



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NYERI
CAUSE NO.59 OF 2016
CONSOLIDATED WITH CAUSE NO. 60, CAUSE NO. 61,
CAUSE NO. 62 AND CAUSE NO. 63 ALL OF 2016

PRISCILLA NYANCHAMA ONSEMBE.....1ST CLAIMANT

JOHN NJOROGE NGINYA.....2ND CLAIMANT

PETER MAINA NG'ANG'A.....3RD CLAIMANT

MARY WANJIRA NJUGUNA.....4TH CLAIMANT

BENSON NDUNGU NJOROGE.....5TH CLAIMANT

VERSUS

THUTA INVESTMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd September, 2016)

JUDGMENT

The claimants filed their respective statements of claims through Mwaniki Warima & Company Advocates. The 1st to 4th claimants were declared redundant and they are claiming one month pay in lieu of the redundancy notice, annual leave, and severance pay. The respondent opposed the suits through Kingori Kariuki & Company Advocates.

For 1st to 4th claimants the only issue for determination is whether the claimants are entitled as prayed for. The court has considered the pleadings, the evidence and the submissions and makes findings as follows:

1. There is no dispute that the 1st claimant was employed on 22.06.2010 to 11.11.2014 at a daily wage of Kshs.200.00. The computation by both parties in their respective submissions is that she would be entitled to **Kshs. 26, 400.00** and she is awarded accordingly. In making the award, the court returns that the discharge voucher the 1st claimant signed upon being paid prorated leave days did not thereby preclude her from alleging unlawful termination on account of breach of section 40 of the Employment Act, 2007 as the employer, the respondent, was strictly bound to adhere to the statutory provisions on redundancy; and this reason will apply in the cases for 2nd, 3rd and 4th

claimants.

2. The only dispute with respect to 2nd claimant was the period of service. The evidence is that he was employed in 2007 then served until August 2012 and he left service to be reengaged sometimes on 1.12.2012 to 11.11.2014. Indeed, during cross examination, the 2nd claimant told the court that he worked 2013 to 2014. His daily wage rate was Kshs. 215.00. The 2nd claimant's dues, as computed in the respondent's submissions will therefore be awarded **Kshs. 5,160.00**.

3. The 3rd claimant is awarded **Kshs. 26,400.00** as computed in both parties' submissions.

4. The 4th claimant is awarded **Kshs. 9,000.00** as computed in both parties' submissions.

The 5th claimant was employed on 02.10.2006 as a supervisor responsible for pesticides and disease control in seedlings' beds. He reported at work at 6.00am to supervise the spraying up to 11.00am when the rest of staff left job and he remained at work up to 5.00pm. The 5th claimant was blessed with a baby on 01.10.2014 when he requested for permission to attend to his wife at hospital. He was given permission per the gate pass filed in court and he reported back at work on 02.10.2014 and continued at work until 06.10.2014 when he was told by a manger called Wanjohi not to enter the office. The respondent addressed to the 5th claimant the internal memorandum dated 6.10.2014 thus,

“Dear Sir,

RE: EXPLANATION TOWARDS IRREGULARITIES

You are hereby requested by TICL Management to come forward to office and clearly explain and elaborate the following:

A. You left your work place on 1st October 2014 without following the stipulated rules and regulations of the Company which you are very much aware of. You were clearly advised by the Assistant Manager to acquire a gate pass which you did not follow, instead you made your way out.

B. The following two consecutive days i.e dates 2nd and 3rd you didn't show up for your day to day duties and no apparent reason was communicated to management.

C. You were requested by the Farm Manager to write a letter to explain the above incidences but you offended further for disrespecting the Manager's request.

The Management has therefore decided to demand your own hand written letter of explanation towards the issues enlisted herein not later than 8th October 2014.

Yours faithfully,

Signed

FARM MANAGER

cc. DIRECTOR”

The claimant testified that he wrote in reply explaining that he had the permission per the gate pass issued on 01.10.2014 and that he had been at work on 02.10.2014 and 03.10.2014. The respondent did not file the claimant's letter in reply to the internal memorandum. In the termination letter dated 04.10.2014, the claimant was informed that he had failed to reply to the internal memorandum and that his services were thereby terminated. He was not paid his terminal dues and he admitted owing the respondent **Kshs. 2,**

886.00.

The respondent's witness testified that the gate pass the 5th claimant used on 01.10.2014 was valid, that there was a check in and checkout register at the gate, on 02.10.2014 the 5th claimant never came on duty and on 06.10.2014 he was asked to explain the absence but he failed to do so. RW testified that since 02.10.2014 the 5th claimant had been absent from duty.

The **1st issue** for determination in the 5th claimant's case is whether the termination was unfair. The court has considered the evidence on record. It is clear that the 5th claimant had a valid permission to be absent on 01.10.2014 as per the gate pass which RW confirmed as valid. RW confirmed that there was a check in and checkout register at the respondent's gate to show if the 5th claimant had been absent on 02.10.2014 and on 03.10.2014 but for unexplained reasons the same was not filed for the respondent and who had the duty to keep employee records. The claimant says he replied to the show-cause internal memo but the respondent denies the same. What is clear is that there was no hearing as envisaged in section 41 of the Employment Act, 2007. Further the court finds that in view of the valid gate pass and in absence of the check in and checkout register to rebut the claimant's evidence, the claimant has established on a balance of probability that the reason for the termination was not valid as envisaged in section 43 of the Act. Indeed, it was for the respondent to show that the reason for termination existed at the time of termination as a genuine and justifiable reason but the respondent has failed to discharge that burden as required in sections 47 (5) and 43(1) of the Act. The court returns that the termination was unfair.

The **2nd issue** for determination is whether the 5th claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The 5th claimant is entitled to the declaration that the termination was unfair.
- b. The 5th claimant claimed for leave for the 1st year of service being in 2006. The suit was filed on 1.04.2015. The court returns that the claim was time barred under section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya or section 90 of the Employment Act, 2007.
- c. He is entitled to **Kshs. 6, 450.00** being one month pay in lieu of the termination notice.
- d. On a balance of probability the claimant has established that he worked on public holidays and is awarded **Kshs. 16, 555.00** as prayed for.
- e. Since the claimant was provided housing accommodation, the prayer for house allowance will fail.
- f. The claimant surrendered the prayer for severance pay as per submissions filed.
- g. The claimant served for a long time with dedication since 2006 to the time of termination. He desired to continue in employment and he did not contribute to his termination. He is awarded 12 months' salaries under section 49(1) (c) of the Employment Act, 2007 making **Kshs. 77, 400.00** as prayed for.
- h. The total award for 5th claimant is therefore Kshs.100, 405.00 less Kshs. Kshs. 2, 886.00 owed to respondent making a net of **Kshs.97, 519.00**.

In conclusion, judgment is hereby entered for the claimants and the respondent for orders as follows:

- a. The termination of the 5th claimant's employment by the respondent was unfair.
- b. The respondent to pay the 1st claimant **Kshs. 26, 400.00**, the 2nd claimant **Kshs. 5,160.00**, the 3rd

claimant **Kshs. 26,400.00**, the 4th claimant **Kshs. 9,000.00** , and the 5th claimant **Kshs.97, 519.00**; all to be paid by 01.12.2016 failing interest at court rates to be paid thereon from the date of this judgment till full payment.

c. The respondent to pay the costs of the suit for 1st, 2nd , 3rd ,4th and 5th claimants, but for the 5th claimant, less the costs of the counterclaim.

Signed, dated and delivered in court at **Nyeri** this **Friday, 23rd September, 2016.**

BYRAM ONGAYA

JUDGE