



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 2274 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th February, 2017)

JOSHUA NYAGOL ONYANGO.....1ST CLAIMANT
 SARAH NDAGARA.....2ND CLAIMANT
 STANLEY GITAU NJOGU.....3RD CLAIMANT
 ANTHONY KANAI WANJOHI.....4TH CLAIMANT
 DAVID OTIENO OWUOR.....5TH CLAIMANT

VERSUS

RELIEF & MISSIONS LOGISTICS LIMITED.....RESPONDENT

JUDGMENT

1. Before the Court is a statement of Claim dated 17th December 2015 where the Claimants are seeking:

a) A declaration that the redundancy of the Claimants was unfair to the extent that the Respondent did not comply with some of the mandatory conditions in Section 40 of the Employment Act 2007.

b) The Sum of Kshs 2,182,950.00 particularised as:

1. Joshua Nyagol Onyango

a) House Allowance (February – September)

15% of salary = Kshs 4,950.00

9 months x Kshs 4,950.00 Kshs. 44,550.00

b) 12 months compensation for unfair termination on account of redundancy

(Kshs. 33,000.00 x 12) Kshs. 396,000.00

SUB TOTAL.....Kshs.440,550.00

2. Sarah Ndagara

a) House Allowance (February – September)

15% of salary = Kshs 4,950.00

9 months x Kshs 4,950.00 Kshs. 44,550.00

b) 12 months compensation for unfair termination on account of redundancy

(Kshs. 33,000.00 x 12) Kshs. 396,000.00

SUB TOTAL.....Kshs.440,550.00

3. Stanley Gitau Njogu

a) House Allowance (May– September)

15% of salary = Kshs 4,950.00

5 months x Kshs 4,950.00 Kshs. 24,750.00

b) 12 months compensation for unfair termination on account of redundancy

(Kshs. 33,000.00 x 12) Kshs. 396,000.00

SUB TOTAL.....Kshs.420,750.00

4. Anthony Kanai Wanjohi

a) House Allowance (February – September)

15% of salary = Kshs 4,950.00

9 months x Kshs 4,950.00 Kshs. 44,550.00

b) 12 months compensation for unfair termination on account of redundancy

(Kshs. 33,000.00 x 12) Kshs. 396,000.00

SUB TOTAL.....Kshs.440,550.00

5. David Otieno Owour

a) House Allowance (February – September)

15% of salary = Kshs 4,950.00

9 months x Kshs 4,950.00 Kshs. 44,550.00

b) 12 months compensation for unfair termination on account of redundancy

(Kshs. 33,000.00 x 12) Kshs. 396,000.00

SUB TOTAL.....Kshs.440,550.00

Total Amount Kshs. 2,182,950.00

c) Certificate of Service

d) Costs of this suit

e) Interest on the amount awarded at court rates.

Facts

1. On or about the 6th of February 2015, the Respondent herein employed the 1st, 2nd, 4th and 5th Claimants together with 15 other people as drivers at a monthly salary of Kshs. 33,000.00 per month exclusive of house allowance. The 3rd Claimant was employed by the Respondent on or about the 15th of May 2015 for the same salary. Their contracts were subject to 3 months' probation.
2. The Claimants' were based at JKIA but could occasionally be required to work on any other assigned duties by the Respondent's supervisors. They were confirmed on permanent basis after the end of their probation period. The Claimants state that they made numerous requests for housing allowance, which request was denied.
3. On or about the 15th of April 2015, His Excellency the President Hon. Uhuru Muigai Kenyatta came to the airport and questioned why the Kenya Airports Authority chose to lease the buses from the Respondents at an exorbitant amount. This led to their hiding the buses whenever the President was at the airport and resume operations after he had left.
4. The Claimants state that on or around the 29th of September 2015, the Claimants received text messages on their phones informing them to report at the Karen offices the next day. They did report only to be issued with termination letters on account of redundancy. The Claimants state that the termination was selective as other drivers were not terminated but were instead given other duties at the company.
5. The Claimants state that they were not informed on the intended redundancy nor was the Labour Officer as stipulated by the law. They state that they did not consider the seniority in time, skill and reliability while selecting the employees before declaring the Claimants redundant.
6. In Response the Respondent has filed a response to the statement of claim, dated 10th February 2015.
7. They admit that the Claimants were in their employment in the stated period, but their salary of Kshs. 33,000.00 was a mutually agreed consolidated sum inclusive of Housing Allowance.
8. They state that the performance of the Contract of Employment was inadvertently frustrated and subsequently terminated as a result of the disputes the eventual termination of the Service Agreement between the Respondent and Kenya Airports Authority.
9. The Respondent denies that it failed to adhere or violated any provisions of the Employment Act 2007 or any of the Claimant's employment rights as alleged by the Claimant's or at all and the Claimants are put to strict proof thereof.
10. They state that the Claimants kept proper working hours and none worked beyond the 48 hours a week stipulated by law.
11. They state that when the dispute arose, they continued to pay the Claimants for two more months in the hope that the issues would be resolved. When it remained unresolved, they were paid one months' salary in lieu of notice, they executed the discharge agreement with the Respondent as full and final

settlement of the frustrated relationship. They state that all the employees are treated fairly and equally and without any discrimination, preference or favouritism.

12. They state that the cause does not disclose any reasonable cause of action and that they shall lodge a Notice of Preliminary Objection to have the claim struck out pursuant to Section 45(3) and 47 (6) of the Employment Act. They ask that the Claim be dismissed with costs.

Submissions:

13. The Claimants submit that via the letter of termination and the evidence given by the Respondent's Director, the Respondents were experiencing frustration in running of the business and were thus declared redundant.

14. They submit that Section 40 of the Employment Act was not followed as the labour officer was not notified, nor were the employees notified personally of the impending redundancy. They cite the case of **Benard A Kagasi vs. For You Chinese Restaurant (2014) eKLR** where Hon. Lady Justice Linnet Ndolo found that since the Respondent did not comply with the conditions set out in Section 40 Employment Act the termination was unfair within the meaning of Section 45 Employment Act.

15. The Claimants submit that they are entitled to Housing Allowance, as the Director who testified failed to illustrate how the salary was consolidated. They rely on the above cited case of **Benard A Kagai (Supra)** where it was stated that the Claimant who was never paid housing allowance was entitled to the claim.

16. As to 12 months' salary compensation, the Claimant submits that as the Respondent did not comply with the redundancy procedure, they ought to be granted compensation for unfair termination. They cite that Section 45(3) of the Act stated that:

“an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have right to complain that he has been unfairly terminated. “

17. As to costs, they submit that the Respondent was duly served with a demand letter, they refused to reply to the same and as such costs should follow this cause and the Respondents should pay the same with interest.

18. They pray that the Court awards as prayed.

19. The Respondent reiterates that the employment of the Claimants came to an end due to frustration when their operations stalled. Their contract with the Kenya Airports Authority came to an end without consultation. The Claimants herein had spent 3 months after the April 2015 President's visit being paid for nothing.

20. The Respondent submits that the Claimants herein are barred from lodging this claim on account of unfair termination since they had served for less than the statutory period of 13 months. To this end they rely on Section 45(3) of the Employment Act 2007 as follows:

“An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

21. They submit that the Claimants were employed for less than a year and the suit is therefore illegal and ought to be struck out.

22. They cite the case of **Kenya Airways Limited vs. Jatwant Singh & Brothers (2013) eKLR** where the Court of Appeal extensively considered the doctrine of frustration of contract and upheld that the

existence of an intervening event vitiates a contract between parties.

23. The Court of Appeal upheld the decision of the trial Judge as follows:

“On the second issue of intervening events, the Appellant has based its arguments on the fact that there was an intervening event in the subsistence of the employment contract which led to the frustration of contract rendering the same incapable of performance. It has therefore argued that the doctrine of frustration to the dissolution of the contract. It contends that since it was a condition of the contract that the Respondent obtained work permit form immigration department, failure to obtain the same from September, 1995 constituted an intervening event beyond the control of the Appellant”.

24. Further in **Sabtyabrata Ghose vs. Mugeneeram Bangur & Co 1954 Scr 310, Supreme Court of India**, the Court adopted the principle of frustration as follows:

“.....frustration occurs whenever the law recognises that, without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which is undertaken by the contract. “Non haec foederaveni”. It was not what i promised to do”.

“... the doctrine of frustration operates to excuse further performance where:

i. It appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that the same fundamental things or state of this will continue to exist, or that some particular person will take place, and

ii. Before breach of performance becomes impossible or any possible in every different way to that contemplated without default or either party, owing to fundamental change or circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more erroneous does not of itself give rise to frustration.

25. They submit that it is clear that the Claimants’ employment were constructively terminated as a consequence of frustration of the contract between the Respondent and the Kenyan Airports Authority, and they cannot be blamed for the loss of the Claimants employment. They ask the Court to declare the termination a frustration of contract and not unfair or unjust. It was unintended by both parties.

26. They submit that they complied with the requirements of Section 35 of the Employment Act and paid salaries in lieu of notice. They ask the Court to adopt the finding of **Thomas Ndiege Oyugi vs. Riley Falcon Security Services (2013) eKLR** where the Ladyship had previously found that the issue of unfair and procedural termination of employment does not arise where the contract has been frustrated.

27. As to the reliefs sought, they submit that the Claimants are not entitled to compensation as the suit is statute barred. They were paid their terminal dues and one month’s salary in lieu of notice therefore the claim for compensation must fail.

28. The claim for housing allowance must also fail as the Respondents uphold that the salary was consolidated on agreement of all parties.

29. The Respondent cite the case of **Thomas Ndiege Oyugi vs. Riley Falcon Security Services (2013) eKLR** where the Honourable Court correctly applied the provision of Section 31(2) of the Employment Act and held that:

”Under this Contract, the Claimant was employed as a driver and initially his salary was consolidated to Kshs 6,629.00 which fact the Claimant also accepted. The issue of house allowance did not therefore arise. This is in line with Section 31(2) of the Employment Act 2007. In the Claimant’s contract, the element of consolidated pay was included and this in essence

covered any anticipated claim of house allowance. The claim for payment of house allowance by the Claimant cannot therefore stand”.

30. They state that the same position was upheld in the case of **Pius Toboso Matendechere vs. Jaswant Singh & Brothers (2015) eKLR** when the Court found that:

“The Claimants were paid a gross salary for the entire period he was in employment. There is no evidence that he ever asked for payment of house allowance during the tenure of his employment. This means that he was aware that his salary was consolidated. This forfeited by the fact that the claim did not demand payment of house allowance in his labour complaints”.

31. I agree with the decision of Wasilwa J in **Thomas Ndiege Oyugi vs Riley Falcon Security Services (2013) eKLR** in that an employee paid a consolidated wage is not entitled to house allowance in addition as the salary is inclusive of house allowance. A gross pay means the salary is inclusive of all allowances including house allowance. I find that the claim has not been proved and is therefore not entitled to house allowance as his salary was inclusive of the same.

32. In light of above, they urged the Honourable Court to adopt the findings in the above case and equally dismiss the claim for the house allowance in the instant case.

33. As to overtime, the Respondents submit that there is no evidence that the Claimants worked longer than the hours provided for in their contract. They submit that clause 4 of the contract of Employment signed by all the Claimants was very clear that the contract did not have overtime and that they would work for 48 hours a week.

34. Further, they submit that their witness corroborated the fact that they worked in shifts and no driver was allowed to work for more than 8 hours as provided by the International Aviation Rules and conditions set by the Kenya Airports Authority for operations of the said buses.

35. The Respondents submit that the Claimants also did not state the number of hours they worked overtime, and that this claim was but an afterthought and should be dismissed.

36. In conclusion they submit that the Claimants have not proved their case, and the same should be dismissed.

37. Having considered the evidence and submissions of both parties, it is apparent that the Claimants were all in the employment of the Respondent. Their work was to drive buses at the airport. This contract of driving buses at the airport was however frustrated between the Respondents and KAA when in any event, the President of the Republic of Kenya also intervened and wanted the buses being driven at the airport to cease being in operation.

38. It is apparent that the contract was actually frustrated due to no mistake of the Respondents and the laying off of the Claimants cannot be said to be an unfair redundancy because the Respondents never deliberately did anything prejudicial to the Claimants.

39. The authorities cited above came in handy and I agree with the finding therein.

40. Are the Claimants then entitled to the remedies they have sought?.

41. Having become redundant without any fault of the Claimants, the only remedy I can award Claimants is:

1. 1 months’ salary in lieu of notice

2. Unpaid house allowance for 9 months. This will be 15% of salary of each employee.

3. The award translates as follows:

1. JOSHUA NYAGOL ONYANGO

(a) Salary = 33,000/=

(b) 15% of 33,000 x 8 = 39,600/=

Total = Kshs.72,600/=

2. SARAH NDAGARA

(a) 1 month salary = 33,000/=

(b) 15% of 33,000 x 8 = 39,600/=

Total = Kshs.72,600

3. STANLEY GITAU NJOGU

= 33,000/= x 15% of 22,000 x 5

= 33,000 x 24,750 = 57,750/=

Total = Kshs.57,750/=

4. ANTHONY KANAI WANJOHI

Kshs. 72,600/=

5. DAVID OTIENO OWUOR

Kshs. 72,600/=

4. *The Respondents will pay costs of this suit.*

Read in open Court this 17th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muga for Respondent – present

Gomba for Claimants – Present