



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1849 OF 2015 CONSOLIDATED WITH CAUSES NO. 1848, 1850, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, AND 1866 ALL OF 2015

ALEX MACHARIA NJOROGE.....1ST CLAIMANT
BENSON WAITHAKA NYAMU.....2ND CLAIMANT
DANIEL KIMANI MUNENGE.....3RD CLAIMANT
NICHOLAS GATEHI MBUGUA.....4TH CLAIMANT
SIMON KARIUKI GITUNGU.....5TH CLAIMANT
FRANCIS THUO MWANGI.....6TH CLAIMANT
EVANSON THUKU KAMONI.....7TH CLAIMANT
DUNCAN MBITHI MUTUA.....8TH CLAIMANT
THOMAS KARANI NYAKUNDI.....9TH CLAIMANT
MATHEW MUSAU MUSYOKI.....10TH CLAIMANT
VINCENT WEKESA MAKANDA.....11TH CLAIMANT
CHARLES WAITHAKA WACUKA.....12TH CLAIMANT
JOHN MACHARIA NYINGI.....13TH CLAIMANT
GEORGE NJOROGE KIMANI.....14TH CLAIMANT
RAPHAEL THUITA MWANGI.....15TH CLAIMANT
PATRICK MWANGI GATHONI.....16TH CLAIMANT
BERNARD CHEGE MUNGAI.....17TH CLAIMANT
PETER GATEIYA WANJIRU.....18TH CLAIMANT

- VERSUS -

CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimants were at all material time employed by the respondent as truck drivers at the respondent's construction project for the Mombasa – Nairobi Standard Gauge Railway Project.

The evidence was that the respondent employed both Kenyan and Chinese staff. On 13.08.2015, the claimant's shop steward one Isaiah Mwaniki Mathenge (the claimants' witness No. 1 – CW1) saw the respondent's Chinese worker assaulting two African workers one George Njenga and Justus Mumo. CW1 decided to intervene and later resumed work. Later that day as CW1 drove the assigned lorry he was suddenly blocked by some pickup. Two Chinese men came out and began pulling CW from the vehicle. The other workers shouted and the police got involved. The police officers asked CW to report at Syokimau Police Station and he complied. He was thereafter arrested and he spent a night at Mlolongo Police Station. On 14.08.2015 the rest of the claimants heard about the incident of CW's arrest and they demanded that the two workers who had been assaulted record a statement in the police occurrence book.

The claimants then temporarily stopped work and went to the police station to find out why CW1 was under arrest. The same day they were served with notices to show-cause why they should not be dismissed on account of participating in unlawful strike and abandonment of vehicles at the site gate on 14.08.2015. They were each required to show-cause in writing within 2 days from the date of the letter (14.08.2015). The letter further stated that the decision the respondent would take against each claimant would be communicated not later than 17.08.2015. Each claimant was required to hand to the supervisor (immediately) at the site workshop the ignition key for the assigned motor vehicle.

The claimants appear to have handed in their reply on diverse dates between 14.08.2015 and 17.08.2015. What is also clear is that each was dismissed by the letter dated 14.08.2015 on purported account that the response to the show-cause letter had been found unsatisfactory.

Being dissatisfied with the turn of events each claimant filed a suit through Maina Makome & Company Advocates against the respondent praying for judgment for:

- a. A declaration that their dismissal was unfair and unlawful.
- b. An order that the respondent do pay the claimants damages equivalent to each claimant's gross salary equivalent to 12 months pay.
- c. Unpaid leave days.
- d. Three months pay in lieu of notice.
- e. Service pay.

The respondent filed in each suit the response to each memorandum of claim through Wambugu & Muriuki and prayed that the claimants' suits be dismissed with costs.

The Court has considered the material on record including the submissions filed for the parties.

The **1st issue** for determination is whether the termination was unfair. It is clear that the respondent dismissed the claimants upon the grievances related to arrest of CW1 and assault of the two Kenyan employees by the Chinese employees. The evidence is that the fact of arrest of CW1 and the assault of the two Kenyans was not in doubt. The Court returns that the reason for termination was unfair in so far as the claimants had a genuine grievance that was based on reasonable foundation as envisaged in section 46 (h) of the Employment Act, 2007 which provides that it is not a fair reason to dismiss or impose a punishment against an employee on account of an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.

The Court further returns that as at termination it is clear that while according the claimants a notice as per section 41 of the Act, the respondent failed to accord them a hearing as prescribed under the section so that the termination was not in accordance with due process under the Act as read with section 45 of the Act which prescribes fair procedure in terminating a contract of service. The respondent's witness (RW) testifies that the claimants were heard one by one as they came back but it was clear that such a hearing, if at all it took place – as it was not documented, served no purpose because the termination decision had already been made on 14.08.2015.

The **2nd issue** for determination is whether the claimants are entitled to the remedies as prayed for. The claimants pray for 12 months' gross salaries in compensation under section 49 of the Act. The factors that favour the claimants include that they desired to continue in employment; they had a clean record of service; and they had valid grievances against the respondent in view of the arrest of RW and assault of the two Kenyan workers by the Chinese employees. The mitigating factors in favour of the respondent are that the claimants downed tools and went to the police station on 14.08.2015 and latter picketed on Mombasa Road thereby seriously affecting the respondent's construction works.

However while submitting that the claimants should have followed the laid down channels for grievance management such procedures were not shown to exist at all or they were not disclosed to the Court. The Court returns that in the circumstances the claimants were doing their best within the respondent's deficient operational systems and policies for grievance management.

The Court upholds its opinion in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR thus,

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour

practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

In view of the considered factors envisaged in section 49 of the Act, the Court returns that each claimant will be awarded **8 months' gross salaries** in compensation for the unfair dismissal.

While making that finding the Court has considered the respondent's submissions on prohibited strikes under the Labour Relations Act, 2007. The Court returns that the provisions of the Act appear not to have applied in the instant case because it was not the case that the claimants were members of a trade union which called the strike as stipulated under the Act. Even if they were members of the Kenya Building, Construction, Timber and Furniture Industries Employees Union, the respondent appears not to have invoked the dispute and grievance resolution mechanism which may have been agreed upon between the union and the respondent in the recognition and the collective agreements and both of which were not referred to at all – suggesting that the parties never invoked the provisions of the Labour Relations Act, 2007. Further under section 80 of the Act, the deduction of the prorated pay for the days of the alleged unprotected strike would have been the primary and most reasonable punishment to be imposed but which was not considered at all.

Each claimant is entitled to **one month pay** in lieu of the termination notice under section 35 of the Employment Act, 2007.

The pay slips exhibited show that the claimants were members of NSSF and the Court returns that they are not entitled to service pay as prayed for per exemption in section 35(6) of the Act.

Each claimant would be entitled to the leave days as prayed for under section 28 of the Act and there being no reasonable pleading, evidence or submission to justify the denial of leave days as prayed for.

In conclusion judgment is hereby entered for the claimants against the respondent for:

- a. The declaration that the termination of the contract of service for each of the claimants by the respondent was unfair.
- b. The respondent to pay each claimant the sum of money thus:
 - 8 months' gross pay at monthly rate as submitted for each claimant.
 - One month pay in lieu of termination notice at the rate as submitted for each claimant.
 - Leave pay at amount as submitted for each claimant.
- c. The amount in (b) above to be computed accordingly as particularized and summed up as part of the decree herein.
- d. The decretal amount be paid to the claimants by 31.01.2019 failing interest be payable thereon at Court rates from the date of this judgment till the date of full payment.
- e. The respondent to pay the claimants' respective costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE