



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 313 OF 2014

1. JOSEPHAT BWIRE LUKALE

2. JUSTUS KIMWELI CHEGE

3. GEORGE OTIENO ODERO

4. LAWRENCE OOKO ODUOL

5. EPHRAEM ADAWA MUTUNDU

6. PATRICK ALUSHULA ATETA.....CLAIMANTS

VERSUS

PREMIER CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent on 4th March 2014 seeking resolution of the disputes relating to their employment. The disputes they had would best have been articulated in separate and distinct causes of action as their dates of employment and terms of employment were different. The only commonality was the fire on 24th June 2013 at the factory leading to the notification to stay away as a result. The Claimants averred that the Respondent resumed operations on 1st October 2013 and reinstated more than half the staff but left out the Claimants. The Claimants thus claimed damages for the wrongful termination, leave pay and notice.

2. The Respondent filed a Memorandum of Response on 5th May 2014. In the Response the Claimants averments were denied and the Claimants put to strict proof thereof. The Respondent averred in the alternative that none of the Claimants were terminated and for unknown reasons refused, despite pleas made by the Respondent directly and also through the Labour Office to resume work despite requests to do so. The Respondent averred that the claim is premature and scandalous, frivolous and vexatious.

3. The Claimants filed an application which sought the same prayers as the suit and in order to save time the Respondent urged that the suit be heard instead of the interlocutory application.

4. The Claimants filed submissions on 15th January 2015. In the submissions the Claimants stated that they filed the suit on 3rd March 2013 to address the silence of the Respondent in regard to the status of the Claimants. The Claimants submitted that the suit was filed due to the failure to call the Claimants back to

work and that there was no proof of the recall to work. The Claimants submitted that the fire only destroyed a part of the factory and not the entire factory and the staff could all have been retained on rotation basis.

5. The Respondent in its submissions stated that the issue that lent itself to determination was the issue the Claimants had raised indirectly on the alleged unlawful termination. The Respondent submitted that the Claimants had absconded duty following the re-opening of the factory on 1st October 2013 as stated in the Response paragraph 7(ii). The Respondent submitted that it remained humane and was ready to take back the Claimants notwithstanding the fire that burnt down its factory. It was keen to reengage the Claimants even as it pursues the insurers. The Respondent thus urged the Court to find in favour of the Respondent and dismiss the claim with costs.

6. The Claimants have demonstrated that the Respondent was their employer and this fact was conceded by the Respondent. The manner in which their services were interrupted is also not in contention. The parties are in agreement that it was as a result of the fire that took place at the Respondent's premises in 2013. The foregoing suggests that the termination of employment was on account of the fire. Dismissal from employment can be constructive. After the fire the employees of the Respondent were not dismissed expressly but were told to await a response.

7. The Respondent asserts that the Claimants have refused and/or declined to resume work in spite of entreaties to resume. It was submitted by counsel that the refusal was in spite of entreaty through the labour office. No letter was produced to that effect.

8. The letter from the Labour Officer in response to the Claimants cries led to a response by the Respondent captured in the handwritten note of 26th August. The letter in part states that in the meantime the Respondent was aware that many had been employed elsewhere and encouraged the Claimants to look to that in the meantime until the factory was up and running. The Respondent in submissions states that it is ready and willing to absorb the Claimants in spite of the loss it had suffered in relation to the fire.

9. Section 49 of the Employment Act provides as follows:-

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to -

(a) reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or ?

(b) re-engage the employee in work comparable to that in which the employee was

employed prior to his dismissal, or other reasonably suitable work, at the same wage . ?

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following-

a. the wishes of the employee; ?

b. b) the circumstances in which the termination took place, including the extent, if any, to which the employee ?caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re engagement.

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonable incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination; ?

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and ?any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee. ?

10. I do not think the Respondent is aware of the ramifications of the reinstatement offered and the financial implications. Evidently such absorption would be at the same terms and without loss of benefits.

11. The fate of the Claimants ought to have been communicated to them once the decision to reopen the factory was reached. The Claimants therefore have proved their case on a balance of probability. I find that that termination was unjustified and was not effected humanely. In the premises I hold that notice was payable. On leave there unfortunately was no proof of the leave days due for each of the Claimants. Additionally there was no indication on the leave allowances due to each. They were all paid for days worked in June the month when the fire took place and thus have no claim for salary arrears.

12. The Claimants have not demonstrated any interest in taking up employment with the Respondent again and as such I cannot order a reinstatement as the law is clear on the issue of reinstatement where interest of the employee is paramount.

13. Having regard to all the parameters in Section 49 of the Employment Act I find that the Claimants were entitled to a more humane termination of employment. The Claimants were thus not terminated in accordance with the law and are entitled to recover compensation in terms of Section 50 as read with Section 49 of the Employment Act. I will order 10 months compensation for each of the Claimants. None of the employees proved they were entitled to compensation for tool boxes.

14. In the final analysis I enter judgment as follows

- a. For 1st Claimant Josphat Bwire Lukale Kshs. 19,000/- as notice pay and Kshs. 190,000/- as compensation.
- b. For 2nd Claimant Justus Kimweli Chege Kshs.14,000/- as notice and Kshs. 140,000/- as compensation.
- c. For 3rd Claimant George Otieno Odera Kshs.14,000/- as notice and Kshs. 140,000/- as compensation.
- d. For 4th Claimant Lawrence Ooko Oduol Kshs.16,000/- as notice and Kshs. 160,000/- as compensation.
- e. For 5th Claimant Ephraem Adama Mutundu Kshs.16,000/- as notice and Kshs. 160,000/- as compensation.
- f. For 6th Claimant Patrick Alushula Ateta Kshs.16,000/- as notice and Kshs. 160,000/- as compensation.
- g. The sums due to each of the Claimants to be subjected to statutory deductions remitted to the relevant authorities in terms of Section 49. There will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of **February** 2015

Nzioki wa Makau

JUDGE