



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 279 OF 2015

JAMES GITAU KAMAU & 9 OTHERS.....CLAIMANT

VERSUS

HABO GROUP OF COMPANIES..... RESPONDENT

JUDGMENT

Introduction

1. The claimants herein were employed by the respondent between 2009 and 2014 at Mombasa and they were discharged on diverse dates between 17.4.2013 and 28.5.2014. The reason for termination was either redundancy due to low business or misconduct. The claimants now bring this Suit claiming terminal dues plus compensation for unfair termination of their employment contracts.

2. The respondent denies that she wrongfully, unlawfully or unfairly terminated the claimants' contract of employment and refused to pay their dues. According to her the termination was justified because of slump in the tourism sector due to terrorism and that all the employees had been duly notified via an internal memo.

3. The Suit was heard on 4.5.2016 and 8.6.2016 when the claimants called James Gitari Kamau, Anne Asayo Edenge, John Msalaba Barasa and John Wasike Wanyama as CW1, 2 3 and 4 respectively. However the respondent never called any witness. After the hearing only the claimants' counsel filed written submissions.

Analysis and Determination

4. There is no dispute that the claimants were employed by the respondent. That the respondents signed all their appointment letter and paid the claimants salaries. There is also no dispute that all the claimants were terminated on ground of redundancy between February and May 2014 except for the 5th and 9th claimants. The issues for determination are:-

- a) Whether the reason for the termination was valid and fair.
- b) Whether the procedure followed was unfair.
- c) Whether the termination was unfair.

d) Whether the reliefs sought should be granted.

Valid and Fair Reason

5. Except for the 5th and 9th claimants, the rest were laid off on ground of low business. They however deny that the business was low and contended that the respondent employed new staff to replace them immediately after they were laid off.

6. The respondent did not call any witness to rebut the foregoing allegation. She only pleaded in paragraph 18 of her defence that the claimants' were laid off due to the slump in the tourism industry that was caused by terrorism. That allegation without evidence in support remains a mere allegation.

7. As regards the termination of the 5th claimant, the reason for termination was misconduct. According to him, the Director of the respondent visited the work station on 17.5.2014 at 1am and alleged that some property had been stolen. He then beat up the 5th claimant and verbally dismissed him without prior notice or any valid reason.

8. On the other hand, the 9th claimant was given 5 days leave from 16.3.2013 and when he reported back on 22.3.2013, he was told to hand over all the company property in his possession and his leave was extended to 16.4.2013. That when he reported back to work on 17.4.2013, he was told to say away until further notice. He however never received any communication from the respondent and brought this Suit for unfair termination of his employment.

9. The respondent also never called any witnesses to rebut evidence by the 5th and 9th claimants. Under section 43, 45(2) and 47(5) of the Employment Act, the burden of proving and justifying the reason for terminating the services of an employee lies on the employer. That burden was not discharged in this case as the respondent never called any witness to adduce evidence to prove and justify the reason for terminating the claimants' employment contracts. Consequently, I find on a balance of probability that the termination of the claimants' services was not founded on a valid and fair reason. Although I take judicial notice of the slump in the tourism industry, the claimants' evidence that new employees were hired to replace them was not rebutted.

Procedure Followed

10. The procedure for termination is fair if it is just and equitable. The procedure for terminating employees on ground of redundancy is fair if it complies with the mandatory provisions of section 40 of the E.A while in all other cases the procedure is fair if it complies with mandatory provisions of section 35, 36, 41 and 51 of the EA.

11. Section 40 of the EA requires that before declaring the services of an employee redundant, the employer must first serve at least one month notice in writing to the employer or his union (if a member of any union) and the Labour Officer.

12. In this case, no evidence was adduced by the defence to prove that she served at least one month notice to all the persons contemplated by section 40 supra. In addition the respondent never complied with the other mandatory requirements of the said law being fair selection of the staff to be laid off and payment of their lawful dues plus severance pay. Consequently, I find the procedure followed in laying off the 8 claimants to be unfair for noncompliance with the mandatory procedure laid down by section 40 supra.

13. As regards the termination of the 5th and 9th claimants, the procedures followed was not in line with the procedure provided for under section 35,36 and 41 of the EA. Section 35 and 36 simply requires that a prior written notice of 28 days be served upon the employee before termination or he be paid one month salary in lieu of notice.

14. Section 41 on the other hand provides for mandatory personal hearing to be given to the employee by the employer before termination for gross misconduct. The said hearing must be done in presence of another employee chosen by the accused employee.

15. In this Case, such personal hearing was not accorded to the 5th and 9th claimants before dismissal and no prior notice was served on them as and as such their termination was not done after following a fair procedure.

Unfair Termination

16. Under section 45(2) of the EA, termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. As observed above, the employer never called any witnesses and never adduced any evidence to prove that there was valid and fair reason for terminating the claimants and that the termination was done after following a fair procedure. I therefore find and hold that the dismissal of the claimant was unlawful, unfair and wrongful.

Reliefs

17. Under section 49(1) and (4) of the EA, the claimants are entitled to salary in lieu of notice, accrued benefits plus compensation for unfair and unjust termination. I therefore award each claimant one month salary in lieu of notice, and salary arrears as prayed. I also award each of them 3 months' salary as compensation for unfair termination considering the fact that they never contributed to their termination through misconduct. I am also of the opinion that all the claimants could secure alternative employment within 3 months if they exercised due diligence. Finally I award each claimant a refund of their respective in-house savings as prayed.

18. I however dismiss the claim for leave, public holidays and off days worked. The reason for the foregoing is that no particulars were pleaded for the said claimants and no evidence was adduced to prove the same. Likewise the claim for severance will not issue because the claimants have been sufficiently compensated above.

19. The award to each claimant is summarized as follows in addition to Certificate of Service.

James Gitau Kamau (1st Claimant)

Notice	kshs. 15000
Salary arrears of 3 months	kshs. 45000
In house savings	kshs. 7200
Compensation	<u>kshs. 45000</u>
	<u>Kshs. 112,200</u>

Lazaro Wanyama Musomeli (2nd Claimant)

Notice	kshs. 15000
3 months' salary arrears	kshs. 45000
In house savings	kshs. 6900
Compensation	<u>kshs. 45000</u>

Kshs. 111,900

Gladys Achieng' Otieno (3rd Claimant)

Notice kshs. 13000

Salary arrears (3 months) kshs. 39000

In house savings kshs. 600

Compensation kshs. 39000

Kshs. 91,600

Constance Mwachofi (4th Claimant)

Notice kshs. 20000

Salary arrears (3 months) kshs. 60000

In house savings kshs. 5100

Compensation kshs. 60000

Kshs. 145,100

John Msalaba (5th Claimant)

Notice kshs. 10000

Salary arrears (3 months) kshs. 30000

In house savings kshs. 18000

Compensation kshs. 30000

Kshs. 88,000

Saidi Maimuna Jumins (6th Claimant)

Notice kshs. 12000

Salary arrears (3½ months) kshs. 42000

In house savings kshs. 600

Compensation kshs. 36000

Kshs. 90,600

Karisa Kayama Kikunde (7th Claimant)

Notice kshs. 10000

Salary arrears (6 months) kshs. 60000

In house savings	kshs. 3000
Compensation	<u>kshs. 30000</u>
	<u>Kshs. 103,000</u>

Anne Aseyo Endege (8th Claimant)

Notice	kshs. 10000
Salary arrears (14 days)	kshs. 4662
In house savings	kshs. 4800
Compensation	<u>kshs. 30000</u>
	<u>Kshs. 49,462</u>

John Wasike Wanyama (9th Claimant)

Notice	kshs. 30000
Salary arrears (15 days)	kshs. 15000
In house savings	kshs. 34000
Compensation	<u>kshs. 90000</u>
	<u>Kshs. 138,400</u>

Dorcus Mwangeli Mwanza (10th Claimant)

Notice	kshs. 12000
Salary arrears (15 days)	kshs. 36000
In house savings	kshs. 600
Compensation	<u>kshs. 36000</u>
	<u>Kshs. 84,600</u>

Disposition

20. For the reasons stated above, I enter judgment for the claimants against the respondent in the aggregate sum of **kshs. 1,014,862** plus costs and interests. Each claimant will also be issued with a certificate of service.

Signed, Dated and Delivered at Mombasa this 9th day of September, 2016.

ONESMUS MAKAU

JUDGE