



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 781 OF 2015

MCDONALD CHARO & 36 OTHERSCLAIMANTS

VERSUS

BOFA MAWENI LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimants' contract of employment by the respondent on 2013 and 1/11/2014. The respondent has not filed any defence despite service with summons and as such the suit proceeded ex parte. Mr. McDonald Charo Mbogo (29th claimant) and Mwalimu Amani Ngonyo (1st claimant) testified on behalf of all the claimants as Cw1 and Cw2 respectively. Thereafter the claimants filed written submissions.

CLAIMANTS' CASE

2. CW1 was employed by the respondent as a supervisor on 5/10/2010 earning ksh.650 per day which translated to ksh.19500 per month. He was working from 6pm to 6 am during his night shift and 6 am to 6pm during his day shift. He knew all the other claimants because they were continuously working together for the respondent. He produced payment vouchers and attendance register to prove that they were indeed employed by the respondent.

3. On 11/1/2014, the respondents' manager Mr. Raymond Gitau brought strangers to the workplace and showed them stores and replaced the padlocks. Thereafter the manager called all the staff to a meeting and told them that the strangers were the new managers of the site. He further advised the staff to go home until further notice. CW1 told the court that the claimants were never called back and when they went to check the respondent's premises, they found the company operating under other workers.

4. CW1 contended that their termination was unfair and unlawful because they were not served with any prior notice and that they were not paid their terminal benefits. He therefore prayed for, and on behalf of all the claimants, salary in lieu of notice plus compensation for the unfair termination. He also prayed for service pay.

5. CW2 testified that he was employed as a casual worker by the respondent from 4/4/2009 earning ksh.500 per day equaling to ksh.15000 per month. The payment was however done weekly. He was working from 6am to 6pm and did so continuously until 11/1/2014 when one of the respondents' directors

Mr. Raymond Gitau brought strangers to the site and after inspecting the facilities, they fitted new padlocks and installed their own watchman to guard. Thereafter they were introduced to the new manager Mr. Edward Wangamati who told them to go home and return after 2 weeks to enable them service the machine.

6. CW1 contended that they were never allowed back to work again since 11/1/2014 and they were never paid their terminal dues. He therefore prayed for the dues sought in the suit.

ANALYSIS AND DETERMINATION

7. After considering the evidence and the submissions presented to the court and which was not controverted by the respondent, it is clear that all the claimants were employed by the respondent. There is also no dispute that the claimants were terminated following the change in the management of the site where the claimants were employed. The issues for determination are:

- a. Whether the termination was unfair and unlawful.
- b. Whether the claimants are entitled to the reliefs sought.

UNFAIR TERMINATION

8. Under Section 45 of the Employment Act, termination of employment by an employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the claimants have contended that they were laid off following a change of management of the site where the claimants were employed and that no prior notice was served on them.

9. The respondent has not tendered any evidence to prove or justify the reason for terminating the employment contract of the claimants. She has also not attempted to prove that the termination was done after following a fair procedure. Under Section 40 of the Act, the employer is barred from terminating the employment of employee on account of redundancy without first serving a written notice of at least one month on both the employee and the labour officer and paying them their terminal dues and severance pay.

10. In this case the employees had continuously worked on casual basis for a long period and had under Section 37 of the act converted to regular terms contract employees. They had therefore qualified for the protection of the law from unfair redundancy. Considering the undisputed evidence that the claimants were laid off without following the mandatory procedure provided under Section 40 of the Act, I find and hold that the termination of the claimants' employment contracts were unfair within the meaning of Section 45 of the Act.

RELIEFS

11. Under Section 49 of the Act, I award each claimant one month salary in lieu of notice plus three months salary as compensation for unfair termination. In awarding the said compensation, I have considered the fact that they were not guilty of any misconduct. I however dismiss the claim for leave allowance for lack of evidence to prove that they were entitled to the same under their contracts of employment. I also dismiss the claim for off days and public holidays worked for lack of particulars and evidence. I further dismiss the claim for house allowance because the claimants were paid a daily wage which under the Wage order includes house allowance. I however award each claimant service pay for their respective years of service.

12. The award for each claimant is summarized as follows.

MWALIMU AMANI NGONYO [1ST CLAIMANT]

Notice15000

Compensation.....45000
Service pay 4 years30000

90000

SAID FOLENI SULEIMAN [2ND CLAIMANT]

Notice18000
Compensation.....54000
Service pay (2years).....18000

90000

SAID SALIM MOHAMMED [3RD CLAIMANT]

Notice18000
Compensation54000
Service pay (7 years).....36000

108000

SUMA SAID NYIRO [4TH CLAIMANT]

Notice18000
Compensation.....54000
Service pay (3years).....27000

90000

BAHATI ELIUD MANDA [5TH CLAIMANT]

Notice19500
Compensation.....58500
Service pay (2 years).....19500

97500

SAFARI NGONYO MAINGE [6TH CLAIMANT]

Notice18000
Compensation.....54000
Service pay (2 years)18000

90000

MWARO BAYA MANGI [7TH CLAIMANT]

Notice12000
Compensation.....36000
Service pay (4 years)24000
72000

RASHID MSENSA FUNDI [8TH CLAIMANT]

Notice21000
Compensation.....63000
Service pay (2 years)21000
105000

MWERI KAZUNGU MURE [9TH CLAIMANT]

Notice11250
Compensation.....33750
Service pay (4 years)22500
67500

CHARO BAMBANYA CHAI [10TH CLAIMANT]

Notice11250
Compensation33750
Service pay11250
56250

AMOS CHAI MUNGA [11TH CLAIMANT]

Notice15000
Compensation.....45000
Service pay45000
105000

MICHAEL KAHINDI YAA [12TH CLAIMANT]

Notice19500
Compensation.....58500

Service pay (4 years)39000
117000

SAMUEL BIRYA MASHA [13TH CLAIMANT]

Notice18000
Compensation54000
Service pay (2 years)18000
90000

FRANCIS MWATUA NDORE [14TH CLAIMANT]

Notice11250
Compensation.....33750
Service pay (3 years).....16875
61875

WILSON NYUNDO MRAMBA [15TH CLAIMANT]

Notice11250
Compensation.....33750
Service22500
67500

SAMUEL KATANA KARISA [16TH CLAIMANT]

Notice18000
Compensation.....54000
Service pay (3 years)27000
99000

KAHINDI KITSAO MAKAZI [17TH CLAIMANT]

Notice18000
Compensation.....54000
Service pay (3 years)27000
99000

NGUMBAO KAZUNGU (18TH CLAIMANT)

Notice11250
Compensation.....33750
Service pay (2 years)11250
56250

BAO MWAFUMBA [19TH CLAIMANT]

Notice18000
Compensation54000
Service pay (3 years).....27000
99000

KELVIN CHARO KAZUNGU [20TH CLAIMANT]

Notice11250
Compensation33750
Service pay (2 years).....11250
56250

JUMA RATIB KHAMIS [21ST CLAIMANT]

Notice11250
Compensation33750
Service pay [1 year]5625
50625

SAFARI MWARINGA [22ND CLAIMANT]

Notice18000
Compensation.....54000
Service pay (2 years)18000
90000

JAMES FONDO [23RD CLAIMANT]

Notice18000
Compensation.....54000
Service pay (3 years)27000

99000

SAFARI KARISA MKARE[24TH CLAIMANT]

Notice13500

Compensation.....40500

Service pay (3 years).....20250

74250

STEPHEN KITI KOMBE [25TH CLAIMANT]

Notice19500

Compensation.....58500

Service pay39000

117000

JUMA ABDHALLAH MUSENA [26TH CLAIMANT]

Notice18000

Compensation.....54000

Service pay (2years).....18000

90000

ANDREW AGOSO AMUNGA [27TH CLAIMANT]

Notice21000

Compensation.....63000

Service pay (3 years).....31500

115500

KHAMIS TSUMA UNDA [28TH CLAIMANT]

Notice19500

Compensation58500

Service pay (4 years).....39000

117000

MCDONALD CHARO [29TH CLAIMANT]

Notice19500

Compensation.....58500
Service pay (3 years)29250

107250

MURAMBA KIRINGI [30TH CLAIMANT]

Notice18000
Compensation.....54000
Service pay (4 years).....36000

108000

JOSPHAT CHARO NDURYA [31ST CLAIMANT]

Notice11250
Compensation 33750
Service pay (2 years).....11250

56250

KAHINDI CHARO NDURYA [32ND CLAIMANT]

Notice11250
Compensation33750
Service pay11250

56250

ABDALLAH SALIM OMAR [33RD CLAIMANT]

Notice18000
Compensation54000
Service pay (3 years)27000

99000

ESHWA EMANKWALE [34TH CLAIMANT]

Notice11250
Compensation33750
Service pay [2 years]11250

56250

WYCLIFF YAA BAYA [35TH CLAIMANT]

Notice	11250
Compensation.....	33750
Service pay (3 years)	<u>16975</u>
	<u>61875</u>

JUMA SALIM MOHAMMED[36TH CLAIMANT]

Notice	12000
Compensation.....	36000
Service pay (4 years)	<u>24000</u>
	<u>72000</u>

DISPOSITION

13. For the reasons that the termination of the claimants employment contracts was unfair, I enter judgment for them in the aggregate sum of ksh.3,096,375 plus costs and interest. They will also be issued with certificates of service.

Dated signed and delivered this 19th May 2017

O. N. Makau

Judge