



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**

**NAIROBI**

**CAUSE NO. 1524 OF 2014**

**FRANK ZAWADI WANJALA MUDIBO..... 1<sup>ST</sup> CLAIMANT**

**KOOME KAZUNGU..... 2<sup>ND</sup> CLAIMANT**

**FIDEL MAITHYA..... 3<sup>RD</sup> CLAIMANT**

**SYLVANO JARED MBUTU..... 4<sup>TH</sup> CLAIMANT**

**WINNIE WAWIRA NYAGA..... 5<sup>TH</sup> CLAIMANT**

**JACOB OJOO OMAMO..... 6<sup>TH</sup> CLAIMANT**

**VERSUS**

**ZIRCON GROUP LIMITED..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the wrongful, unfair and unlawful termination of employment, breach of trust and confidentiality and failure to pay terminal benefits.

2. The Claimants all being adults were employed by the Respondent with the 1<sup>st</sup> Claimant commencing employment on 28<sup>th</sup> November 2013 as a News Director; the 2<sup>nd</sup> Claimant on 28<sup>th</sup> November 2013 as Sports News Producer; the 3<sup>rd</sup> Claimant in December 2013 as a Commercial Producer, the 4<sup>th</sup> Claimant on 16<sup>th</sup> December 2013 as a News Presenter; the 5<sup>th</sup> Claimant on 1<sup>st</sup> December 2013 as Agency Account Manager, and the 6<sup>th</sup> Claimant on 26<sup>th</sup> November 2013 as a Presenter and Events manager. The Claimants were employee of the Respondent working with Urban Radio and an entity of the Respondent Company. The Claimants were also issued with contracts of employment.

3. On 2<sup>nd</sup> May 2014 the Claimants were all terminated from their employment with the Respondent without notice or justifiable cause. The Respondent stated that the claimant's positions had become redundant due to cash flow challenges. The abrupt terminations were without procedure, notice or discussions with the claimants. The Claimants were not notified that they would be terminated due to redundancy. This caused the Claimants mental anguish and distress as the law was not followed. The Claimants are seeking;

*i. One month's pay in lieu of notice*

*ii. Damages for wrongful dismissal*

*iii. Payment in lieu of annual leave and*

*iv. Severance pay.*

4. The Claimants were also not issued with certificates of service and also seek for costs.

5. In evidence, the Claimants witness was Jacob Ojoo Omamo the 6<sup>th</sup> Claimant who testified that he is trained in media and radio and has now ventured into television.

On 1<sup>st</sup> December 2013 he commenced work with the Respondent upon issuance of a contract of employment as a Public Relations manager and Presenter. The Claimant was sent to Kisumu at Urban Radio. That the other Claimants were also employed around the same time and each issued with a contract of employment. The Claimants were the first employees of the Respondent which started operations on 1<sup>st</sup> December 2013.

6. Mr Omamo also testified that he was paid kshs.118, 000.00 per month but the full amount was never paid. The salary paid was not inclusive of a house allowance and the pay slip did not reflect the payment of such an allowance. The salaries were not paid regularly and it became very difficult as he could go for 2 months without pay. He had to move to Kisumu at great expense as he was recruited while in Nairobi where he was based. He went into great expense trying to get accommodation in Kisumu and make the house habitable. The Claimant made effort to reach out to the management to pay but they refused to pick his calls.

7. Mr Omamo also testified that he was called by the Respondent who said that they were going to downsize the company as they could not afford to pay salaries and that due to financial challenges he was terminated. There was no notice and he was simply called to Nairobi from Kisumu abruptly without prior information that he was coming to receive his termination notice. He was not paid salary arrears; no severance pay; no notice pay or leave pay for days due. All the other Claimants were issued with similar termination letters without prior notice.

8. The Claimant on cross-examination testified that under his contract he was to be on probation for 6 months ending in May 2014 as he commenced work on 1<sup>st</sup> December 2013. He was not privy to the financial position of the Respondent and he was busy setting up the Kisumu office so as to go on air and attract commercial advertisements. The Claimants made effort not to complain due to non-payment of salaries until the time of termination. The salary arrears have not been paid.

9. The Claimant also called Winnie Wawira Nyaga, the 5<sup>th</sup> Claimant as a witness. She testified that she is a Salesperson having been trained in Sales and Marketing and Customer Service. The Respondent employed her from December 2013 as the Agency Accounts Manager to be paid kshs.40, 000.00 and commissions on any new business. Other benefits to the employment were provision of mobile phone allowance and fuel allowance due to the nature of work that required constant movement.

10. Ms Nyaga also testified that she was paid kshs.15, 000.00 via Mpesa and was then forced to resign from her employment on 17<sup>th</sup> February 2014. That due to the nature of work, she was traveling and visiting clients to source business and incurred costs. She asked to meet management over the non-payment of salary and allowances after the January salary not being paid. She met with Ben Ogombe, the Head of Sales and Diana Mumo, Head of Legal Department who coerced her to resign. The Claimant refused to resign until her dues were paid. She was later called to the office by Mr Ogombe but she had no money to pay for her transport and could also not be able to pay her rent. She was then forced to resign.

11. Ms Nyaga is claiming for Kshs.25, 000.00 being balance of salary not paid; February salary; and compensation for constructive dismissal; leave allowance; unpaid house allowance and costs.

## Defence

12. In defence, the Respondent admit they had employed the Claimants but they all were under probation at the time of termination. That under section 42(4) of the Employment Act, the Respondent had the right to terminate the Claimants upon 7 days' notice or payment in lieu. The termination was not unlawful and redundancy did not arise since the Claimants were still on probation and there was liberty to terminate. On 14<sup>th</sup> March 2014 via internal memo, the respondents extended the probation period for all staff for a further 3 months ending June 2014. That the Respondent acted within the law and the claims by the Claimant should be dismissed with costs.

13. In evidence, the respondent's witness was Ben Ogombe, the General Manager of the Respondent which operates a radio station. He worked with the Claimants and each signed a contract of employment with the 6<sup>th</sup> Claimant reporting to work from 1<sup>st</sup> December 2013 at Kisumu and the others reported on 1<sup>st</sup> January 2014. The Claimants were to be on probation for 3 months which was extended to 6 months. Probation was to end on 30<sup>th</sup> June 2014.

14. Mr Ogombe also testified that Winnie Nyaga resigned from her position voluntarily with effect from 18<sup>th</sup> February 2014 and other Claimants were terminated on 2<sup>nd</sup> May 2014 while they were still on probation. That Winnie Nyaga was called to the office on 17<sup>th</sup> February 2014 as the Respondent wanted to know why she was not at work where she chose to resign while still on her probation period.

15. The Respondent was not able to pay salary arrears to the Claimant as the Respondent was facing hard financial times. This has not improved and the Respondent is still not able to pay;

January 2014 the Respondent paid full salaries;

February 2014 the Respondent paid half salaries;

March 2014 the Respondent paid half salaries

16. All salaries were deposited in the bank accounts. Such was not inclusive of the house allowance as the contract of employment made provision for an all-inclusive salary.

## Submissions

17. In submissions, the Claimants submitted that they were wrongfully terminated on account of redundancy. The termination notice indicated that the Respondent was facing major financial problems and therefore had to reduce the workforce and that their positions would no longer be required. That such loss of employment is defined by the Employment Act as a situation of redundancy under the provisions of section 40 as held in the case of **hesbon Ngaruiya Waigi versus Equatorial Commercial bank Limited [2013] eKLR**. In this case the mandatory provisions of the law were not adhered to. The notice required in a redundancy situation was not issued or a payment in lieu of such notice made.

18. The Claimants also submitted that the Claimants were under probation based on their letters of employment and as recognised by section 42 of the Employment Act. That the provisions of section 42 do not oust the operation of section 40 on redundancy situation and to engage in such malpractice is an unfair labour practice.

19 The resignation of the 5<sup>th</sup> Claimant amounted to constructive dismissal as her salary had not been paid and was forced out of work. The Claimant was not able to return to work due to non-payment of her salary which led to her resignation and was therefore not voluntary as it was caused by the Respondent as held in **Emmanuel**

**Mutisia Solomon versus Agility Logistics, Cause No.1448 of 2011.**

20. The Respondent on their part submitted that section 42 of the Employment Act ousts the operation of section 41 of the Act where the employer has a right to terminate an employee on probation with less notice and without giving reasons or a hearing. What is contemplated under section 40 of the Employment Act on redundancy is not applicable to employees on probation. Probationary contracts of employment are terminable on short notice as held in **Jalang'o & Another versus Amicabre Travel Services Limited, Cause no.1068 of 2012.**

21. The Respondent also submitted that save for what is admitted by the Respondent that the Claimants are entitled to notice pay of 7 days, the claims by the Claimants should be dismissed with costs.

### **Determination**

Whether the Claimants were terminated on probationary contracts of employment; Whether the Claimants were terminated due to redundancy;

Whether the 5<sup>th</sup> Claimant was constructively dismissed;

Whether there are any remedies.

22. Probationary contracts of employment are regulated under section 42 of the Employment Act thus;

*42. (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*

*(2) A probationary period shall not be more than six months but may be extended for a further period of not more than six months with the agreement of the employee.*

*(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*

*4. A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

23. While on probation, an employee can be terminated without a hearing; probation period can be extended with the consent of the employee; probation cannot be for more than 12 months [one year]; while on probation and employee can be terminated on 7 days' notice or payment in lieu of such notice. In this case the Claimants were under an employment contract that stipulated probation period to be for 3 months. Paragraph (1) (f) of the *letters of Appointment* for the Claimants set out the probation period. Such period was to be respected by the parties unless changed by consent as held in the case of **Peris Nyambura Kimani versus Dalbit Group limited, Petition No.63 of 2014** that where an employee completes the probation period and the same is not extended by consent, the employee becomes automatically confirmed in to permanent employment by operation of the law.

24. Probationary period has a purpose. This is meant to evaluate an employee and confirm them into employment or extend the same if not satisfied or terminate the contract if the employee's performance is below expectation. However probation period should not be abused and turned into exploitation of an employee for the simple reason that once an employer has benefitted from the labours of such an employee they can abruptly and without notice or due cause issue termination notice so as to avoid a confirmation and the benefits that go with it. An evaluation of an employee before confirmation into employment and a transition from probation to full time employment is therefore not just for the benefit of the employee. It cuts both ways. The employer has a duty to give reasons of termination if indeed it is not the probation term that is the issue and the employee who has not performed well during probation may be terminated or such probation period extended to period of not more than 12 months. However, where the terms of probation change, the employer must issue a personal and written notice to the subject employee and in the case of changes to time of probation, the employee must give their consent to the

extension. The extension of the probation period must therefore be with the full knowledge and consent of the employee. Otherwise, without such consent, the employer cannot change the same *suo motto* and where the employee refused to have such extension upon notice, the employer may terminate the employment.

25. In this case it is apparent that the respondents were facing difficult financial times. They had not paid the Claimants full salaries. The Respondent were a young business and were not able to sustain operations. It is therefore not a good labour practice to apply the probationary provisions of the contract to assert that the Claimants were only entitled to 7 days' notice and there was no other reason for the termination. In any case, where the Claimants were good employees, such should not be watered down for the simple reasons that the Respondent could not be able to pay the due salaries.

26. The Claimants save for the 5<sup>th</sup> Claimant were all terminated on 2<sup>nd</sup> May 2014. The internal memo and notice extending the probation period to 30<sup>th</sup> June 2014 is not accompanied by any consents by the Claimants that indeed they were aware of the extension and gave their written consents to the same. In any event, the 6<sup>th</sup> Claimant Mr Omamo was based in Kisumu. How did he access the information and memo submitted by the respondent? Was it sent to him and did he give his consent? These are serious grey areas that the only confirm that the probation period ended as noted in the contracts of employment after 3 months. In the case of **Gladys Agayo versus Somak Travel Ltd, Cause No. 413 of 2014** the court held;

*The contract of employment is personal and cannot be unilaterally reviewed to the disadvantage of an employee. To assume that employee receive crucial and important information relevant to their work performance, benefit and direction through the grapevine is a practice that is not reasonable and inappropriate for an entity such as the respondent.*

27. All relevant and crucial information with regard to employment must be brought to the attention of an employee. Posting information on the notice board or the assumption that once a memo has been sent the employees will get to learn about the same through workmates is wrong. In this case;

The 1<sup>st</sup> Claimant contract dated 28<sup>th</sup> November 2013 made provision of probation for 6 months;

The 2<sup>nd</sup> Claimant contract dated 28<sup>th</sup> November 2013 made provision for probation for 3 months;

3<sup>rd</sup> Claimant did not attach his contract to the Claimant and there was no evidence as to the nature of probation period;

4<sup>th</sup> Claimant contract dated 16<sup>th</sup> December 2013 made provision for probation at 3 months;

The 5<sup>th</sup> Claimant resigned with effect on 18<sup>th</sup> February 2014; and

The 6<sup>th</sup> Claimant contract dated 26<sup>th</sup> November 2013 provided for 6 months' probation.

28. I therefore find the claimants, save for the 5<sup>th</sup> Claimant completed their probation periods based on their contracts of employment;

The 1<sup>st</sup> claimant's probation was to end on 28<sup>th</sup> May 2014;

The 2<sup>nd</sup> claimant's ended on 28<sup>th</sup> February 2014;

The 3<sup>rd</sup> Claimant has no details for the court assessment;

The 4<sup>th</sup> claimant's probation period ended on 16<sup>th</sup> March 2014;

The 5<sup>th</sup> Claimant resigned on 18<sup>th</sup> February 2014; and

6<sup>th</sup> Claimant probation period was to end on 26<sup>th</sup> May 2014.

29. The application of section 42 of the Employment Act as noted above is not to aid an employee who otherwise does terminate employment for reasons other than the terms of probation. The notice sent out to the Claimants on 2<sup>nd</sup> May 2014 were clear in their content and context. The termination of employment was due to *major cash flow problems and in efforts to manage the same, the company has decided to implement a work force reduction. In that regard therefore, your position shall no longer be required.*

30. Where indeed the Respondent wished to rely on the probationary terms, nothing prevented them from doing so. By the use of the reason of *cash flow problems and in efforts to manage the same, the company has decided to implement a workforce reduction* the Respondent was essentially making the same from probationary provisions to a redundancy situation regulated under section 40 of the Employment Act. Had there not been cash flow problems, there would have been no need for staff reduction. The Respondent does not aid their case at all as there was no evidence with regard to how many employees they had and whether they were all affected by the termination notice, but I take it Ben Ogombe and Diana Mumo as well as Anthony Lugaho were still in the employment of the respondent. To therefore set apart the Claimants and terminate their employment due to cash flow problems without notice or or inform the Labour Officer or give consideration to the provisions of section 40, I find to be unfair.

**31. The claimants, save for the 5<sup>th</sup> Claimant were all entitled to notice pay as contemplated under section 40 of the Employment Act. However, none of the Claimants had served for a period of over one (1) year to qualify for severance pay. This however does not in any way diminish the unfair circumstances of the termination and compensation is due. The 2<sup>nd</sup> and 4<sup>th</sup> Claimants had long completed their probation periods and on the application of section 40 of the Employment Act, each is awarded compensation at 3 months each. The 1<sup>st</sup> and 6<sup>th</sup> Claimant were yet to complete their probation period and save for the unfair termination, this was foreseeable but were denied the chance to do so. Each is awarded compensation equivalent to one months' pay.**

32. On the case of the 4<sup>th</sup> claimant, her evidence is that she was called to the office by Ben and Diana on 17<sup>th</sup> February 2014 and made to resign from her employment. On 4<sup>th</sup> March 2014 the 5<sup>th</sup> Claimant wrote a letter protesting her treatment and the fact that she had been forced to resign from her employment. On the same date, the Respondent officer in reply to the Claimant had sent an email acknowledging the resignation and sending details of final dues.

In this regard, Ms Nyaga, the 5<sup>th</sup> Claimant testified that she was not paid her January salary in time and due to the nature of her work which required constant movements to clients, she was not able to pay her rent or get transport to work and thus stopped reporting to work. Mr Ogombe in his evidence confirmed these facts when he testified that the 5<sup>th</sup> Claimant stopped reporting to work and was summoned. I therefore take it, the non-payment of salaries to the 5<sup>th</sup> Claimant made her unable to attend to her duties effectively.

33. It is trite that an employee who attends to their work should be paid her dues. Where such dues are payable as set out in a contract of employment such as the one the 5<sup>th</sup> Claimant had, the delay or non-payment of the same did not have justification. Where the Respondent had hired the Claimant and were unable to pay, the law applicable was not applied. To therefore fail to pay and employee is tantamount to reducing them into a position of indignity, it is degrading and inhuman. Such is punishment that is unwarranted. The failure to pay salaries and then accuse an employee of not reporting to work is an unacceptable labour practice.

34. I therefore find, the resignation of the Claimant due to non-payment of her due salaries was justified and was forced upon her and therefore this was constructive dismissal. This is an unfair labour practice.

## Remedies

35. On the remedies due, by letter dated 6<sup>th</sup> July 2014 and by the evidence of the respondent's witness Ben Ogombe, the Claimants are still owed salaries in arrears. Save for notice pay as computed for each claimant, the following are confirmed as due and owing and awarded to each claimant;

### **Frank Wanjala Zawadi Mudibo**

February arrears Kshs.37, 408.29

March arrears Kshs.35, 287.43

April salary kshs.74, 816.58

### **Koome Kazungu**

February arrears Kshs.28, 107.60

March arrears Kshs.27, 196.74

April salary kshs.56, 215.20

### **Fidel Maithya**

February arrears Kshs.37, 408.29

March arrears Kshs.35, 287.43

April salary kshs.74, 816.58

### **Silvano Jared Mbatu**

February arrears Kshs.25, 782.42

March arrears Kshs.26, 545.80

April salary kshs.51, 564.85.

36. The 6<sup>th</sup> claimant, Mr Omamo testified that he was paid less his contract amount at Kshs.118, 000.00 which was less house allowance. He had salary arrears over the months which have not been paid. The Claimant was in Nairobi but was forced to move to Kisumu where he had to rent new accommodation. The net salary for the 6<sup>th</sup> Claimant is set out under clause (6) of the *letter of appointment*. It makes a provision of Kshs.118, 000.00 as his net salary. In the pay slip issued, the Claimant had a gross salary of **Kshs.158, 889.00** and upon the statutory deductions, this became **Kshs.112,56** These figures do not tally. The chargeable amounts of *pension and NSSF* are combined and then made part of the deductions made. This does not amount to the contract net amounts set out as kshs.118, 000.00.

37. On the *Client Payment Processing Advice Slip* submitted by the respondent, on

31.<sup>st</sup> January 2014 the amounts payable to Mr Omamo is kshs.112, 055.60.

38. In February 2014, Mr Omamo was paid Ksha.55, 387.10 in salary. There is no

other record of any salary paid to the 6<sup>th</sup> claimant. The gross salary therefore remained at Kshs.158, 889.00 and upon deduction of statutory dues, an amount of Kshs.112, 055.00 was paid. The gross pay is

confirmed in the pay slips submitted by the respondent.

39. On 2<sup>nd</sup> March 2016, the court directed the Respondent to file records of payment of all salaries. The Respondent filed the records on 31<sup>st</sup> March 2016. These records only show the 6<sup>th</sup> Claimant was paid his salary for January 2014 at kshs.112, 056.00 and for February 2014 at kshs.55, 387.10. I take it that;

January 2014 salary was paid less Kshs.5, 944.00 of the agreed net salary;

February 2014 salary was paid less Kshs.62, 613.00 of the agreed net salary;

March 2014 salary due at kshs.118, 000.00

April 2014 salary due at kshs.118, 000.00

May 2014 salary for 2 days worked due at Kshs.7, 867.00.

40. Such amounts in salaries are all due to the 6<sup>th</sup> claimant.

41. On the claim for notice pay, as set out above, in a case of redundancy, notice pay is due for one month. Each claimant, save for the 5<sup>th</sup> Claimant are entitled to one

(1) months gross pay as under section 49(1) (c) of the Employment Act.

42. Leave was due at 25 working days to be calculated on a pro rata basis per year. Such on average amounted to 2 days leave per month for each Claimant for each month served. Annual leave is due in accordance with section 28 of the Employment Act and where not paid it becomes part of terminal dues payable in accordance with section 49(1)(c), that is on the gross pay. In this case leave is therefore due;

a) 1<sup>st</sup> Claimant prorated leave of 10 days based on his gross salary amounts to Kshs.34, 557.00;

b) 2<sup>nd</sup> Claimant prorated leave of 10 days based on gross pay amounts to Kshs.25, 233.00;

c) 3<sup>rd</sup> Claimant prorated leave of 10 days based on gross pay amounts to Kshs.34, 557.00;

d) 4<sup>th</sup> Claimant prorated leave of 10 days based on gross pay amounts to kshs.22, 902.00;

e) 5<sup>th</sup> Claimant prorated leave days of 4 days Kshs.5, 333.00; and

f) 6<sup>th</sup> Claimant prorated leave days of 10 days based on gross pay amounts to kshs.52, 963.00.

43. The claim of severance pay is stipulated under section 40 of the Employment Act and the same is payable in the context of each full year worked. The Claimant served for periods of less than 5 months, the dues of severance pay and therefore not payable. Such is declined.

44. On the claim for house allowance, I find the contract agreed amounts were all inclusive and the Claimants cannot claim for housing or an allowance thereof outside their contracts of employment. Such is declined.

**Judgement is hereby entered for the Claimants in the following terms;**

**a) I declare the Claimants were unfairly terminated;**

**b) Compensation is awarded accordingly;**

**c) Notice pay is due;**

**d) Leave due is awarded;**

**e) Unpaid salaries are awarded accordingly;**

**1<sup>st</sup> Claimant - Frank Wanjala Zawadi Mudibo**

a) Compensation awarded at one (1) month salary Kshs.74,816.00;

b) Notice pay of 14 days Kshs.37,408.00;

c) Leave due Kshs.34,557.00;

d) February arrears Kshs.37,408.29

e) March arrears Kshs.35,287.43

f) April salary kshs.74,816.58

**2<sup>nd</sup> Claimant - Koome Kazungu**

a) Compensation awarded at 3 months' salary Kshs.168,645.00;

b) Notice pay Kshs.56,215.00;

c) Leave due Kshs.23,233.00;

d) February arrears Kshs.28,107.60

e) March arrears Kshs.27,196.74

f) April salary kshs.56,215.20

**3<sup>rd</sup> Claimant - Fidel Maithya**

a) February arrears Kshs.37,408.29

b) March arrears Kshs.35,287.43

c) April salary kshs.74,816.58

**4<sup>th</sup> Claimant - Silvano Jared Mbatu**

a) Compensation at 3 months' salary Kshs.154,692.00;

b) Notice pay Kshs.51,564.00;

c) Leave due Kshs.22,902.00

d) February arrears Kshs.25, 782.42

e) March arrears Kshs.26,545.80

f) April salary kshs.51, 564.85.

**5<sup>th</sup> Claimant – Winnie Wawira nyaga**

- a) I declare the Claimant was constructively dismissed from employment;
- b) Compensation awarded at one (1) month salary at Kshs.40,000.00; and
- c) Leave due awarded at Kshs.5, 333.00.

**The 6<sup>th</sup> Claimant – Jacob Ojoo Omamo**

- a) Compensation awarded at Kshs.158,889.00;
- b) Notice pay for 14 days Kshs.79,445.00;
- c) January 2014 salary was not paid Kshs.5,944.00;
- d) February 2014 salary not paid less Kshs.62,613.00;
- e) March 2014 salary due at kshs.118,000.00
- f) April 2014 salary due at kshs.118,000.00
- g) May salary for 2 days worked due at Kshs.7, 867.00.

**h ) The Respondent should unconditionally issue the Claimants with Certificates of Service pursuant to section 51 of the Employment Act; and**

**i) Costs to the claimants.**

**Orders accordingly.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2016.**

**M. MBARU**

**JUDGE**

In the presence of

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