

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1127 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 10th December, 2018)

- 1. CAROLINE WAIRIMU**
- 2. FESTUS MWANACHILU MAKIO**
- 3. CYRUS MOGIRE OGWAYA**
- 4. SAMUEL SILIVAND KARANI**
- 5. MICHAEL OMONDI OWINO**
- 6. JACOB NGUI MUTUNGA**
- 7. SIMON WAMBUA MUSYOKA**
- 8. DUNCAN ZAKAYO MOREKA**
- 9. VINCENT GISORE BASWETI**
- 10. JOHNSTON NYANGOTO MOGARE**
- 11. JACKTON INGANGA M'BWANA**
- 12. NICHOLAS NDUNGU MACHARIA**
- 13. EVANS BARASA WALWANDA**
- 14. HEZRON OUMA OREYO**
- 15. GODFREY ODUOR MUMBO**
- 16. DANIEL GICHUKI MUGI**
- 17. MUTORO M. JAMES**
- 18. LUDEMBEI GEORGE**
- 19. RICHARD KIARIE WAITHERERO**
- 20. JARED MASESE KEANA**
- 21. STEPHEN MATHENGE WAMAHIU**
- 22. SETRICK LUVAYO MUYONGA**
- 23. HARON ONCHIEKU OHURU**
- 24. CALEB ODHIAMBO OWUOR**

25. **KIMULI MARTIN WAMBUA**
26. **BENARD HUNJA ISIAH KAMAU**
27. **WADANDA OLUOCH**
28. **NICHOLAS SIJENYI OMONDI**
29. **BENSON AKOYO ETINDI**
30. **HERBON MURUNGA WATAKA**
31. **NAFTARY MWANU GITWARA**
32. **ALBERT MORARA RAMBEKA**
33. **JAMES KARINA NJUGUNA**
34. **DENIS MBOGHO MWAVISWA**
35. **ISAAC BOSIRE KERAMA**
36. **SAYYID ODHIAMBO ONYANGO**
37. **DERICK KIMATHI MUGAMBI**
38. **JOSEPH MAINA**
39. **WAKINGO PETER OUMA**
40. **GODFREY JUMA NYONGESA**
41. **HENRY ANDERE AKHABOCHI**
42. **NELSON MWANIKA LUKHOLO**
43. **STEPHEN TUCHORA MWANGI**
44. **DAVID BAKARI DENJE**
45. **PETER NGANGA MUNYUA**
46. **FRANCIS AKHONYA NETIA**
47. **ALFRED KUSINA MUYELA**
48. **PATRICK OKOTH OKONG'O**
49. **PETER MALOBA MUKWANA**
50. **JOHN ZADOCK OTSIMI**
51. **PETER OBELAI OLADI**
52. **NYAMANYA ABSOLOM**

53. DENIS OINO

54. GOVEDI NAMUSASI VIDOLO

55. JULIUS OPIYO

56. WILSON IKOKHA

57. ROBERT MOGERE

58. JOSHUA AMOLLO

59. STEPHEN NGETHE N.

60. JOSEPHAT KARIUKI

61. THOMAS WANYERE

62. PATRICK NYONGESA.....CLAIMANTS

VERSUS

EMCO BILLETS AND STEEL LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants filed the instant claim on **11th July, 2014**, through the Firm of J. W. Wanjohi & Company Advocates seeking the following Orders:-

- a) *A declaration that the summary dismissal was wrongful, unfair and discriminatory.*
- b) *Two (2) months salary in lieu of notice.*
- c) *Damages for severance pay equivalent of One (1) month salary for each year completed for each Claimant.*
- d) *Damages for unlawful termination equivalent of 12 months' salary for each of the Claimant.*
- e) *Issuance of a certificate of service to each Claimant as per the Employment Act Section 51*
- f) *Unpaid leave days*

2. The Claimants aver that they were employed by the Respondent herein on diverse dates from **2008** until **8th May, 2013**, when the Respondent affixed a notice on the gate that all employees were terminated.

3. The Claimants aver that they worked in various capacities with the Respondent Company that deals with steel manufacturing. It is further their averment that they worked for the Respondent diligently and faithfully without any record or incidence of misconduct until **8th May, 2013**, when the Respondent without any notice terminated the services of all the Claimants.

4. The Claimants further aver that they had tried to resolve the differences through the Ministry of Labour, Social Security and Services department of labour to no avail thus they proceeded to file the claim before this Court.

5. The Claimants aver that their dismissal was unlawful, oppressive, malicious, amounts to bad labour practice and therefore unconstitutional.
6. The Claimants further aver that at the time of their termination each of them was earning different wages as per attached schedules.
7. The Respondent in its Response to the Memorandum of Claim states that the Claimants were casual employees of the Respondent Company who worked depending on the availability of work save for the 1st Claimant who worked on contractual basis.
8. The Respondent denied affixing any notice terminating the services of the Claimants and avers that the Claimants willingly and without any notice absconded their duties at the company.
9. The Respondent avers that on 13th May 2013 the Claimants ganged up at the Company's gate and blocked other employees from gaining access into the premises. The Respondent further issued a notice dated 14th May 2013 requiring all employees to report immediately failure to which their positions will be advertised.
10. The Respondent's evidence is that the Claimants failed to report to work and the Company proceeded to advertise the positions on 15th May 2013.
11. The Respondent confirms that a complaint was lodged by the Claimants herein at the Ministry of labour vide Reference Number ML/DLO/NBI/LAB 1. It was this meeting that the labour officer made his findings as indicated in the Response to the Memorandum of Claim.
12. The Respondent avers that the Claimant is not entitled to any of the reliefs prayed for in their Memorandum of Claim as they in fact absconded duty. They pray for the claim to be dismissed with costs.

Evidence

13. One of the Claimants (Nicholas Ndungu Macharia CW1) gave evidence on his behalf and on behalf of 61 other Claimants. In his evidence, CW1 stated that he was employed by the Respondent with effect from 16th September 2010 as a gas cutter. That he worked for the Respondent until 8th May 2013.
14. CW1 further avers that on 8th May 2013 he was on duty until about 10.20 am when the Respondent Human Resource Manager, John Njenga handed them a note to exit the company. It was CW1's evidence that as the Claimants exited the Company, they saw a group of policemen, who guarded the premises till 9th May, 2013.
15. CW1 stated that they did return to the Respondent Company on 9th May 2013 but the Claimants were unable to gain access into the Company premises as the policemen present asked them to leave. CW1 confirmed that they did leave and later reported the issue at the labour office.
16. CW1 confirmed that he was a member of NSSF and that the Respondent Company made provision for NSSF deductions from his monthly salary as evidenced in his payslip and as such he was an employee and not a casual as pleaded by the Respondent.
17. In cross-examination, CW1 stated that they did not receive any further communication from the Respondent Company asking the Claimants to report back to work or risk having their positions advertised for replacement.
18. CW1 urged the Court to allow the claim in terms of the prayers in the Memorandum of Claim.

19. The Respondent put up one witness one Mr. Joab Mwangi, Human Resource Manager at the Respondent Company, who stated in evidence that the Claimants were employed on diverse dates as casual labourers save for Claimant number 1 who was employed by the Respondent on contractual basis that was subject to renewal upon expiry.

20. That the Claimants herein absconded duties on 9th May 2013 and that on the said date there was no police presence at the Respondent Company as alleged by the Claimants.

21. The Respondent urged the Court to dismiss the suit.

Claimant's Submissions

22. The Claimants submits that that they are entitled to the prayers as prayed in the Memorandum of claim.

23. It is the Claimants' further submission that all the Claimants worked diligently for the Respondent for a period of between one and a half years to five years. It is further submitted that at the time of termination (8th May 2013) the Respondent failed to follow the legal channels specifically Section 41 of the Employment Act, Section 15 (c) of the Labour Institutions Act 2007 and the Labour Laws of Kenya.

24. That the Claimants were indeed employed by the Respondent as they all worked at the Respondent Company daily without fail whose salaries were paid to their respective bank accounts and the Respondent remitted statutory payments through statutory bodies: NSSF, NHIF and PAYE (this reflected in the Bank statements produced in Court).

25. It is the Claimants' submissions that in the circumstances the claim in its entirety be allowed with costs.

Respondent's submissions

26. It is submitted by the Respondent that the Claimants were not dismissed but instead all Claimants opted to abscond duties with no explanation and proper justification. The notice relied upon by the Claimants and produced in Court simply allowed all employees out on 8th May 2013 as there was growing tension within the Company premises.

27. That given that the Claimants were not dismissed from employment they are not entitled to any of the remedies sought in the Memorandum of Claim and most particularly 12 months compensation.

28. The Respondent submits that given that CW1 confirmed that the Respondent had been paying NSSF and NHIF the Claimants are not entitled to severance pay.

29. The Respondent submits that all computations of amounts due to each individual Claimant ought to have been done as part of the Claimants' pleadings so as to have an opportunity to address the same at the hearing. It was submitted that the schedule of payments be expunged from the Court record in the circumstances. The Respondent prays that the instant suit to be dismissed with costs.

30. I have examined all the evidence and submissions of all the parties. The issues for determination by this Court are as follows:-

1) Whether Claimant's were casual employees of the Respondents.

2) If not, whether the Claimants were dismissed or they absconded from duty.

3) If the Claimants were dismissed, if due process was followed.

4) Whether the Claimants are entitled to the remedies sought.

31. On the 1st issue, the Respondents have submitted that all Claimants save for the 1st Claimant were casual employees and worked when work was available.

32. The Claimants position is that they worked for Respondent between 1 ½ years to 5 years and were not casual employees. The Claimants averred that the Respondents would not have paid the monthly statutory dues such as NSSF and NHIF if they were casual employees.

33. Indeed the Claimants submitted their bank statutory indicating that they were paid salary every month. The statements produced in Court and NHIF statements also show constant remittances to their accounts by their employer Emco Billets and Steel Limited the Respondent herein. On the NSFF statements produced, the employer name is also indicated as Emco Billets and Steel Limited.

34. The Respondents did not provide any evidence to contradict this position that they indeed remitted NHIF and NSSF payment for the Claimants as alleged. They attached a list of employees they state are casual employees showing payments made and even remittances for NHIF, NSSF and PAYEE.

35. Section 37(1) of Employment Act 2007 states as follows:-

1) ***“Notwithstanding any provisions of this Act, where a casual employee***

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service”.

36. The Claimants having worked continuously for over 1 year and having been paid by the Respondents on a monthly basis, though being referred to as casuals, they are not casual employees by virtue of the law and I therefore find that they were not casual workers but permanent and pensionable employees.

37. On the 2nd issue, the Respondent aver that the Claimants absconded duty and this forced them to dismiss them and advertise for their jobs. The “abscondment” is said to have occurred on 9.5.2013. The Respondents sought to rely on the minutes of the Ministry of Labour where parties attempted to reconcile their disputes (page 17 of Respondents’ documents).

38. Assuming that indeed the Claimants absconded duty due to the various complaints they had, then being permanent and pensionable employees as found in issue No.1 above, then they were still entitled to be due process as provided under Section 41 of Employment Act.

39. No notice was issued to them to show cause why they should not be dismissed for absconding duty. No disciplinary hearing was ever conducted against them and thus any action taken by the Respondent was against the laid down procedure. They were dismissed without a hearing. The notice posted by the Respondent on 14.5.2012 warned employees to report to work by 1 pm or be deemed to have deserted. On 15.5.2012, the Respondent advertised for the Claimants’ vacancies.

40. It is evident that the Notice of 14.5.2012 was not served upon the Claimants as it was pinned on the notice board and if the Claimants had absconded duty they could not have seen the said notice. They were therefore condemned unheard.

41. In the circumstances, I make a finding that the Claimants were dismissed unfairly and without following due process. This settles issue No.2 and 3 above.

42. Having found the dismissal unfair and unjustified, the only remedies the Claimants are entitled to are:-

1. *1 months' salary in lieu of notice.*
2. *6 months as compensation for unfair termination.*
3. *Totals on the above figures is as per the annexed addendum 'A'.*
4. *The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.*

Dated and delivered in open Court this **10th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oketch holding brief for Wangago for Respondent – Present

Kamau holding brief for Wanjohi for Claimants – Present

ADDENDUM 'A' TO JUDGEMENT

	Name of Claimant	One Month's Salary (Kshs)	Six Months' Compensation (Kshs)	TOTALS (Kshs)
1	CAROLINE WAIRIMU	16,750	100,500	117,250
2	FESTUS MWANACHILU MAKIO	14,100	84,600	98,700
3	CYRUS MOGIRE OGWAYA	21,720	130,320	152,040
4	SAMUEL SILIVAND	14,100	84,600	98,700
5	MICHAEL OMONDI OWINO	15,210	91,260	106,470
6	JACOB NGUI MUTUNGA	10,000	60,000	70,000
7	SIMON WAMBUA MUSYOKA	15,000	90,000	105,000
8	DUNCAN ZAKAYO MOREKA	8,850	53,100	61,950
9	VINCENT GISORE BASWETI	17,100	102,600	119,700
10	JOHNSTON NYANGOTO MOGARE	10,000	60,000	70,000
11	JACKTON INGANGA M'BWANA	15,960	95,760	111,720
12	NICHOLAS NDUNGU MACAHARIA	15,900	95,400	111,300
13	EVANS BARASA WALWANDA	15,210	91,260	106,470
14	HEZRON OUMA OREYO	14,100	84,600	98,700
15	GODFREY ODUOR MUMBO	13,182	79,092	92,274
16	DANIEL GICHUKI MUGI	14,000	84,000	98,000
17	MUTORO M. JAMES	14,100	84,600	98,700
18	LUDEMBEI GEORGE	12,000	72,000	84,000
19	RICHARD KIARIE WAITHERERO	8,850	53,100	61,950
20	JARED MASESE KEANA	14,100	84,600	98,700
21	STEPHEN MATHENGE WAMAHIU	14,000	84,000	98,000
22	SETRICK LUVAYO MUYONGA	10,000	60,000	70,000
23	HARON ONCHIEKU OHURU	14,100	84,600	98,700
24	CALEB ODHIAMBO OWUOR	12,320	73,920	86,240
25	KIMULI MARTIN WAMBUA	14,100	84,600	98,700
26	BENARD HUNJA ISAAH KAMAU	15,900	95,400	111,300
27	WADANDA OLUOCH	14,100	84,600	98,700
28	NICHOLAS SIJENYI OMONDI	15,200	91,200	106,400
29	BENSON AKOYO ETINDI	15,960	95,760	111,720
30	HERBON MURUNGA WATAKA	14,100	84,600	98,700
31	NAFTARY MWANU GITWARA	23,760	142,560	166,320
32	ALBERT MORARA RAMBEKA	10,000	60,000	70,000
33	JAMES KARINA NJUGUNA	14,100	84,600	98,700
34	DENNIS MBOGHO MWAVISWA	12,390	74,340	86,730
35	ISAAC BOSIRE KERAMA	15,900	95,400	111,300
36	SAYYID ODHIAMBO ONYANGO	12,320	73,920	86,240
37	DERICK KIMATHI MUGAMBI	12,220	73,320	85,540
38	JOSEPH MAINA	15,210	91,260	106,470
39	WAKINGO PETER OUMA	15,000	90,000	105,000
40	GODFREY JUMA NYONGESA	14,100	84,600	98,700
41	HENRY ANDERE AKHABOCHI	14,100	84,600	98,700
42	NELSON MWANIKI LUKHOLO	14,100	84,600	98,700
43	STEPHEN TUCHORA MWANGI	16,050	96,300	112,350
44	DAVID BAKARI DENJE	21,600	129,600	151,200
45	PETER NGANGA MUNYUA	15,690	94,140	109,830
46	FRANCIS AKHONYA NETIA	12,320	73,920	86,240
47	ALFRED KUSINA MUYELA	14,100	84,600	98,700
48	PATRICK OKOTH OKONG'O	14,850	89,100	103,950
49	PETER MALOBA MUKWANA	15,210	91,260	106,470
50	JOHN ZADOCK OTSIMI	12,390	74,340	86,730
51	PETER OBELAI OLADI	15,210	91,260	106,470
52	NYAMANYA ABSOLOM	12,000	72,000	84,000
53	DENIS OINO	15,210	91,260	106,470
54	GOVEDI NAMUSASI VIDOLO	15,870	95,220	111,090
55	JULIUS OPIYO	14,950	89,700	104,650
56	WILSON IKOKHA	10,000	60,000	70,000
57	ROBERT MOGERE	17,000	102,000	119,000

GRAND TOTAL Kshs. 6,191,234/=

HON. LADY JUSTICE HELLEN WASILWA

JUDGE