



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 166 OF 2015 CONSOLIDATED WITH CAUSES NO. 167, 168, 169, 170, 171, 172, 173, AND 174 ALL OF 2015

ALI KULO GODANA.....1ST CLAIMANT
ALI MOHAMED GUYO.....2ND CLAIMANT
ABDI GALMA.....3RD CLAIMANT
HALAKE JATTANI.....4TH CLAIMANT
ABDI GUYO.....5TH CLAIMANT
BARAKO WARIO ADANO.....6TH CLAIMANT
ALI NUNO KIRIJA.....7TH CLAIMANT
ABKUL JIBA.....8TH CLAIMANT
BORU HUQUA GAME.....9TH CLAIMANT

-VERSUS-

**JIANGXI ZHONGMEI ENGINEERING
CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 3rd March, 2017)

JUDGMENT

There is no dispute that the claimants were employed by the respondent as general workers on diverse dates in 2011 and 2012 as set out in the statement of claims filed for each of the claimant on 29.09.2015 through Khan & Associates Advocates. Each of the claimants prayed for judgment against the respondent for:

- a) A declaration that the termination or dismissal process carried out by the respondent against the claimant was unlawful and that during the employment the claimant was not remunerated as required by the law.
- b) Payment of sums claimed and as specifically pleaded and quantified under the headings of one

month pay in lieu of notice; service pay; compensation for unfair termination; underpayment; annual leave dues; unpaid house allowance; and overtime pay.

c) Costs and interest.

d) Any other relief the honourable court may deem fit to grant.

The respondent filed the memorandum of response in each of the suits to oppose the claimants' respective cases. The respondent appointed Iseme, Kamau & Maema Advocates and prayed that each of the claimant's suits be dismissed with costs. The suits were consolidated and heard concurrently.

The main issue for determination is whether the claimants are entitled to the remedies as prayed for. The court makes findings as follows:

1) The respondent has submitted that it is undisputed that the claimants were not taken through a disciplinary hearing but oral warnings had been issued against the claimants. The respondent has further submitted that there were procedural lapses in the termination process as there was no notice and hearing as envisaged in section 41 of the Employment Act, 2007. Accordingly, the court finds that the claimants are entitled to the declaration that the dismissal or termination of the employment by the respondent was unfair for want of due process.

2) Each claimant has prayed for 12 months compensation for the unfair termination under section 49 (1) of the Employment Act, 2007. The respondent has submitted that an award of 3 to 4 months for the unfair termination will serve justice in these cases. The court has considered that the claimants had served for an average of about two or three years. They desired to continue in employment but also knew that the tenure of the employment was as long as the period for the upgrading of the Marsabit to Turbi Road so that in the court's opinion the claimants' legitimate expectation would be to serve until the end of the road project as opposed to a permanent service spanning over several future years. Taking into account the stated considerations, each claimant is awarded 6 months' gross salaries for the unfair termination. In line with Sub-Rule 4(7) of the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012 the rate for the monthly pay shall be 26 days times Kshs.411.00 making Kshs.10, 686.00.

3) The claimants were members of the National Social Security Fund and as submitted for the respondent, the court finds that they would not be entitled to service pay in view of section 35(6) of the Employment Act, 2007. Nevertheless, the court finds that they are entitled to the declaration that the NSSF payments due but not remitted by the respondent be remitted in accordance with the applicable law and not later than 15.04.2017.

4) The claimants have claimed for unpaid house allowance. Under section 31 of the Employment Act, 2007 the respondent's duty was to provide reasonable housing accommodation for each employee either at or near the place of employment or to pay the employee sufficient sum, as rent, in addition to the wages or salary so as to enable the employee to obtain reasonable housing. The claimants' case is that no reasonable house allowance was paid as per the section as read together with Rule 3(1) of the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012. The respondent's case as was pleaded is that the claim lacks merit because a consolidated pay was provided and which was sufficient for reasonable housing of each claimant's choice. In particular the pay was above the minimum statutory wage and the excess was sufficient for rent. CW1 testified that the respondent housed only drivers and not the general workers. In cross-examination CW1 stated that they were provided a bus from Marsabit to the work station and they stayed at their respective homes. For the respondent, in contradiction of the pleading that a consolidated pay was provided, it was submitted that accommodation was provided at the work station and further, transport from home to work was provided. The court has considered that inconsistent submission and pleading and finds that on a balance of probability, the respondent did not pay a consolidated salary with reasonable element for rent and further did not provide housing at the work station. Thus the court returns that the claimants are entitled to unpaid house allowance

per the provisions of the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012 being Kshs.1, 725.00 for each month the claimants served in the respondent's employment.

5) As submitted for the respondent, the claimants are entitled to only one month pay in lieu of the termination notice as provided for in section 35(1) (c) of the Employment Act, 2007 making Kshs.10,686.00 per claimant.

6) The claimants have claimed pay due to underpayment. Parties are in agreement that the applicable minimum wage is as per the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012. It is not disputed that the claimants were paid Kshs.35.00 per hour and they claim Kshs.51.00 per hour. The daily rate under the Order is Kshs.411.00 making Kshs.51.00 per hour. Thus, the court finds that the claimants were underpaid as claimed and are each awarded at the rate of Kshs.16 x 26 days x number of months worked x 8 hours per day.

7) The court finds that the claimants are entitled to leave as claimed for and as submitted and as per section 28 of the Employment Act, 2007. Annual leave is awarded at monthly pay Kshs10, 686.00 per claimant for each completed 12 months of service and thereafter prorate for the months served.

8) The claimants have prayed for overtime. As submitted for the respondent, the claimants have not established the hours they allege to have worked overtime. Thus the court returns that the claims and prayers in that regard will fail on a balance of probabilities.

9) RW confirmed that the claimants worked seven days a week without a rest day per week and each is entitled to rest day or Sunday underpayment as prayed for and at the rate of Kshs 411.00 x number of months served x 40 days per month.

In conclusion, judgment is hereby entered for each claimant against the respondent for:

1) The declaration that the termination of the employment by the respondent was unfair for want of due process of a notice and a hearing as per section 41 of the Employment Act, 2007.

2) The declaration that the NSSF payments due to the claimant but not remitted by the respondent be remitted in accordance with the applicable law and not later than 15.04.2017.

3) The respondent to pay the claimant the amount found due as per the findings in this judgment by 01.04.2017 failing interest at court rates be paid thereon from the date of this judgment till full payment.

4) The claimant to compute the quantum per this judgment for pay in lieu of notice, compensation for unfair termination, annual leave, unpaid house allowance, wage underpayment and Sunday underpayment and to serve the respondent in 7 days from the date of this judgment for recording the same on a convenient mention date.

5) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 3rd March, 2017.

BYRAM ONGAYA

JUDGE