



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.28 OF 2015 CONSOLIDATED WITH CAUSES 29,30,31,32, 33 AND 34 ALL OF 2015

JOSEPHAT GICHAU WAIHENYA.....1ST CLAIMANT
BERNARD MWANGANGI MUNGAI.....2ND CLAIMANT
BERNARD NGARI NG'ANG'A.....3RD CLAIMANT
JOHANA KISESE NZIOKI.....4TH CLAIMANT
JOHN WAMBUA KISIMO.....5TH CLAIMANT
JOSEPH NJUGUNA MUNGAI.....6TH CLAIMANT
MBURU MWANGI.....7TH CLAIMANT

VERSUS

IGI HOLDINGS LIMITED T/A KIRIMIRI ESTATE..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The claimants filed their respective statements of claims on 27.02.2015 and their respective amended statements of claim on 03.07.2015 through Namada & Company Advocates. Each claimant prayed for judgment against the respondent for:

- a. A declaration that the dismissal of the claimant from employment was unlawful and unfair.
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. An order for the respondent to pay the claimant his due terminal benefits and compensatory damages.
- d. Interest from the date of filing the suit.
- e. Cost of the suit.

The respondent filed the statement of response on 08.04.2015, in each of the cases, through Mohamed Madhani & Company Advocates. The respondent prayed that the claimants' suits against it be dismissed with costs.

The suits were consolidated on 07.05.2015.

It is not disputed that the claimants were employed by the respondent as watchmen and deployed at the respondent's Makuyu coffee farm in Murang'a County. They were employed on diverse dates and they were placed on the same terms and conditions of service. The terms of service were as follows:

- a. Daily wage of Kshs.327.00(as per claimants' evidence) or Kshs. 237.00 (as per respondent's evidence) payable at claimants' respective bank accounts at mid and end month. The respondent's records showed pay of Kshs.237.00 per day.
- b. Working on day and night shifts interchangeably being 6.00 am to 6.00 pm and 6.00 pm to 6.00 am respectively.
- c. There was a check in and checkout register.
- d. No payslips were issued.
- e. No annual leave was given and claimants worked throughout the week including holidays and weekends without off days.

On 28.09.2014 the respondent decided to downsize the watchmen to only one night guard. The claimants considered that the workload was too high taking into account the size of the premises to be guarded and they presented the grievance to the respondent's management that the premises would not be secure with one night guard. In the process, the respondent decided to employ and deploy other guards and the claimants were orally informed that their employment had been terminated. The claimants worked closely with the police and they reported their grievance to the police but there was no amicable resolution. The claimants left employment and never heard from the respondent. They filed the suit.

The **1st issue** for determination is whether the termination was unfair. The evidence is clear. The claimants had a genuine grievance. The respondent decided to orally terminate their employment instead of addressing the complaint to reach an amicable settlement.

Under section 46(h) of the Employment Act, 2007, an employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer, except where the complaint is shown to be irresponsible and without foundation, does not constitute a fair reason for dismissal or imposition of a disciplinary penalty. The court finds no reason to doubt the claimants' account that they complained about downsizing on their deployment at the factory and the respondent's manager decided to declare them fired. The court finds that the reason for termination was unfair under sections 46(h) and 43 of the Act. Further, it is obvious that the respondent did not follow due process of a notice and a hearing as prescribed in section 41 of the Act. The court returns that the termination was unfair in substance and procedure.

The **2nd issue** for determination is whether the claimants are entitled to the remedies as prayed for. The court makes findings as follows:

1. Each of the claimants is entitled to one month's pay in lieu of the termination notice.
2. The claimants' evidence and the respondent's evidence was that the claimants worked 7 days a week without an off and each would be entitled to pay for off days as prayed for. However, the claimant's witness testified that he did not know the breakdown for the daily pay being Kshs.327.00 per day. The respondent showed that the wage was Kshs.237.00 per day with further pay going to off days and overtime. Parties appear not to have had disputes about pay and on a balance of probability the court finds that the claimants are not entitled as prayed for.
3. The claimants' and respondent's evidence was that each claimant was not given annual leave. However, the respondent's submission and evidence is that there was payment of Kshs.474.00 per month as pro-rate leave pay for 2 days per month. The prayer will therefore fail.
4. The claimants and respondent's evidence was that the claimants worked on public holidays and they are entitled to the pay for days worked on public holidays as prayed for.
5. The respondent's and claimant's evidence is in harmony that the claimants worked overtime and the respondent has showed that the same was paid for at 2.5 hours per day. The court finds that the claimants are not entitled to overtime payment as prayed for.
6. As the termination was unfair, the claimants did not contribute to it in any manner and they each desired to continue in employment, the court finds that they are, each, entitled to 12 months'

- salaries at the last monthly rate of payment.
7. Each claimant pegged the claim to salary underpayment on the Regulation of Wages (General) (Amendment) Order 2013. The respondent submitted that they paid well above the minimum wages in the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013 which was applicable to the agricultural workers like the claimants. There is no doubt that the claimants worked on a farm or agricultural enterprise and as submitted for the respondent, the prayer for underpayment will fail. The court has further found that the parties had agreed on the pay and there were no disputes on the same.
 8. Whereas parties made detailed submissions on the issue of housing accommodation and house allowance, the claimants made no claims or prayers in that regard and the issue is not before the court for determination.

For avoidance of doubt, the computations are to be done on the basis of a daily wage rate of Kshs.237.00 that the respondent established to be the agreed wage and monthly working days will be set at 26 days.

In conclusion, judgment is entered for the claimants against the respondent for:

- a. The declaration that the dismissal of each of the claimants from employment was unlawful and unfair.
- b. The declaration that the claimants are entitled to payment of terminal dues as found in this judgment and the claimants to file and serve the schedule of the computed dues in terms of findings 1, 4, and 6 in this judgment and for recording the same in court on a date convenient to the parties.
- c. The respondent to pay each claimant the judgment sum by 01.06.2015 failing interest to be paid thereon at court rates from the date of this judgment till full payment.
- d. The respondent to pay each claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Thursday, 24th March, 2016.

BYRAM ONGAYA

JUDGE