



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1043 OF 2013

PAUL MUNIKO MARIBA.....1ST CLAIMANT

ZAKAYO KEVERENGE MASITSA.....2ND CLAIMANT

IGNATIUS SHAKAVA INGANJI.....3RD CLAIMANT

JOB KHAGAI LUYENJI.....4TH CLAIMANT

JAMES KITUA MATHENDU.....5TH CLAIMANT

SHADRACK ENANE MASABA.....6TH CLAIMANT

VERSUS

VISHAK BUILDERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants were all employees of the Respondent having been employed on diverse dates in various positions. Following the termination of their employment in January 2013, they brought this action seeking relief for unlawful termination.

2. The Respondent filed a Reply on 15th August 2013 but did not attend the hearing in spite of due notice. The 5th Claimant, James Kitua Mathendu testified for the Claimants.

The Claimants' Case

3. The 1st Claimant, Paul Muniko Mariba was employed as a general worker at a daily rate of Kshs. 550 effective October 2011. On 27th January 2013, while working at the Respondent's site in Westlands he was involved in an accident thus sustaining serious injuries. Thereafter, his employment was terminated.

4. The 2nd Claimant, Zakayo Keverenge Masitsa was employed as a general worker in November 2012 at a daily rate of Kshs. 300. He also sustained injuries in the accident of 27th January 2013 after which his employment was terminated.

5. The 3rd Claimant, Ignatius Shakava Inganji was employed as a general worker in November 2012 at a

daily rate of Kshs. 550. He worked until the accident of 27th January 2013 in which he suffered injuries and was subsequently dismissed.

6. The 4th Claimant, Job Khagai Luyenji was employed as a general worker in October 2010 at a daily rate of Kshs. 300. He worked until the accident of 27th January 2013 in which he was also injured.

7. The 5th Claimant, James Kitua Mathendu was employed as a carpenter in October 2012 at a daily rate of Kshs. 550. He was also injured in the accident of 27th January 2013 after which his employment was terminated.

8. The 6th Claimant, Shadrack Enane Masaba was employed as a general worker in October 2011 at a daily rate of Kshs. 550. His employment was terminated following an accident at the Respondent's site in April 2013.

9. It is the Claimants' case that the accident in which they were injured was caused by the Respondent's negligence. They now claim the following:

1st Claimant: Paul Muniko Mariba

- a) 3 months' salary in lieu of notice.....Kshs. 51,150
- b) Service for 3 months.....51,150
- c) 6 months' pay as damages for unlawful termination.....102,300
- d) General damages for injuries sustained in the course of work
- e) Underpayments from October 2011 to January 2013
- f) Overtime from October 2011 to January 2013

2nd Claimant: Zakayo Keverenge Masitsa

- a) 3 months' salary in lieu of notice.....Kshs. 27,900
- b) Service for 3 months.....27,900
- c) 6 months' pay as damages for unlawful termination.....55,800
- d) General damages for injuries sustained in the course of work
- e) Underpayments from November 2012 to January 2013
- f) Overtime from November 2012 to January 2013

3rd Claimant: Ignatius Shakava Inganji

- a) 3 months' salary in lieu of notice.....Kshs. 51,150
- b) Service for 3 months.....51,150
- c) 6 months' pay as damages for unlawful termination.....102,300
- d) General damages for injuries sustained in the course of work

e) Underpayments from November 2012 to January 2013

f) Overtime from November 2012 to January 2013

4th Claimant: Job Khagai Luyenji

a) 3 months' salary in lieu of notice.....Kshs. 27,900

b) Service for 3 months.....27,900

c) 6 months' pay as damages for unlawful termination..... 55,800

d) General damages for injuries sustained in the course of work

e) Underpayments from October 2010 to January 2013

f) Overtime from October 2010 to January 2013

5th Claimant: James Kitua Mathendu

a) 3 months' salary in lieu of notice.....Kshs. 51,150

b) Service for 3 months.....51,150

c) 6 months' pay as damages for unlawful termination.....102,300

d) General damages for injuries sustained in the course of work

e) Underpayments from October 2012 to January 2013

f) Overtime from October 2012 to January 2013

6th Claimant: Shadrack Enane Masaba

a) 3 months' salary in lieu of notice.....Kshs. 51,150

b) Service for 3 months.....51,150

c) 6 months' pay as damages for unlawful termination.....102,300

d) General damages for injuries sustained in the course of work

e) Underpayments from October 2011 to January 2013

f) Overtime from October 2011 to January 2013

The Respondent's Case

10. In its Reply dated 15th August 2013 and filed in Court on even date, the Respondent admits that the 1st to the 5th Claimants were its employees as at 27th January 2013 but does not admit their respective dates of employment as pleaded in the Memorandum of Claim. The Respondent does not admit that the 6th Claimant was its employee.

11. The Respondent admits that an incident occurred on 27th January 2013 when some of its employees

were injured in the course of duty but does not admit that the 1st to 5th Claimants were involved in the said incident or that they sustained injuries. The Respondent does not admit that an incident involving the 6th Claimant occurred in April 2013.

12. The Respondent denies that the Claimants lost their employment by reason of injuries sustained in the two incidents pleaded. The claim for unlawful termination is denied.

Findings and Determination

13. There are two issues for determination in this case:

- a) Whether the Claimants have proved a case for unlawful termination of employment;
- b) Whether the Claimants are entitled to the remedies sought.

The Termination

14. The Claimants' case as pleaded and as confirmed by the testimony of the 5th Claimant, James Kitua Mathendu is that their employment was terminated after they had sustained injuries at the Respondent's construction site. Mathendu told the Court that they were compensated for the injuries. Therefore the claim now before the Court is for compensation for unlawful termination and payment of terminal dues.

15. In its Reply filed in Court on 15th August 2013, the Respondent admits an employment relationship with the 1st to 5th Claimants but denies the employment record. The Respondent does not admit that the 6th Claimant was its employee.

16. The Claimants told the Court that they were not issued with letters of appointment and the Respondent did not adduce any evidence to counter the employment particulars provided by the Claimants. I therefore invoke Section 10(7) of the Employment Act, 2007 and adopt the account rendered by the Claimants in this regard.

17. Further, in the absence of any contrary evidence on the circumstances under which the Claimants left employment, I adopt their testimony that they were terminated following an accident at the Respondent's premises in which they were injured.

18. This form of termination is unlawful and unfair within the meaning of Section 45 of the Employment Act and the Claimants are entitled to compensation.

Remedies

19. In light of the foregoing findings I award each of the Claimants the equivalent of three (3) months' salary in compensation. I also award them one (1) month's salary in lieu of notice.

20. There was no evidence that the Respondent made National Social Security Fund (NSSF) contributions on the Claimants' account and I therefore allow the claim for service pay at the rate of fifteen (15) days' pay for each completed year of service.

21. No evidence was led to support the claims for general damages for personal injury, underpayment and overtime which are therefore dismissed.

22. Finally I enter judgment in favour of the Claimants as follows:

1st Claimant: Paul Muniko Mariba

- a. 3 months' salary in compensation.....Kshs.49,500

b. 1 month's salary in lieu of notice.....	16,500
c. Service pay for 1 completed year of service.....	<u>8,250</u>
Total.....	74,250

2nd Claimant: Zakayo Keverenge Masitsa

a. 3 months' salary in compensation.....	Kshs.27,000
b. 1 month's salary in lieu of notice.....	<u>9,000</u>
Total.....	36,000

3rd Claimant: Ignatius Shakava Inganji

a. 3 months' salary in compensation.....	Kshs.49,500
b. 1 month's salary in lieu of notice.....	<u>16,500</u>
Total.....	66,000

4th Claimant: Job Khagai Luyenji

a. 3 months' salary in compensation.....	Kshs.27,000
b. 1 month's salary in lieu of notice.....	9,000
c. Service pay for 2 completed years of service.....	<u>9,000</u>
Total.....	45,000

5th Claimant: James Kitua Mathendu

a. 3 months' salary in compensation.....	Kshs.49,500
b. 1 month's salary in lieu of notice.....	<u>16,500</u>
Total.....	66,000

6th Claimant: Shadrack Enane Masaba

a. 3 months' salary in compensation.....	Kshs.49,500
b. 1 month's salary in lieu of notice.....	16,500
c. Service pay for 1 completed year of service.....	<u>8,250</u>
Total.....	74,250

23. The judgment amount will attract interest at court rates from the date of judgment until payment in full.

24. I direct the Respondent to issue the Claimants with certificates of service and to pay the costs of this

case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER 2016

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JUDGE

Appearance:

Ms. Betty Rashid for the Claimants

No appearance for the Respondent