



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2041 OF 2014

JOSEPH MATITI MAEMA..... 1ST CLAIMANT

MARY MUTIO DAVID..... 2ND CLAIMANT

DOMINIC NDUNDA MUTISO..... 3RD CLAIMANT

RICHARD MULI MULWA..... 4TH CLAIMANT

VERSUS

KABIRO BUILDERS LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the constructive dismissal of the Claimants and failure to be paid their arrears and terminal dues.

2. The matter proceeded for hearing on 11th may 2016 in the absence of the Respondent who had been served with a hearing notice on 23rd March 2016, acknowledged such service. The Claimant filed Affidavit of Service sworn by Peter Mwangi Njoroge on 20th April 2016. Noting the deliberate absence of the Respondent who had knowledge of the hearing date, the court proceeded and heard the Claimant in open court.

3. The Claimants were employed by the Respondent in various capacities earning different salaries paid through vouchers. The Respondent unilaterally terminate the claimants' services on 16th June 2014 without notice.

1st claimant

Was employed on 2nd march 2007 as machine operator with a salary of kshs.15, 000;

Claims

(a) Notice pay;

(b) June 2014 salary;

(c) Leave balance 6 years

- (d) Off duty of 4 days x 12 months x 6 years
- (e) House allowance 15% of 15,000
- (f) Overtime of 4 hours x 6 days x 4 weeks x 12 months x 6 years
- (g) Salary underpayment
- (h) Compensation

Total dues Kshs.1, 406,172.00

2nd claimant

Was employed on 7th January 2008 as secretary at a salary of kshs.12, 500.00

Claims

- (a) Notice pay;
- (b) June 2014 salary;
- (c) Leave balance 6 years
- (d) Off duty of 4 days x 12 months x 6 years
- (e) House allowance 15% of 12,500
- (f) Overtime of 4 hours x 6 days x 4 weeks x 12 months x 6 years
- (g) Salary underpayment
- (h) Compensation

Total dues Kshs.1, 300,320.00

3rd claimant

Claims

Was employed on 3rd April 2011 as Turn Boy and paid kshs.10, 764.00

- (a) Notice pay;
- (b) June 2014 salary;
- (c) Leave balance years
- (d) Off duty of 4 days x 12 months x 3 years
- (e) House allowance 15% of 1510,764.00
- (f) Overtime of 4 hours x 6 days x 4 weeks x 12 months x 3 years
- (g) Salary underpayment

(h) Compensation

Total dues Kshs.648, 114.

4th Claimant

Was employed on 1st July 2010 as machine Operator and paid kshs.11, 856

Claims

(a) Notice pay;

(b) June 2014 salary;

(c) Leave balance 4 years

(d) Off duty of 4 days x 12 months x 4 years

(e) House allowance 15% of 113,634

(f) Overtime of 4 hours x 6 days x 4 weeks x 12 months x 4 years

(g) Salary underpayment

(h) Compensation

Total dues Kshs.900, 542.00

5. The claim is that the Respondent made the working environment for the claimant's unbearable and working conditions unfavourable to the extent of coercing the Claimant to write resignation letters and promising them that they would be paid their June 2014 salary and termination benefits which the Respondent failed to do. The Respondent refused to pay the Claimants their full terminal dues. Upon demand of the owing dues, the Respondent defence was that the Claimants resigned en mass so as to punish the respondent. The correct position is that the Claimants were forced to resign without notice or being paid their terminal dues.

6. The Claimants as seeking their tabulated dues.

7. In evidence, the Claimants called one witness, the 2nd Claimant, Mary Mutie David who testified for and on behalf of all the claimant. Ms Mutie testified that she was employed by the Respondent as a secretary and worked with the other Claimant sin their different capacities. None was issued with a letter of appointment and all salaries were paid through a voucher and no copies were issued tot eh claimant. They worked 7 days a week – Monday to Sunday and in a given month, one had a one day off but no extra pay was made. None of the Claimants too their annual leave but in 2014 all were given 15 days of leave.

8. Ms Mutie also testified that the owner of the Respondent Mr Kidhoria was supervising the claimant. Each Claimant would report to work at 7am and leave after 7pm and no overtime pay was made but there was a one (1) hour lunch break. As the Secretary, if anybody took annual leave she would know but this was not the case. No records were also kept for the employees.

9. On 2nd June 2014 in the morning Mr Kidoria called the Claimant and said that he was closing the company and that all the Claimants had to all resign so that he could be able to pay their terminal dues. She was called to the officer and told to resign or lose her benefits. She protested this directive to resign so as to be paid her dues as this was not the correct procedure but Kidoria said he was under a lot of

pressure. At 1pm she submitted her resignation and gave one (1) month notice. She did not resign under the terms she had been directed to state and when Kidhoria read the letter he tore it into pieces and told her how to write another letter.

10. On 15th June 2014 the Respondent gave all the Claimant 15 days leave. All the Claimants were issued with similar letter. The Respondent then said that their last working day would be 2nd July 2014 and terminal dues would be paid but this has not been done to date hence the suit in court. That the termination was most unfair noting the Respondent all along knew they were closing down but failed to give notice and then forced the Claimants to resign so as to avoid paying the terminal dues.

Defence

11. In the defence, the respondents admit they had employed the Claimants and had contracts of service with them. The Claimants resigned *en masse* so as to punish the business and to force massive losses and eventually collapse. Notice pay is not due as this was a case of voluntary resignation and were paid all their dues. The Claimants had no pending leave at the time of exit. The Claimants had one rest day per week and house allowance was part of the consolidated salary paid every month. All the Claimants worked for 45 hours a week which is within the legal provisions for the positions they held with the respondent.

12. The defence is also that each Claimant was paid per his/her individual contract of employment and no claims in this regard should arise. Upon resignation, all dues were paid in full. The claim should be dismissed with costs.

13. There was no evidence called to support the defence. The same was left bare.

Determination

14. It is trite that an employer is required to keep all employment records for each employee. Once a claim such as this one is filed in court, under Rule 4 of the Court procedure Rules, a party to the suit is required to submit all evidence and submissions in support of their case. In the case of a Respondent who is also the employer, the work records, statements of payments and schedules of taking leave, off days and or rests days, when challenged by a Claimant that such were never taken or paid for, as of necessity, that is an invitation to the employer to submit all such records as they become relevant for the effective arbitration of the dispute. In this case, the Claimant have set out their claims but the Respondent only set out general denials and failed to submit any employment records or offer any evidence to controvert the claims made. The claims are therefore not challenged in any material way.

15. The claim for constructive dismissal is accepted by these court based on the circumstances an employee sets out a shaving been placed under intolerable conditions and is therefore forced out of work by resignation as held 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.*

16. The claimant's witness was emphatic that they were abruptly called and made to resign from their employment as Mr Kidhoria their supervisor informed them that the business was not doing well. Ms

Mutie submitted her resignation letter after much insistence by Mr Kidhoria and when she gave one month notice, this was torn apart and she was made to do another letter in the terms dictated upon by Mr Kidhoria. All the other Claimants were made to write similar letters of resignation.

17. I take it that without any challenge to this evidence or submission of any record that these resignations were accepted or the labour Officer was informed of the eventuality that befell the respondent, such mass resignations were not voluntary and were forced upon the Claimants as held 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 Obirika 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.

18. I therefore find the Claimants were constructively dismissed from their employment and this amounted to unfairness under the provisions of section 45 of the Employment Act. Compensation is due.

Remedies

19. On the finding that there was unfair termination of employment, each Claimant is awarded compensation at 3 months' salary based on the last gross pay. The claim for underpayment was not supported and therefore I will apply the last paid salary in the assessment of compensation.

20. Notice pay is also due in a case of unfair termination and where there is no evidence or record of such payment. Equally leave where claimed as due and is not challenged with any evidence or record of the employee having taken such leave is payable. These are awarded to each claimant.

21. The Respondent in defence state that the Claimants were issued with contracts of service that had a salary consolidated with a house allowance. Such contracts of service are not attached or the payslips that consolidate the salary with house allowance. Such house allowance is due as claimed.

22. Off days are a legal right to an employee. Where taken, it should be paid for. Where not taken and not paid for, the due pay is at a rate regulated in law. Without any challenge to the claims for rest days, overtime due, such is awarded to each Claimant as pleaded.

Judgement is hereby entered for the Claimants against the respondents in the following terms;

- (a) A declaration that the Claimants were constructively dismissed**
- (b) Compensation awarded at 3 months gross salary;**
- (c) Notice pay for one month's salary;**
- (d) Costs of the suit;**

1st claimant

- (a) Compensation at Kshs.45,000.00;**
- (b) Notice pay Kshs.15,000.00;**
- (c) June 2014 salary Kshs.15,000.00;**
- (d) Leave balance 6 years Kshs.90,000.00;**

(e) Off duty of 4 days x 12 months x 6 years Kshs.144,000.00;

(f) House allowance 15% of 15,000 Kshs.162,000.00;

(g) Overtime of 4 hours x 6 days x 4 weeks x 12 months x 6 years Kshs.746,496.00

2nd claimant

(a) Compensation kshs.37,500.00;

(b) June 2014 salary Kshs.12,500.00;

(c) Notice pay kshs.12,500.00;

(d) Leave balance kshs.75,000.00;

(e) Off duty Kshs.158,976.00;

(f) House allowance Kshs.135,000.00;

(g) Overtime kshs.718, 848.00.

3rd claimant

(a) Compensation Kshs.32,292.00;

(b) June 2014 salary Kshs.10,764.00

(c) Notice pay Kshs.10,764.00;

(d) Leave due kshs.37,134.00;

(e) Off duty Kshs.68,544.00;

(f) House allowance kshs.58,104.00;

(g) Overtime Kshs.311, 040.00.

4th claimant

(a) Compensation Kshs.35,568.00;

(b) Notice pay Kshs.11,856.00;

(c) June 2014 salary kshs.11,856.00;

(d) Leave due kshs.54,536.00;

(e) Off duty pay kshs.100,608.00;

(f) House allowance kshs.98,164.00;

(g) Overtime pay kshs.452, 736.00.

(h) The Claimants should be issued with Certificates of Service in terms of section 51 of the

Employment Act.

(i) Costs of the Suit.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MAY 2016.

M. MBARU

JUDGE

In the presence of

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