



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 145 OF 2016

AUGUSTINE WAMALWA **1ST CLAIMANT**

SIMON NJUKU OMULAMA **2ND CLAIMANT**

v

OSERIAN DEVELOPMENT CO. LIMITED **RESPONDENT**

JUDGMENT

1. The 2 Claimants instituted legal proceedings against Oserian Development Co. Ltd (Respondent) on 21 April 2016 and they stated the issues in dispute as

- (i) Withholding /refusal to pay full gratuity.
- (ii) Unlawful dismissal.
- (iii) Illegal detention.
- (iv) Defamation.

2. According to an affidavit of service sworn by George Omayio Rasugu and filed in Court on 16 January 2017, the Respondent's Human Resources Manager acknowledged service of Notice of Summons on 25 April 2016 (a stamped and signed original of the Summons was attached to the affidavit).

3. The Respondent however did not enter appearance or file a Response.

4. On 30 March 2017, the Court being satisfied with the service scheduled the Cause for formal proof on 19 July 2017, and the Claimants were directed to serve a hearing notice.

5. An affidavit of service filed in Court on 13 July 2017 deposed to service of the hearing notice through registered post.

6. The Court consequently allowed the Claimant(s) to proceed with formal proof.

7. At the close of the 1st Claimant's testimony, Ms. Kiberenge for the Claimant's applied to withdraw the case of the 2nd Claimant, a request the Court acceded to.

8. The Claimant filed written submissions on 30 August 2017.

9. The Court will address the *Issues* as identified in the Memorandum of Claim and the submissions.

Unlawful dismissal

10. Augustine Wamalwa (Claimant) testified that he was a Pump Operator. He informed the Court that he was issued with a suspension letter dated 6 November 2015 alleging that he was involved in theft. The suspension was to allow for investigations.

11. In the course of the investigations, the Claimant stated that he was arrested by the Police and was placed in custody for about 2 days after which he was released without being charged and that he was issued with a letter dated 13 November 2015 terminating his contract on account of *redundancy* (for reasons best known to the Claimant, the letter, a relevant and material piece of evidence was not filed or produced in Court).

12. The redundancy narrative is corroborated by a letter dated 19 February 2016 from the Respondent's legal advisers, Macharia-Mwangi & Njeru Advocates.

13. The Court will therefore accept that the Claimant's employment was terminated on account of *redundancy*.

14. According to the Claimant, there were no valid and or fair reasons to terminate his contract on account of *redundancy* because on 16 November 2015, the Respondent published a vacancy notice for the position of Pump Operator. He produced a copy of the notice as exhibit 4.

15. The Court has no hesitation in believing the testimony of the Claimant on the notice and that the vacancy was for the position he had held.

16. The Court can therefore conclude that there was no genuine operational reason to terminate the Claimant's employment on account of *redundancy*.

17. Perhaps, the Respondent was attempting to avoid the challenges arising from investigations into the theft allegations as a basis for dismissal, but that is speculation.

18. Further section 40 of the Employment Act, 2007 provides for conditions to be followed by an employer in cases of *redundancy*.

19. The Respondent did not bother to file a Response or attend the hearing to demonstrate that it complied with the conditions fully.

20. Sections 40, 43 and 45 of the Employment Act, 2007 have placed upon employers certain statutory obligations in cases such as the present. The Respondent failed to avail itself of the opportunity.

21. The Court can therefore infer and conclude that there termination of the Claimant's contract was not for valid and fair reasons and therefore he is entitled to compensation (proved salary was Kshs 10,746/-)

Illegal detention

22. The Claimant was arrested by the Police in the course of investigations into a possible criminal offence.

23. However, the Claimant did not demonstrate that the Police did not have a genuine complaint before it worth taking the action it took.

24. The Court also notes that the Claimant did not join the Police as a necessary part in order for the Court to address the illegal detention question, for after all, it is the Police which took the decision to detain him and not the Respondent.

25. The Claimant did not prove illegal detention.

Defamation

26. The Claimant did not lead any evidence to establish the essentials of defamation and nothing turns on this issue.

Gratuity

27. The Claimant admitted that the Respondent paid him Kshs 83,000/- upon the termination of his contract. Unfortunately a breakdown of the payment was not disclosed in Court, nor did the Claimant disclose any contractual or legal foundation for the gratuity he was seeking (perhaps the breakdown was in the letter of termination).

28. The Court cannot therefore find that the Respondent owed or that the Claimant was entitled to gratuity.

Leave

29. No evidential basis for this head of claim was presented to the Court.

Overtime/night shift allowance

30. No evidential basis for this head of claim was presented to the Court.

Pay in lieu of notice

31. With the conclusion on the fairness of termination, the Claimant would be entitled to pay in lieu of notice.

Unpaid salary

32. Although pleaded, the Claimant did not disclose the month he was not paid nor the amount. This head of claim was not proved.

33. Before concluding, the Court notes that in the absence of the breakdown of dues paid to the Claimant, it would not be prudent to make any awards in respect of any dues except compensation.

34. The Claimant served Respondent for about 8 years and it is the view of the Court that the equivalent of 7 months' gross wages would be appropriate and fair.

Conclusion and Orders

35. The Court finds and holds that the termination of the 1st Claimant's contract on account of redundancy was unfair and awards him and orders the Respondent to pay him

(a) Compensation **Kshs 75,222/-**

36. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 17th day of November 2017.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kiberenge instructed by Omwoyo Masese & Co. Advocates

Respondent did not participate

Court Assistants Nixon/Martin