant is still in employment, the due leave earned should be taken or paid in lieu thereof and not later than the next 12 months.

The 2nd claimant is entitled to salary areas of ksh.45,000.00 and compensation awarded at one month salary Ksh.25,000.00 all dues being Ksh.70,000.00.

The 3rd claimant is entitled to the salary arrears at Ksh.100,000.00 and compensation awarded at one month salary of Ksh.25,000.00 all being Ksh.125,000.00.

The 4th claimant is entitled to the salary arrears at Ksh.52,200.00 only.

The 5th claimant is entitled to salary arrears at kshs.96,000.00 and is awarded compensation at one month at Ksh.18,000.00 all being Kshs.114,000.00.

The 6th claimant is entitled to the salary arrears at Ksh.51,000.00 and compensation awarded at one month salary at ksh.8,500.00 all being Ksh.59,000.00.

The 7th claimant is entitled to salary arrears at Ksh.32,000.00 only.

The 8th claimant is entitled to salary arrears at Ksh.237,000.00 only.

35. A Certificate of Service should issue to each claimant save for the 1st claimant in accordance with section 51 of the Act. This does not apply to the 1st claimant who is still in the employment of the respondents.

Accordingly, judgement is hereby entered for the claimants against the respondents jointly and severally in the following terms;

(a) Termination of employment is hereby decayed unfair save for the 1st claimant;

(b) The claimants are hereby awarded salary arrears, use of personal funds and the benefits due as set out below;

i. The 1st claimant is awarded salary arrears amounting to Ksh.488,010.00 and use of personal funds at Ksh.27,000.00;

ii. 2nd claimant is awarded total dues of Kshs.70,000.00;

iii. 3rd claimant is awarded Ksh.125,000.00;

iv. 4th claimant is awarded Ksh.52,000.00;

v. 5th claimant is awarded Ksh.114,000.00;

vi. 6th claimant is awarded ksh.59,000.00;

vii. 7th claimant is awarded Ksh.32,000.00;

viii. 8th claimant is awarded Ksh.237,000.00;

ix. 9th claimant is awarded compensation at Ksh.490,000.00; salary arrears Ksh.2,872,850.00; expenses for the business Ksh.1,417,500.00 and payment in lieu of taking leave Ksh.98,000.00.

(c) The claimants shall be issued with Certificate of Service save for the 1st claimant.

(d) The claimants are awarded costs.

Dated and delivered in open court at Nakuru this 22nd of November, 2018.

M. MBARU JUDGE

In the presence of: