



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.145 OF 2014

Consolidated with

CAUSE NO.2137 OF 2014

- 1.GODFREY KITOTO OCHIENG**
- 2. VITALICE ODUOR OJODE**
- 3. WILFRED OCHIENG KUNDA**
- 4. JOSHUA OTIENO MUDUDA**
- 5. ODHIAMBO KENNEDY ODHIAMBO**
- 6. DAVID ERIC OTIENDO**
- 7. JOSEPH OKUNDI ODUKA**
- 8. ANTHONY INGOYI**
- 9. CLYDE OTIENO**
- 10. MOHAMMED SALIM**
- 11. TITUS MWANGI**
- 12. FRANK NJUMWA**
- 13. FREDERICK OKETCH**
- 14. GEORGE OMBEDHO**
- 15. PERTERSON IRERI**
- 16. ROBERT MBIA NDEGE**
- 17. WALTER LUVIA MDAYI**
- 18. FREDERICK ADANG**
- 19. JAMES MATHENGE**

20. MARTIN GITONGA

21. SAMUEL KURIA

22. ELIJAH KIPTAI

23. CHELESTINE MUGO NGONDI

24. JOSEPH NJAGI RUIRU

25. GABRIEL MWANIKI

26. PETER NGARI..... CLAIMANTS

VERSUS

1. HYDROBUILD CONSTRUCTION CO.

LTD

2. JOHN OTIENO OOKO RESPONDENTS

JUDGEMENT

ISSUES in dispute

- a. Unfair termination
- b. Unpaid salary arrears.

1. Cause No. of 145 of 2014 was filed on 7th February 2014 by 8 Claimants. Cause No. 2137 of 2014 was filed on 1st December 2014 by 19 claimants. Both suits relate to former employees of the Respondents, they were terminated in similar circumstances having been at work in South Sudan under the employment of the Respondents. These suits were consolidated under Cause No.145 of 2014 for hearing and disposal. Judgement herein relates to all the 26 claimants.

2. The Memorandum of claim was amended and filed on 19th June 2015.

3. No defence was filed. The Respondent filed notice of preliminary objection on 21st February 2014 which was disposed of through Ruling dated 17th September 2014. Despite the ruling that addressed the question jurisdiction, the Respondent advocates did not file any defence and have since not appeared to represent the Claimant.

4. The Claimants were all employed by the 1st respondent, a limited liability company incorporated in Kenya and the 2nd Respondent its director. Upon employment of the Claimants in Kenya, they were allocated work in South Sudan. The Claimants agreed with the Respondents to make deductions on their salaries while in South Sudan to be paid whenever they visited Kenya. The employment was terminated without notice while the Claimants had returned to Kenya and were adviced on diverse dates not to go back to South Sudan for work. No explanation or reasons for termination were given. The dues salaries were not paid and despite demand, such dues remained owing.

5. The claim is for the owing salaries and that the termination was unfair and compensation is due. The Claimants also seek notice pay, costs and interest on the due amounts.

6. In evidence, the 1st Claimant Godfrey Kitoto testified for and on behalf of the Claimants as

provided for under Rule 9 of the Court Rules. He testified that he is a Welder and was employed by the Respondents and his terms agreed upon between him and the 2nd Respondent the director. He was initially based in Kenya since 2010 and was then taken to South Sudan in the same capacity of Welder. He was paid a salary of Kshs.31, 000.00 per month. Part of the salary was deposited in Kenya for his family access and upkeep while he was abroad. In October 2013 the Claimant was terminated.

7. Mr Kitoto also testified that the circumstances of his termination and that of his colleagues was very sad. The Respondent left them in South Sudan as a *chokoraa*. At the time, South Sudan was undergoing civil war and there was no food and under a very hostile environment. The Respondent was facing work challenges, the 2nd Respondent was aware but failed to address the situation. Most of the 21 employees left and only 10 were left on site. Some employees sued the Respondents in South Sudan but the Respondent said that the contracts had been made in Kenya. The 2nd Respondent left the Claimants with his brother Morris who was acting manager but he also abandoned the employees. The Claimants were left to fend for themselves and seek for alms for well-wishers. The Claimants got help and assistance to come back to Kenya.

8. Kitoto also testified that the Claimant are seeking their due salaries and compensation for unfair termination. Before the termination of their employment there was no notice, they came to learn of work difficulties for the Respondent while the 2nd Respondent had left South Sudan and was in Kenya. There was no notice or the reasons given to them. They were left abroad under very difficult circumstances.

9. All the Claimants also filed their witness statements in support of the claim.

Defence

10. Upon the close of the claimants' case, the 2nd Respondent for the Respondents appeared in person and in the absence of his advocates. He admitted on 6th October 2015 that no defence had been filed. He agreed to file a consent.

Consent

11. On 14th October 2015 parties confirmed their consent dated 7th October 2015 on part issues. On 14th December 2014 parties agreed on another consent on part issues. The only outstanding issues not settled were;

- a. Notice pay;
- b. Damages for unfair termination; and
- c. Costs.

Also contested is terminal dues owing to the 1st and 9th claimants. The 4th issue is therefore;

- d. Whether the sum of kshs.50, 000.00 and Kshs.90, 000.00 is payable to the 1st and 9th Claimants respectively.

13. Both parties made their submissions on the above issues not agreed upon.

14. The Claimant submitted that the parties agreed and filed consents herein on the dues owing. Through the consents filed herein, the issue of dues owing to the Claimants was compromised. The outstanding issues therefore are the compensations due to the Claimants and if costs are to be paid.

15. The Claimants submitted that they were terminated without notice, no reasons and were abandoned in South Sudan and left without any directions. That this was a clear case of constructive termination as set out by this court in the case of **Max Masoud Roshankar versus Sky Aero Limited, Cause No.1519 of 2014** consolidated with **Mariana Onica versus Sky Aero Limited, Cause no.1518 of 2014**; that there

is constructive termination of employment where an employee is put in intolerable work conditions that forces the employee to leave their employment. That similar findings were made in **Augustine peter Obirik versus Card Centre Limited, Cause no.677 of 2012**. The Claimant gave emphasis that they are entitled to notice pay, compensation, interest and costs. That each Claimant should be issued with Certificates of Service.

16. The Respondents submitted that there are no damages or compensation due to the Claimants as the owing dues have since been paid. The circumstances of the case do not warrant payment of notice pay or compensation at 12 months. That the Claimants were not unfairly terminated. The Respondents are willing to issue Certificates of Service.

Determination

Most of the issues in dispute have since been dispensed with through the consents now filed by the parties. The only outstanding issues for determination are;

Whether the Claimant should be paid compensation;

Whether notice pay is payable; and

Whether the Claimants are entitled to interest and costs.

17. What is crucial herein is that there was no defence filed by the Respondents. Such was noted, the Respondents given time to address this issue. Upon the close of the claimants' case the Respondents were given more time to file their defence, but this was not done.

18. The claims, set out and some issues settled by consent, remained unopposed. With the noted issues for determination, such shall be assessed as they are not opposed by any defence or call for evidence to challenge the unfair circumstances leading to the termination of the claimants.

19. It is admitted that the Claimants were employed by the Respondent and had work allocated abroad, out of the country, in South Sudan. The Claimants are no longer employed with the respondent, they were forced to abandon their employment upon being left by the Respondents in South Sudan. By the time of making a decision to travel back to Kenya from South Sudan, the Claimants had not been paid their salaries, which have since been paid in consents filed herein.

20. Without any explanations or defence as to what led to the circumstances leading to the exit of the Claimants from their employment, terminal dues admitted as owing, and there being no written reasons for the exit and non-payment of owing dues, I take it the Claimants were terminated by the Respondents without any reasons contrary to section 43 of the Employment Act. Such reasons are important to give as with such, the employee enjoy rights under section 35(4) of the Employment Act thus;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

21. Without giving the reasons of termination being issued, termination of employment becomes unfair labour practice. This is contrary to section 45 of the Employment Act.

22. The evidence that the Claimants were abandoned at their place of work, they underwent intolerable conditions that forced them out of work, such, and as submitted by the Claimants effectively became constructive dismissal. Such a dismissal does not require any written notice as with it, the employer is

simply by their conduct pushing the employee out of work. The non-issuance of termination notice, or reasons for termination or a letter for summary dismissal is effectively issued through the conduct of the employee. Mr Gitoto testified that he was left in South Sudan by the Respondent officers and in the company of Morris a brother to the 2nd respondent. He was not able to give appropriate directions and was left at the mercy of well-wishers and would receive alms from well-wishers. Eventually, the Claimant was forced to travel back to Kenya under very hostile conditions. Such I find are intolerable conditions, the abandonment of work was at the instance of the Respondents and amounted to constructive dismissal.

23. In the case of **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011** the court held that;

... the basics are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

24. Therefore, in the absence of any defence to controvert the evidence and submissions by the claimants, I find that they were unfairly terminated by the respondent. They are entitled to compensation. Noting that the Claimants filed the claim in 2014, were taken through various preliminary objections that were found not warranted, they are entitled to costs. With the terminal dues now paid by consent, the payable dues herein shall not be with interest.

25. In this case therefore, without any evidence of the circumstances of the respondent, it is appropriate to award compensation for each Claimant at 6 months gross pay. Such amounts shall be assessed based on the last gross salaries paid to each claimants.

26. George Were Okello is not listed as a Claimant though his witness statement was filed. There is no awarded for this witness.

- a. **Godfrey Ochieng Kitoto gross pay at kshs.31,000.00 and is awarded Kshs.186,000.00;**
- b. **Vitalis Odour Ajode gross salary Kshs.26,350.00 is awarded kshs.158,100.00;**
- c. **Wilfred Ochieng Kunda gross salary kshs.31,000.00 is awarded kshs.186,000.00;**
- d. **Joshua Otieno Mududa gross salary Kshs.26,350.00 is awarded kshs.158,100.00;**
- e. **Kennedy Odhiambo Odiango gross salary Kshs. 37,200.00 is awarded Kshs.223,200.00;**
- f. **David Eric Otendo gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- g. **Joseph Okundi Uduka gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- h. **Anthony Ingoyi gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- i. **Clyde Otieno gross salary Kshs.26,350.00 is awarded 158,100.00;**
- j. **Mohammed Salim gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- k. **Titus Mwangi gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- l. **Frank Njumwa gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- m. **Fredrick oketch gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- n. **George Ombedho gross salary Kshs.26,350.00 is awarded Kshs.158,100.00;**
- o. **Peterson Ireri gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- p. **Robert Mbia Ndege gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- q. **Walter Luvai Mdanyi gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- r. **Frederick Adang gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- s. **James Mathenge gross salary Kshs.20,000.00 is awarded Kshs.120,000.00;**
- t. **Martin Gitonga gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- u. **Samuel Kuria gross salary Kshs.22,000.00 is awarded Kshs.132,000.00;**
- v. **Elijah Kiptai gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- w. **Chelestine Mugo Ngondi gross salary Kshs.38,750.00 is awarded Kshs.232,500.00;**

- x. **Joseph Njagi njeru gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- y. **Gabriel Mwaniki Njeru gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**
- z. **Peter Ngari gross salary Kshs.31,000.00 is awarded Kshs.186,000.00;**

Judgement is hereby entered for the Claimants against the respondent; compensation is awarded as set out under paragraph 26(a) to (z) above; costs of the suit; certificates of service shall be issued unconditionally forthwith.

Orders accordingly.

Delivered in open court at Nairobi and signed this 16th day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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