



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

CAUSE NO 1082 OF 2014

CONSOLIDATED WITH CAUSE NO 1083 OF 2014

AND

CONSOLIDATED WITH CAUSE NO 1084 OF 2014

AND

CONSOLIDATED WITH CAUSE NO 1085 OF 2014

ELLY MADIKA AMOS..... 1ST CLAIMANT
HENRY MUNALA ACHIMOLA..... 2ND CLAIMANT
JUSTUS OWITI OWATE..... 3RD CLAIMANT
SEBASTIAN BAHATI INGASO..... 4TH CLAIMANT

VS

JANKI ENTERPRISES LIMITED.....RESPONDENT

AWARD

Introduction

1. This consolidated action is brought by the Claimants against their former employer,

Janki Enterprises Limited. The respective claims are contained in separate Memoranda filed on 30th June 2014. The Respondent filed separate Memoranda of Defence on 21st July 2014. By consent of the parties, the four causes were consolidated for disposal. At the hearing the 2nd Claimant, Henry Munala Achimola testified for the Claimants and the Respondent called its Managing Director Naran Valji Patel and Supervisor, Charles Nyambogo.

The Claimants' Case

2. The 1st Claimant, Elly Madika Amos was employed by the Respondent as a general labourer on 30th June 2007. He was later promoted to the position of turn boy. Sometimes in September 2013, the 1st Claimant was summoned by his supervisor, Charles Nyambogo who notified him that there was shortage of work. He was told to go home and wait to be recalled. He was however not recalled.

3. The 1st Claimant pleads unlawful and unfair termination of employment and claims the following:

a) One month's salary in lieu of notice.....	Kshs. 9,900
b) Leave pay for 6 years.....	59,400
c) Service/gratuity for 6 years.....	29,700
d) Unpaid salary for 6 months.....	59,400
e) 12 months' salary in compensation for unlawful termination.....	118,800
f) Costs plus interest	

4. The 2nd Claimant, Henry Munala Achimola was employed as a turn boy in January 2009. He worked as such until October 2013 when he was notified by his supervisor, Charles Nyambogo that there was shortage of work. He was asked to go home on the promise that he would be recalled, a promise that the Respondent did not honour.

5. The 2nd Claimant claims that this amounts to an unlawful and unfair termination of his employment and therefore seeks the following:

a) One month's salary in lieu of notice.....	Kshs. 9,300
b) Leave pay for 4 years.....	37,200
c) Service/gratuity for 4 years.....	18,600
d) Unpaid salary for 5 months.....	46,500
e) 12 months' salary in compensation for unlawful termination.....	111,600
f) Costs plus interest	

6. The 3rd Claimant, Justus Owiti Owate was employed as a general labourer in June 2009 and was promoted to the position of turnboy in June 2012. In October 2013, he was informed by his supervisor, Charles Nyambogo that there was shortage of work. Nyambogo asked the 3rd Claimant to go home and report back the following day. Upon reporting to work as advised, he was notified that there was no work to be done.

7. The 3rd Claimant kept reporting at the Respondent's premises but he was not assigned any work. In mid December 2013, a supervisor told him that he would be recalled once work became available but this never came to pass.

8. The 3rd Claimant states that this amounts to unlawful and unfair termination of his employment and claims the following:

a) One month's salary in lieu of notice.....	Kshs. 8,400
b) Leave pay for 4 years.....	33,600
c) Service/gratuity for 4 years.....	16,800
d) Unpaid salary for 5 months.....	42,000
e) 12 months' salary in compensation for unlawful termination.....	100,800
f) Costs plus interest	

9. The 4th Claimant, Sebastian Bahati Ingaso was employed as a general labourer in May 2010. Sometime in March 2013, he was summoned by his supervisor, Charles Nyambogo who informed him that there was shortage of work. He was then instructed to go back home on the promise that he would be recalled.
10. The 4th Claimant who was not recalled as promised states that the Respondent unlawfully and unfairly terminated his employment. His claim is as follows:

a) One month's salary in lieu of notice.....	Kshs. 8,100
b) Leave pay for 3 years.....	24,300
c) Service/gratuity for 3 years.....	12,150
d) Unpaid salary for 11 months.....	89,100
e) 12 months' salary in compensation for unlawful termination.....	97,200
f) Costs plus interest	

The Respondent's Case

11. In its various responses filed on 21st July 2014, the Respondent states that the Claimants were on and off piece work employees paid on a daily basis as and when they worked. It is the Respondent's case therefore that there was no contractual relationship between itself and the Claimants beyond the days worked. The Claimants were paid for the days worked in full. The Respondent further states that the Claimants filed a labour dispute at the Labour Office in Kajiado which they later abandoned.
12. The Respondent states that the 1st Claimant, Elly Madika Amos was alternately engaged by one of the Respondent's employees, Alphonse Ingaso to drive his lorry. In addition, Madika was engaged in other establishments such as Steel Mills, Export Processing Zone, cement factories and several construction sites.
13. In its Response to the claim by the 2nd Claimant, Henry Munala Achimola, the Respondent states that Achimola was alternately engaged as a turn boy by Alphonse Ingaso and could not therefore have worked for the Respondent continuously. Additionally, Achimola worked in other establishments such as Steel Mills, Export Processing Zone, cement factories and several construction sites.
14. With respect to the 3rd Claimant, Justus Owiti Owate, the Respondent states that between March 2012 and March 2013, he did not do any work. Further, in the course of his engagement with the Respondent, Owate was an alternate worker in other establishments such as Steel Mills, Export Processing Zone, cement factories and several construction sites.
15. The Respondent states that the 4th Claimant, Sebastian Bahati Ingaso, is the son of Alphonse Ingaso who is an employee of the Respondent. The 4th Claimant whose school fees the Respondent assisted in paying would occasionally do manual semi-skilled work at the Respondent Company.
16. In addition, Ingaso was engaged as an alternate worker in other establishments such as Steel Mills, Export Processing Zone, cement factories and several construction sites. The Respondent states that the 4th Claimant was never its employee.

Findings and Determination

17. There are three issues for determination in this case:
 - a. The nature of the Claimants engagement with the Respondent;
 - b. Whether the Claimants have made out a case for unlawful termination;
 - c. Whether the Claimants are entitled to the remedies sought.

Nature of Engagement

18. In its various responses filed in Court the Respondent states that the Claimants were engaged on casual basis and that there was no contractual relationship beyond the days worked.
19. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”

20. According to their Memoranda of Claim, the Claimants were paid weekly at daily rate figures ranging from Kshs. 270 to 330. The question then is whether this meant that they were casual employees. In my view, an employee is not rendered casual by the mere fact that they earn a daily rate. Indeed Section 37(1) of the Act provides for conversion of casual employment to term contract where an employee has worked for a continuous period of at least one month.
21. The Respondent states that the Claimants reported intermittently and were in fact engaged in other establishments as well. There was however no evidence to support this assertion
22. The Respondent also produced a number of petty cash vouchers showing payment to employees, including the Claimants. I have scrutinised these vouchers and make three observations; first, they are all for the year 2013 when the Claimants left the Respondent's employment; second, the dates on the vouchers appear to have been written by a different hand from the one that wrote the names and figures; third, the Respondent did not call the makers of these documents to enhance their veracity.
23. Moreover, none of the Respondent's witnesses could tell the exact periods of the Claimants' employment. An employer who claims that an employee is a casual is expected to produce a casuals register in proof. In the absence of any such register coupled with the doubts I have cast on the petty cash vouchers as presented I have arrived at the conclusion that the Respondent's claim that the Claimants were casuals is without basis and is therefore rejected. Consequently the Court finds that the Claimants were term employees as defined under Section 37(1) of the Employment Act.

The Termination

24. Having settled the question as to the nature of the Claimants' engagement with the Respondent, I now turn to the termination. The Claimants' case is that they were informed by their supervisor, Charles Nyamboga that there was scaling down of work. They were therefore advised to go home on the promise that they would be recalled which promise was not honoured.
25. The Respondent's defence is that the Claimants were casual employees who worked on need basis and could not therefore claim that they were terminated. In light of the finding that the Claimants were in fact not casual employees, this defence must collapse
26. As a result, the Court adopts the Claimants' evidence that they were terminated on the ground of scaling down of work. This would fall under what is known as redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

27. While the law recognises redundancy as a lawful means of termination of employment, it must be undertaken within the following conditions set out under Section 40 of the Employment Act:
- a. ***where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the***

employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

- b. *where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*
- c. *the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees a*
- d. *where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
- e. *the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
- f. *the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
- g. *the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.*

28. In the instant case, there was no evidence of any adherence to these conditions and as held by this Court in *Francis Maina Kamau v Lee Construction [2014] eKLR* where an employer declares a redundancy without observing the conditions set out under Section 40, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.

Remedies

29. Arising from the foregoing I find that the Claimants are entitled to compensation for unlawful termination of employment as well as one month's salary in lieu of notice. The Respondent admitted that the Claimants were not granted any leave and the claims for leave pay are therefore allowed. I also allow the claims for service pay.

30. The claims for unpaid salary were however not proved and are dismissed.

31. Cumulatively I make an award in favour of the Claimants in the following terms:

1st Claimant-Elly Madika Amos

- a) 6 months' salary in compensation for unlawful termination..... Kshs.59,400
- b) 1 month's salary in lieu of notice..... 9,900
- c) Leave pay for 6 years & 3 months $(9,900/30 \times 21 \times 6 + 9,900/30 \times 1.75 \times 3)$..43,313
- d) Service pay for 6 years $(9,900/30 \times 15 \times 6)$ 29,700
- Total..... 142,31**

2nd Claimant-Henry Munala Achimola

- a) 4 months' salary in compensation for unlawful termination..... Kshs.37,200
- b) 1 month's salary in lieu of notice..... 9,300
- c) Leave pay for 4 years & 10 months

(9,300/30x21x4+9,300/30x1.75x10).....	31,465
d) Service pay for 4 years (9,300/30x15x4).....	18,600
Total.....	96,565

3rd Claimant-Justus Owiti Owate

a) 4 months' salary in compensation for unlawful termination.....	Kshs.33,600
b) 1 month's salary in lieu of notice.....	8,400
c) Leave pay for 4 years & 4 months (8,400/30x21x4+8,400/30x1.75x4).....	25,480
d) Service pay for 4 years (8,400/30x15x4).....	<u>16,800</u>
Total.....	84,280

4th Claimant-Sebastian Bahati Ingaso

a) 3 months' salary in compensation for unlawful termination.....	Kshs.24,300
b) 1 month's salary in lieu of notice.....	8,100
c. Leave pay for 3 years & 10 months (8,100/30x21x3+8,100/30x1.75x10)	21,735
d) Service pay for 4 years (8,100/30x15x3).....	<u>12,150</u>
Total.....	66,285

32. In making these awards I have taken into account the Claimants' length of service as well as the Respondent's conduct in the termination transaction. The award amounts will attract interest at court rates from the date of the award until payment in full.

33. The Claimants will have the costs of this case.

34. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF JULY 2016

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JUDGE

Appearance:

Mr. Mulaku for the Claimants

Ms. Ndago for the Respondent