



**REPUBLIC OF KENYA**

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

**CAUSE NO. 23 OF 2016**

**ALOISE ABUNGU MAGO.....1<sup>ST</sup> CLAIMANT**

**BENARD MUTINDA NDAMBUKI.....2<sup>ND</sup> CLAIMANT**

**ANTONY MAINA KAGWI.....3<sup>RD</sup> CLAIMANT**

**JOSEPH WAITURU GATEHI.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**JASWANT SINGH & BROTHERS..... RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 25<sup>th</sup> November, 2016)**

**JUDGMENT**

The claimants filed the statement of claim on 04.02.2016 through M.K. Kiminda Advocate. It was submitted that the 2<sup>nd</sup> claimant was deemed to have abandoned the claim because he did not file relevant documents and a witness statement. Despite service the respondents did not enter appearance and did not file a defence. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants opted that their suit is determined on the basis of the pleadings, witness statements and documents filed for their respective claims.

The claimants were employed as guards by the respondents. The 1<sup>st</sup> claimant was employed in 1984, and, the 3<sup>rd</sup> and 4<sup>th</sup> claimants on 01.09.2012. The respondents alleged that on 01.10.2013 the claimants had stolen or failed to stop commission of theft at the site they were assigned to guard at Othaya District Hospital. The claimants were arrested and charged in criminal case no. 281 of 2013 in the Principal Magistrate's Court at Othaya. The claimants were acquitted under section 210 of the Criminal Procedure Code because the prosecution failed to establish a prima facie case against them.

It is the claimants' case that from the date of the arrest to the date of the acquittal on 09.04.2015 the respondents did not pay them and consequential to the acquittal, the claimants were not reinstated. The claimants filed the present suit and prayed for judgment against the respondents for:

- a) Pay of wages from the date of arrest to the date of acquittal being 18 months' pay.
- b) One month pay in lieu of the termination notice.
- c) Unpaid wages for 24 weeks prior to the arrest.

The court has considered the claimants' case. The court finds that consequential to the arrest and then acquittal without a reinstatement, the claimants were entitled to consider themselves terminated from employment. The court finds that the termination was constructive and unfair for want of a valid reason under section 43 of the Employment Act, 2007. The court considers that 12 months' pay under section 49 (1) (c) of the Employment Act, 2007 will meet ends of justice. While making that award the court considers that the claimants desired to continue in employment, they did not contribute to their termination and the respondent has not opposed the prayer. Further, the claimants are each entitled to a month's pay in lieu of the termination notice.

The court considers that the claimants are not entitled to pay for the 24 weeks prior to the arrest, and for 5 years leave as prayed for, because 12 months time of limitation for continuing injury (such as such withheld leave and pay) had lapsed calculated from 01.10.2013 when the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants could last claim leave or withheld pay prior to the arrest and the suit having been filed on 04.02.2016 outside the period of limitation.

Thus the 1<sup>st</sup> claimant is awarded as follows:

- a) Kshs.216, 000.00 for unfair termination.
- b) Kshs. 18,000.00 in lieu of notice.
- c) Total award **Kshs. 234,000.00**.

Thus the 3<sup>rd</sup> claimant is awarded as follows:

- a) Kshs.120, 960.00 for unfair termination.
- b) Kshs. 10,080.00 in lieu of notice.
- c) Total award **Kshs. 131,040.00**.

Thus the 4<sup>th</sup> claimant is awarded as follows:

- a) Kshs.120, 960.00 for unfair termination.
- b) Kshs. 10,080.00 in lieu of notice.
- c) Total award **Kshs. 131,040.00**.

In conclusion judgment is hereby entered for the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> claimants against the respondents for:

- a) The respondents to pay the 1<sup>st</sup> claimant **Kshs. 234,000.00**, the 3<sup>rd</sup> claimant **Kshs. 131,040.00** and the 4<sup>th</sup> claimant **Kshs. 131,040.00** by 15.12.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- b) The respondents to pay the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants' costs of the suit.

**Signed, dated and delivered** in court at Nyeri this **Friday, 25<sup>th</sup> November, 2016**.

**BYRAM ONGAYA**

**JUDGE**