



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 105 OF 2015**

**BETWEEN**

- 1. TIMOTHY GAKERE GACHAGA**
- 2. HAMAD SALIM ALFAN**
- 3. SAMMY NZOKA MUTUKU .....CLAIMANTS**

**VERSUS**

- 1. KENYA MARINE CONTRACTORS**
- 2. KENYA ENGINEERING WORKERS' UNION .....RESPONDENTS**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Otieno Asewe & Company Advocates for the Claimants*

*Ndegwa Katisya Sitonik & Associates, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimants filed their joint Statement of Claim on 6<sup>th</sup> March 2015. They state they were employed by the 1<sup>st</sup> Respondent as Welders. They worked under different 3-month contracts. 1<sup>ST</sup> Claimant was employed in 2004; 2<sup>nd</sup> in 2007; and 3<sup>rd</sup> in 2008. Their contracts were all terminated by the 1<sup>st</sup> Respondent, on 8<sup>th</sup> January 2014. 1<sup>st</sup> and 3<sup>rd</sup> Claimants earned a salary of Kshs. 25,648 monthly, as of the date of termination. 2<sup>nd</sup> Claimant earned Kshs. 21,648 monthly. They were regularly sent by the 1<sup>st</sup> Respondent to work in Mozambique, Djibouti, Madagascar and Tanzania. They were always paid traveling allowance of US dollars 200 to 300.

2. On 8<sup>th</sup> January 2014, they were told they would be sent to Agoche, in Mozambique to work. This time however, the 1<sup>st</sup> Respondent offered them US dollars 10 each, as traveling allowance. They sought audience with Management, but were told they would be sacked if they insisted on agitating for a higher

rate of traveling allowance. They sought the intervention of their Trade Union, the 2<sup>nd</sup> Respondent herein. They were not assisted in any way by their Trade Union. They were summarily dismissed on the same day they were informed they would travel to Mozambique, 8<sup>th</sup> January 2014. They state termination was unfair and unlawful. They were not heard, and were denied terminal benefits. The 2<sup>nd</sup> Respondent is faulted for breaching its duty of care to the Claimants. It did not represent them. The 2<sup>nd</sup> Respondent denied the Claimants the benefit of representation, conferred on the Claimants by their membership of the 2<sup>nd</sup> Respondent.

3. Against the 1<sup>st</sup> Respondent, the Claimants pray for:-

**1<sup>st</sup> Claimant Timothy Gakere**

- a) Salary in lieu of notice at Kshs. 25,648.
- b) Unlawful salary deduction at Kshs. 19,395.
- c) Years of service at Kshs. 147,900.
- d) Compensation for unfair termination, equivalent of 12 months' salary at Kshs. 307,776

Sub-total.... Kshs. 500,719

**2<sup>nd</sup> Claimant Hamad Salim:-**

- a) Notice pay at Kshs. 21,648.
- b) Unlawful salary deduction at Kshs. 16,370.
- c) Years of service at Kshs. 87,360.
- d) Compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 259,776

Sub-total.... Kshs. 385,154

**3<sup>rd</sup> Claimant Sammy Nzoka: -**

- a) Notice pay at Kshs. 25,648.
- b) Unlawful salary deduction at Kshs. 19,648.
- c) Years of service at Kshs. 88,740.
- d) Compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 307,776

Sub-total..... Kshs. 441,559

The grand total sought by the Claimants stands at Kshs. 1,327,432. They pray also for general damages against the 2<sup>nd</sup> Respondent; a declaration that termination was unfair; costs; interest; and any other suitable relief.

4. The 1<sup>st</sup> Respondent filed its Statement of Response on 17<sup>th</sup> April 2017. Its position is that the Claimants were employed by the Respondent on various fixed term contracts of 3 months' each. The 1<sup>st</sup> Respondent had the right under the contracts, to summarily dismiss the Claimants for justifiable cause, which included disobedience of lawful or reasonable orders issued by the 1<sup>st</sup> Respondent; habitual or

willful neglect of duties; failure to carry out their duties as per their terms of employment; and disobedience of the 1<sup>st</sup> Respondent's right to transfer an Employee to another Branch, or another workplace. They were directed by the Respondent to work in Mozambique. They refused to travel, unless their salaries were increased, and their site allowance reviewed by 100%. They were invited to a disciplinary hearing, and in the presence of their Union Shop Steward, Union Representative, Personnel Officer and Project Manager, conceded they were aware refusal to travel comprised breach of contract. They were warned their conduct would lead to summary dismissal. They were given time to reconsider their stance. The 1<sup>st</sup> Respondent advised them to travel and would have their grievances addressed by the Managing Director once he was back in the country. They refused to travel. They were summarily dismissed, cleared with the 1<sup>st</sup> Respondent, they were paid all their terminal dues, and signed discharge vouchers. They have no Claim against the 1<sup>st</sup> Respondent.

5. The 2<sup>nd</sup> Respondent does not seem to have filed a Statement of Response.

6. The Parties recorded a consent order on 14<sup>th</sup> March 2017, to the effect that the dispute is considered and determined on the strength of the record. They confirmed filing of their Submissions at the last mention on 28<sup>th</sup> July 2017.

### **Submissions**

7. The Claimants submit that termination failed to meet the standards of fairness under Section 41, 43 and 45 of the Employment Act 2007. There were no charges drawn against the Claimants. Fair hearing could not have taken place within a few minutes on 8<sup>th</sup> January 2014. The minutes of the meeting were only signed by the Personnel Manager. The 2<sup>nd</sup> Respondent denied attending any disciplinary hearing. Termination was substantively and procedurally unfair.

8. The 1<sup>st</sup> Respondent submits the Claimants do not dispute that they were required to travel to Mozambique by the 1<sup>st</sup> Respondent. They concede that they refused to travel, arguing that the allowance offered to them was insufficient. They knowingly refused to obey a proper command of their Employer. They were guilty of an act of gross misconduct under Section 44 [4] of the Employment Act 2007. They were heard fairly, in the presence of Union Representative and Shop Steward. This is captured in the minutes of the meeting exhibited by the 1<sup>st</sup> Respondent. They do not merit the prayers sought.

9. The 2<sup>nd</sup> Respondent submits that the Claimants did not report their dispute to the 2<sup>nd</sup> Respondent to enable the 2<sup>nd</sup> Respondent to represent them. The Union did not neglect its responsibility to the Claimants; they failed in communicating their dispute to the 2<sup>nd</sup> Respondent. Other Members of the 2<sup>nd</sup> Respondent, who worked for the 1<sup>st</sup> Respondent, had been assisted by the 2<sup>nd</sup> Respondent when involved in a dispute with the 1<sup>st</sup> Respondent.

### **The Court Finds: -**

10. The Claimants were employed by the Respondent on various dates as Welders. They were all summarily dismissed by the Respondent on 8<sup>th</sup> January 2014. It is common ground that they were required to travel to Mozambique to work in a project the 1<sup>st</sup> Respondent was undertaking. They insisted on having their site allowances and salaries reviewed before they could travel.

11. The Court is satisfied the Claimants were dismissed for a clear act of gross misconduct. They defied a reasonable and lawful command of their Employer. They were guilty of an employment offence under Section 44 [4] of the Employment Act 2007. The 1<sup>st</sup> Respondent had valid reason to summarily dismiss the Claimants.

12. They were requested to travel to Mozambique. The project was behind schedule. They were advised to address their concerns to the Managing Director who was at the time out of the country. Their

grievances would be addressed upon the Managing Director's return. They did not budge. They remained recalcitrant. The 1<sup>st</sup> Respondent implored on the Claimants to travel. Their grievances would be addressed by the Managing Director. They maintained an attitude of stiff-necks. They acted unreasonably and the 1<sup>st</sup> Respondent had justification in ending their contracts of employment. The 1<sup>st</sup> Respondent had the right to summarily dismiss the Claimants under the Employment Act, as well as under the terms of their contracts, specifically under Clause 5. One of the grounds justifying summary dismissal, under this Clause, was willful disobedience by the Claimants, of lawful and/or reasonable orders given by the Employer.

13. The record shows there was a disciplinary hearing on the 8<sup>th</sup> January 2014. The meeting was called by the Project Manager. It was attended by the Claimant, Assistant Shop Steward, Union Representative, and the Personnel Officer. The Claimants were all allowed to state their grievances and defend themselves. They told the meeting about their salaries and allowances. The shop steward, Issack Lumbasi asked for a break to enable him persuade the Claimants to reconsider their position. When hearing resumed, the Claimants maintained their position.

14. The Claimants cannot be heard to say that they were not given sufficient time to prepare for the hearing. They did not complain at the hearing that they required more time. They went there knowing the allegations against them. They had adopted a position and were unwilling to change. They were quite rude to the Disciplinary Panel. Hamad is quoted as telling the Project Manager to postpone the project until the Claimants' grievances were addressed. He also told the Project Manager the Respondent could go ahead and recruit other Welders for the project. Fair procedure was followed. The Respondent observed the standards of fair procedure under Section 41 and 45 of the Employment Act 2007.

15. The Claim against the 2<sup>nd</sup> Respondent is that the 2<sup>nd</sup> Respondent did not represent the Claimants, as required under the terms of Claimants' membership of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent states the Claimants did not report their dispute to the 2<sup>nd</sup> Respondent.

16. There is no evidence that the Claimants officially reported the dispute to the 2<sup>nd</sup> Respondent. What is recorded however, shows the Assistant Shop Steward and the Union Representative at the shop floor, attended the disciplinary meeting. Although there was no report officially made to the 2<sup>nd</sup> Respondent, perhaps due to the fact that hearing was conducted on the same date the offence was committed, the participation of the Lumbasi and Union Representative Ibrahim Ndosi, as captured in the minutes, would answer the Claimants' assertion that the 2<sup>nd</sup> Respondent abandoned them. The prayer for damages against the 2<sup>nd</sup> Respondent is unwarranted.

17. In all the Court finds the whole Claim has no merit. The Claimants' wounds were self-inflicted. ***Their Claim is hereby rejected, with no order on the costs.***

Dated and delivered at Mombasa this 24<sup>th</sup> day of October 2017.

James Rika

Judge