



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1714 OF 2011

ESTHER MURINGI WAHOME & 5 OTHERS.....CLAIMANT

VERSUS

**THE CEMENTERS BUILDING AND CIVIL
ENGINEERING**

CONTRACTORS LTD.....RESPONDENT

JUDGMENT

1. The claimants in cause number 1714 of 2011 aver that they were employed by the respondent orally and dismissed in the same manner. They further claimed that during their employment with the respondent, they were never paid leave and commuter allowance for the entire period worked. They further aver that they were never paid house allowance. They contend that their dismissal was without due process.
2. Regarding the 5th claimant, it was averred that she was dismissed while on maternity leave which she claimed was inhumane and discriminatory. The first claimant worked for 5 months, second claimant 3 ½ months, 3rd claimant 10 months, 4th claimant 4 months, 5th claimant 5 months, 6th claimant 9 months.
3. In response to the claim, the respondent stated that in the main that 5th claimant was not terminated on account of maternity leave but that she failed to return to work after the end of the maternity leave and that she was paid all her dues before proceeding for maternity leave. The respondent further averred that the claimants were casual workers and worked for less than one year hence were not entitled to leave. Regarding wages, the respondent stated that this was all inclusive as was mutually agreed. The respondent further averred that the termination of the claimants was occasioned by the claimants' gross misconduct of perpetually absenting themselves from work and lack of commitment to their duties.
4. In cause no. 1697 of 2011 there are eight claimants and they claim similarly that they were hired verbally and terminated in the same manner. They further complain that they were kept as casual employees for over three years contrary to provisions of the law.
5. In response to the claim, the respondent similarly averred that the claimants were casual workers whose services would end upon completion of a project hence no notice of termination was necessary. The respondent further averred that save for the 4th claimant, the rest of the claimants were outside the

purview of Employment Act 2007 which came into effect on 2nd June, 2008.

6. In cause 2080 of 2011 there is only one claimant who averred similarly that he was employed by the respondent in 2008 and was dismissed on 27th September, 2011 through a letter dated the same day. He states that the dismissal letter accused him of loss of material under his care as a storeman. According to the claimant, the decision to terminate or summarily dismiss him was without any proof or evidence that he was involved in the alleged disappearance of the stated items since no investigations were carried out to ascertain the same.

7. The Court did not find the response to the claim in the file but it cannot be assumed none was filed. The most probable thing is that the same may have been filed but misplaced which is not uncommon with the Registry as I have noted in several other cases. In any event submissions in opposition of the claim has been filed by Counsel for the respondent.

8. In cause number 1643 of 2011 there is also one claimant. He avers that he was employed by the respondent in 2003 and worked until 18th July, 2011 when his services were terminated. Before termination, he claims, the respondent never gave him a chance to defend himself. He denied being perpetually absent from duty and refusing to sign a warning letter on 16th June, 2011. According to the claimant, he had worked for the respondent for 8 years by the time his services were terminated.

9. The respondent in response to the averments in the memorandum of claim stated in the main that the termination of the claimant's services was occasioned by the claimant's gross misconduct, perpetually absenting himself from duty and lack of commitment to work.

10. The claimant in 2080, Mr. Patrick Kariuki in his oral evidence in Court stated that he was employed as a storekeeper in charge of issuing materials. It was his evidence that there was an allegation of a lock and door hinges that were missing. He was accused of being responsible. It was his testimony that before dismissal he was never given a hearing. In cross-examination he stated that the items alleged to have been stolen were in the care of the site manager. He denied ever being called, charged and conceding to the allegations against him.

11. The claimant in cause number 1714 Ms. Esther Wahome stated that she was employed in March 2011 as a cleaner and her services terminated in September, 2011. She was told there was no more work. There was no letter of dismissal. She denied that she perpetually absented herself from work.

12. The claimant in cause number 1697 of 2011 Mr. Duncan Gacheha Wainaina stated that he used to work for the respondent as a driver. He was earning Kshs.800 per day payable at the end of the month. It was his evidence that they were terminated as a group without being taken through any disciplinary process.

13. In cross-examination he stated that his services were terminated in 2008.

14. The claimant in 1643 of 2011 Mr. John Kimani stated that he was employed by the respondent as a carpenter in November, 2002 and was terminated in 2011. He was earning Kshs.550 per day but payable monthly. According to him, his services were terminated without any reason. In cross-examination he stated that he was paid Kshs.65,000/= but did not know why he was paid. He further stated that they had a dispute over the amount to be paid to each of them.

15. The respondent called one witness, a Mr. Obed Gatimu who stated that he joined the respondent in September, 2011 as Quality Management Systems Manager. According to him John Kimani, claimant in 1643 of 2011 was employed by the respondent as a carpenter in 2003 and worked until 2008 when his services were terminated. According to the witness, the claimant was seasonal worker and was hired on need basis. When the project was over the claimant would be paid his dues and only return when a new project is found.

16. In this particular case he stated that the claimant was paid his terminal dues and signed for it.

17. Concerning claimants in cause 1714 of 2011 he stated that the claimants were respondent employees for the durations pleaded and were similarly terminated when the project they were engaged on ended and paid their terminal dues for the period worked. He similarly stated for cause numbers 1697 of 2011 with regard to cause number 2080 of 2011, he stated that the claimant was dismissed after the loss of some items that were under his responsibility and that he was paid his dues upon termination. In cross-examination he stated that he was not aware if any disciplinary hearing was conducted prior to termination of the claimant in cause number 2080.

18. Counsel for the claimant Mr. Enonda submitted with regard to cause number 1714 of 2011 that the claimants were terminated without any reason and if they were declared redundant, the procedure in redundancy was not followed. Concerning cause no. 2080 of 2011 counsel submitted that the claimant was dismissed on account of the accusations over the lost items without being heard and with regard to claimants in cause no. 1697 of 2011, counsel submitted that the claimants were dismissed or declared redundant without following the laid down procedure and no payment was made on account of redundancy. The same submission applied to causes number 1643 of 2011.

19. Counsel for the respondent Mr. Kihara on the other hand submitted that the claimants in cause no.1714 of 2011 justifiably dismissed and are thus not entitled to the remedies sought. Counsel further submitted that the claimants were casual labourers paid weekly hence not entitled to one month notice or pay in lieu of notice. Regarding the 5th claimant in this cause, Counsel submitted that she was not dismissed on account of maternity leave but rather because she absconded duties after the expiry of her maternity leave.

20. Concerning cause number 1697 of 2011, counsel submitted that the Court had no jurisdiction to entertain the claim by the 4th claimant, Mr. Maxwell Omondi Otieno since the same was commenced out of time stipulated by section 90 of the Employment Act.

21. According to Counsel, the claimant was employed on 15th October, 2000 and his services terminated on 4th October, 2008 after the commencement of the Employment Act, 2007.

22. Regarding the other claimants, counsel submitted that their contracts of service were governed by the repealed Employment Act, since their services were terminated prior to the commencement of the current Act. Under the repealed Act, it was not mandatory for an employer to give reasons prior to termination of an employment contract.

23. Concerning cause number 1643 of 2011, Counsel submitted that the claimant was justifiably terminated due to perpetual absenteeism and failure to follow instructions given to him upon termination the claimant was paid his full and final dues which he acknowledged by appending his signature.

24. On cause no. 2080, Counsel submitted that the claimant who was a casual labourer was justifiably dismissed after the respondent's property which was under his custody and case went missing.

25. It is not contested that all the claimants in the consolidated causes were respondents' employees. The contested issues are whether they were validly terminated or not and further whether the claims are sustainable in law.

26. Termination or dismissal from employment is clearly stipulated in the Employment Act, 2007 for those contracts where the Act is applicable. Further, employment relationship is a contractual relationship governed by the general principles of law of contract modified by applicable employment statutes, human resource practice and principles of labour relations obtaining in the industry. The role of the Court is therefore to oversee that the entry and exit from this relationship adheres substantially to these laws, principles and practices. There need not be 100% compliance but parties need to ensure they are observed to a large extent.

27. The claimant in cause no. 1643 of 2011 was terminated via a letter dated 18th July, 2011. The letter accused him of refusal to sign for a warning letter, perpetual absenteeism and lack of commitments to work. Consequently he was paid some Kshs.65,200/= on account of leave, Notice, salary for days worked in July and service. He acknowledged receipt of this payment. Prior to termination, the respondent did not exhibit or aver by way of pleadings that the claimant was taken through a disciplinary hearing and afforded an opportunity to defend himself against the accusations leveled against him as required by the Act. To this extent the Court finds that whereas the grounds for termination may have been justifiable, the employment was terminated without following due procedure as set out in the Act hence unfair. The Court will therefore **award him five months salary** on account of unfair termination of services.

28. The other claims in the memorandum of claim are dismissed for lack of evidence and lack of any legal basis. The respondent shall issue the claimant with a **certificate of service** if not already.

29. In cause no. 1697 of 2011, the claimant aver that they were employed by the respondent, but were never issued with letters of appointment, they further complained that they were never paid leave allowance and commuter allowance. They averred that they were dismissed summarily on various dates without following due process.

30. The respondent on the other hand refuted the claimants' claims stating that they were not entitled to commuter allowance since they were picked and dropped to and from work and that their leave allowances were paid annually. The respondent further contended that the claimants were casual workers whose services were terminable when a particular site was completed and no notice was necessary for terminating their services. The respondent further contended that save for the 4th claimant, the rest of the claims were outside the purview of the Employment Act, 2007 which came into force on 2nd June, 2008.

31. The claimant never filed any reply to these very substantive defences raised by the respondent nor were they refuted during the oral testimony in Courts nor by submissions by the claimant's counsel.

32. In the claimants' supplementary list of documents filed on 25th June, 2013 is attached a notice dated 27th June, 2007 directed to the respondent concerning the 8th claimant in which he alleged that he was employed by respondent from January, 2000 to 16th June, 2007 when his services were terminated. This coupled with the pleadings are not very helpful in unravelling when exactly each of the claimants were terminated. The Court can only therefore go by the testimony of Mr. Duncan Wainaina that they were terminated as a group and this can only be somewhere in 2008 since he stated that he was employed by the respondent 2000.

33. A party moving a Court for any remedy has a duty to plead and present before Court evidence in support of the remedy sought. The Court has gone through the pleadings and the prayers sought vis-à-vis the defence raised by the respondent and is not persuaded that the claimant have presented before the Court a claim capable of being granted. Apart from seeking a declaration that the dismissals are unlawful and unfair, prayers for committal to jail are not capable of being granted. The Court therefore finds the claim not sufficiently proved and dismisses the same with costs.

34. With regard to cause no 1714 of 2011, the respondent does not deny that the claimants were its employees only that they had worked for not more than 10 months.

35. Under section 37 of the Employment Act an employee who serves for an aggregate period exceeding one month is considered a regular employee for purposes of procedure and reasons for termination and payment of service pay. There is no evidence that these claimants were assigned reasons for termination and afforded a hearing before termination. If they were declared redundant as alleged, there was no evidence that redundancy procedures as set out under the Act were followed. To this extent the Court awards them one month's salary in lieu of notice for termination and five months' salary on account of compensation for unfair termination. The respondent shall further issue the claimants with certificate of services.

36. Concerning cause number 2080 of 2011, the claimant was dismissed on 27th September, 2011 for the reason that some items under his care and custody went missing. Whereas the reason for dismissal were plausible, there was no evidence that prior to dismissal, the claimant was taken through due process as provided in the Employment Act. To this extent the Court awards him 5 months' salary as compensation for unfair termination of services. The claimant shall further have costs of the suit.

37. In conclusion the Court orders as follows:-

a. **In cause no. 1643 of 2011**

5 months salary as compensation for unfair termination.

b. **Cause no. 1697 of 2011**

This cause is dismissed with costs.

c. **Cause no. 1714 of 2011**

One month's salary in lieu of notice and 5 months salary as compensation for unfair termination.

d. **In 2080 of 2011**

5 months salary as compensation for unfair termination of services.

e. Costs in (a) (c) and (d) to the claimants.

f. The respondent shall issue all the claimants with certificates of service.

38. It is so ordered.

Dated at Nairobi this 12th day of February 2016

Abuodha J. N.

Judge

Delivered this 12th day of February 2016

In the presence of:-

.....**for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge