



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 104 OF 2016 CONSOLIDATED WITH CAUSE 106 OF 2016

JOHN KAMAU GITUNDU.....1ST CLAIMANT

ALEX WERU MAINA.....2ND CLAIMANT

VERSUS

LEOMAC TRADERS (K) LIMITED.....1ST RESPONDENT

NICHOLAS KARIA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 25th November, 2016)

JUDGMENT

The claimants filed their respective memorandum of claim against the respondent on 20.05.2016 through Ishmael & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) The 1st claimant Kshs.158,000.00 and the 2nd claimant Kshs.380,000.00 being special damages for unpaid salaries up to January 2016, salary for January 2016, transport and accommodation allowances not refunded and one month salary in lieu of notice.
- b) Aggravated or exemplary damages for the mental anguish suffered by the claimant and his family.
- c) General damages for unfair termination by constructive dismissal.
- d) An order for issuance of a certificate of service.
- e) Costs of the suit.

The respondents' case is based on the amended memorandum of response filed in each of the cases on 01.07.2016 through Okundi & Company Advocates. The respondents' prayer is for dismissal of the claimants' suits with costs.

The respondents admit that they employed the claimants. It is admitted that the 1st claimant was employed in December 2014 to supervise excavation works. The 2nd claimant was employed in April 2015 as an excavation machine operator.

The main issue for determination in the present cases is whether the claimants are entitled to the remedies as prayed for. The court makes findings as follows;

a) The 1st claimant prays for Kshs.158, 000.00 and the 2nd claimant Kshs.380, 000.00 being special damages for unpaid salaries up to January 2016, salary for January 2016, transport and accommodation allowances not refunded and one month salary in lieu of notice. The material on record is clear that at all material time the claimants were deployed to serve on an assignment at Machakos County. The respondents admit that while on assignment outside Nairobi, the 1st respondent would provide accommodation or allowances to the employee. The respondents' case is that during the Machakos assignment the 1st claimant rented a house for the claimants, bought beddings and provided money for claimants' food. The 1st claimant testified that at some point in November the respondents provided funds for employees' food and it would be in instalments of Kshs. 14,000.00 or Kshs.12, 000.00. The 1st claimant further testified that furnished housing accommodation was provided for the employees in Machakos with Kshs. 200.00 per day for food. The number of days the claimants claim transport allowance and accommodation allowance are at large and the basis of the amount of money claimed is not justified. The 2nd claimant did not offer evidence on the issue of transport and accommodation allowance. The court returns that on a balance of probabilities and taking into account the evidence by the 1st claimant and the respondent's evidence, the respondents provided housing accommodation and food so that the claims for transport and accommodation will fail. The 1st claimant's case is that he was paid incomplete salaries including in December 2015. There was no evidence on the amount duly paid and not paid to the 1st claimant in that regard. The respondents' evidence was that the 1st claimant was paid except for January 2016. On a balance of probabilities, the court finds that the 1st claimant is entitled to January 2016 pay being **Kshs. 26,000.00** as prayed for. While making that finding the court has taken into account the 1st claimant's witness statement in which the claimant stated that he had been paid until sometimes in December 2015 but sought to belatedly amend the same by his evidence that he meant October 2015. For the 2nd claimant his evidence was that he was paid his salaries until sometimes in August or September 2015 when the respondents started to pay him in bits. By December, the 2nd claimant testified that the accrued unpaid amount had become too much. The 2nd claimant did not provide evidence on the bits that had been paid as at December 2015 and if he earned Kshs. 50,000.00 per month as per his testimony, then the claim of Kshs. 202, 000.00 for 3 months of October, November, and December is clearly improbable and therefore not justified. The court finds that he is entitled to pay of **Kshs. 50, 000.00** for January 2016 because RW admitted that he worked and he had not been paid for that month. Each claimant is entitled to one month pay in lieu of the termination notice as it is found later in this judgment, the termination of the claimants' contracts of service was unfair.

b) The claimants prayed for aggravated or exemplary damages for the mental anguish suffered by the claimants and their respective families. There was no evidence and there were no submissions to justify the prayer and the same is deemed abandoned and not justified.

c) The claimants prayed for general damages for unfair termination by constructive dismissal. The respondents' evidence was that the claimants left employment because they conspired to siphon fuel from the excavation machine. The claimants say they left employment because the respondent breached the fundamental condition to pay salary and when that happened, they were forced to consider themselves terminated from employment. The respondent has not given an explanation for the failure to initiate disciplinary proceedings for dismissal of the claimants in view of the alleged misconduct. In the circumstances, the court finds that the claimants' employment ended constructively when they were not paid their salaries. That finding is consistent with the respondents' evidence that they were not paid by the Machakos County Government promptly or at all for the project the claimants had been deployed and assigned to work on. The court has considered that the claimants had served for about a year, they might have desired to continue in employment and the respondents had difficult financial times. In the circumstances each is awarded 2 months' salaries for unfair termination, the 1st claimant **Kshs.52, 000.00** and the 2nd claimant

Kshs.100, 000.00.

d) The claimants are entitled to issuance of a certificate of service as the same is their statutory right under section 51 of the Employment Act, 2007.

e) The respondents will pay costs of the suit.

In conclusion judgment is hereby entered for the claimants against the respondents for:

a) The respondents to pay the 1st claimant **Kshs.104, 000.00** and the 2nd claimant **Kshs. 200,000.00** by 15.12.2016 failing interest to be payable thereon at court rates from the date of the judgment till full payment.

b) The respondent to deliver the certificate of service to each claimant by 15.12.2016.

c) The respondents to pay each claimant's costs of the suit.

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

BYRAM ONGAYA

JUDGE