



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 365 OF 2015
CONSOLIDATED WITH CAUSE NO 366 OF 2015

SILVANUS KHAYESIA KHASIALA.....1ST CLAIMANT

BONIFACE NEWTON ANGATIA.....2ND CLAIMANT

VERSUS

AVIC INTERNATIONAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated action is brought by Silvanus Khayesia Khasiala and Boniface Newton Angatia against their former employer, Aric International Limited. The claim is contained in Memoranda of Claim dated 11th March 2015 and filed in Court on 12th March 2015. The Respondent filed Memoranda of Response on 21st December 2015.

2. When the matter came up for hearing both Claimants testified on their own behalf. The Respondent did not present any witnesses in spite of adequate opportunity to do so. Both parties filed written submissions.

The Claimants’ Case

3. The 1st Claimant, Silvanus Khayesia Khasiala states that was employed by the Respondent as a Mason at a basic monthly salary of Kshs. 15,860, effective 7th January 2014. He was not issued with a written contract of employment. He was neither house nor was he paid house allowance. He avers that he worked every day from 7.00 am until 6.00 pm, without a lunch break.

4. The 1st Claimant worked for the Respondent for a period of 14 months until 5th March 2015 when he was instructed not to report for work again. He states that no reason was given for the termination of his employment and that he was not given an opportunity to be heard. He therefore claims the following:

- a. One month’s salary in lieu of notice.....Kshs. 15,860
- b. Prorata leave.....15,860
- c. House allowance.....33,306

- d. Severance pay.....7,930
- e. 12 months' salary in compensation.....190,322
- f. Certificate of service
- g. Costs plus interest

5. The 2nd Claimant, Boniface Newton Angatia was also employed by the Respondent as a Mason at a basic monthly salary of Kshs. 15,860, effective 7th January 2014. He was not issued with a written contract of employment. He was neither house nor was he paid house allowance. He avers that he worked every day from 7.00 am until 6.00 pm, without a lunch break.

6. The 2nd Claimant worked for the Respondent for a period of 14 months until 5th March 2015 when he was instructed not to report for work again. He states that no reason was given for the termination of his employment and that he was not given an opportunity to be heard. He therefore claims the following:

- a. One month's salary in lieu of notice.....Kshs. 15,860
- b. Prorata leave.....15,860
- c. House allowance.....33,306
- d. Severance pay.....7,930
- e. 12 months' salary in compensation.....190,322
- f. Certificate of service
- g. Costs plus interest

The Respondent's Case

7. In its Memoranda of Reply dated 17th December 2015 and filed in Court on 21st December 2015, the Respondent states that the Claimants were employed as unskilled casual labourers for a period of 4 months from 22nd November 2014 until 5th March 2015. They were each paid a consolidated monthly salary of Kshs. 15,860 inclusive of house allowance and overtime compensation.

8. The Respondent avers that the Claimants were issued with several verbal warnings on account of absenteeism and incompetence. The Respondent further states that the construction project in which the Claimants were engaged, came to an end and that the Claimants' contracts of employment *ipso facto* came to an end, a fact that the Claimants were well aware of.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimants' employment was lawful and fair;
- b. Whether the Claimants are entitled to the remedies sought.

The Termination

10. The Claimants state that their employment was terminated on 5th March 2014 without justifiable cause and without notice. The Respondent's defence is that the construction work in which the Claimants

were engaged came to an end and the Claimants' employment was thereby terminated.

11. The Respondent states that the Claimants had prior notice that their employment would come to an end once the assignment in which they were engaged was completed. The Claimants told the Court that the site in which they were engaged remained active after their departure. There was also no evidence that the Claimants had prior notice that their employment would come to an end.

12. In my view the reason given by the Respondent for termination of the Claimants' employment would fall within what is generally known as redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

13. The law recognises redundancy as a valid form of termination of employment. However Section 40 of the Employment Act, 2007 sets the following mandatory conditions to be met by an employer considering termination on account of redundancy. :

40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-

a. Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

14. From the evidence on record, there was no attempt by the Respondent to comply with any of the foregoing conditions and the termination of the Claimants' employment was therefore unfair within the meaning of Section 45 of the Employment Act.

Remedies

15. Before determining the remedies available to the Claimants I need to dispense with the preliminary issue of the effective date of the Claimants employment, which is contested. The Claimants pleaded 7th

January 2014 and the Respondent pleaded 22nd November 2014 as the effective date of employment.

16. The employer is charged with the responsibility of keeping employment records and where none are produced, the Court will adopt the employee's testimony as unchallenged. With this in mind, I adopt 7th January 2014 as the effective date of the Claimants' employment.

17. That settled, I proceed to award each of the Claimants four (4) months' salary in compensation for unfair termination of employment. I also award them one (1) month's salary in lieu of notice.

18. The Claimant further claim house allowance. Section 31 of the Employment Act provides as follows:

31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

19. The Respondent chose not to document the Claimants' employment and as held in **Robai Musinzi v Safdar Mohamed Khan [2012] eKLR** where an employer fails to document the employment of an employee, the terms are subject to interpretation by the Court. In this regard, the Court did not find any evidence that the monthly salary paid to the Claimants was inclusive of house allowance. I therefore allow the claim for house allowance at the rate of 15% of the basic salary and adopt the resultant figure of Kshs. 18,239 as the Claimants' monthly salary for purposes of this claim. The claims for leave pay and severance pay also succeed and are allowed.

20. Ultimately I enter judgment in favour of the Claimants as follows:

1st Claimant: Silvanus Khayesia Khasiala

- a. 4 months' salary in compensation.....Kshs. 72,957
- b. 1 month's salary in lieu of notice.....18,239
- c. House allowance for 14 months.....33,306
- d. Leave pay for 1 year (18,239/30x21).....12,767
- e. Severance pay for 1 year.....9,120

Total.....146,389

2nd Claimant: Boniface Newton Angatia

- a. 4 months' salary in compensation.....Kshs. 72,957
- b. 1 month's salary in lieu of notice.....18,239

c. House allowance for 14 months.....	33,306
d. Leave pay for 1 year (18,239/30x21).....	12,767
e. Severance pay for 1 year.....	<u>9,120</u>
Total.....	146,389

21. The judgment amounts will attract interest at court rates from the date of judgment until payment in full.

22. I direct the Respondent to issue the Claimants with certificates of service and to pay the costs of this case.

23. It is so ordered

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2017

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JUDGE

Appearance:

Mr. Khalwale for the Claimants

Mr. Wanga for the Respondent