



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NO. 312 OF 2012

(Before Hon. Justice Maureen Onyango on 13.3.2015)

THOMAS MAMBO OTWABE & 3 OTHERS CLAIMANTS

-VERSUS-

TUMAC ENGINEERING SERVICES LTD RESPONDENT

JUDGMENT

This case was initiated by the claimants Thomas Mambo Otwabe - 1st claimant, Fulgence Ombech Opiyo - 2nd claimant, Maxwell Amaganga Lugalia - 3rd claimant and Paul Munene Njiraini - 4th claimant through their Memorandum of Claim dated 24th February 2012 and filed in court on 27th February 2012 against the respondent Tumac Engineering Services Limited through Lilian Amere Machio & Co. Advocates. The 2nd, 3rd and 4th claimants signed letters of authority authorizing the 1st claimant to appear, plead or act on their behalf in these proceedings. They allege that they were employed by the respondent, a limited liability company on the following dates; 1st claimant, 23rd March 2011, as Group Finance Director; 2nd claimant on 23rd March 2011 as Procurement Officer; 3rd claimant on 23rd March 2011 as ICT Officer and 4th claimant on 15th June 2011 as Accountant. They allege that about October 2011 the respondent closed its offices, indefinitely hence terminating the claimants' services without notice. They pray for the following terminal benefits:-

Thomas Mambo Otwabe (1st Claimant)

- Three months salary arrears - Kshs 300,000/=
- One (1) month salary in lieu of notice - Kshs 100,000/=
- N.S.S.F & N.H.I.F Feb, 2011 - July, 2011 - Kshs 4,320/=

Sub Total = Kshs 404,320/=

Fulgence Ombech Opiyo (2nd Claimant)

- Three months salary arrears - Kshs 90,000/=
- One (1) month salary in lieu of notice - Kshs 30,000/=
- N.S.S.F & N.H.I.F - April, 2011 - July, 2011 - Kshs 2,880/=

Sub Total = Kshs 122,880/=

Maxwel Amaganga Lugalia (3rd Claimant)

- Three months salary arrears - Kshs 90,000/=
- One (1) month salary in lieu of notice - Kshs 30,000/=
- 21 working leave days - Kshs 30,000/=
- N.S.S.F & N.H.I.F - Oct, 2010 - July, 2011 - Kshs 7,200/=

Sub Total = Kshs 157,200/=

Paul Munene Njiraini (4th Claimant)

- Three months salary arrears - Kshs 90,000/=
- One (1) month salary in lieu of notice - Kshs 30,000/=
- N.S.S.F & N.H.I.F - April, 2011 - July, 2011 - Kshs 1,440/=

Sub Total = Kshs 121,440/=

They further seek the following orders:-

- (a) This honourable court do please to declare that the dismissal of the claimants was wrongful.
- (b) The respondent be ordered to compensate the claimants for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- (c) This honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (d) The respondent to pay the costs of this claim.
- (e) Interests on the above at court rates.

On 27th March 2012 the respondent filed a Statement of Defence through Mbaluka & Company Advocates. The respondent admitted employing the claimants but denied terminating the claimants without notice. The respondent also denied owing the claimants the sums claimed.

The case was heard on 9th July 2014. The claimants were represented by Ms. Machio and Ms. Bachu appeared for the respondent. The 4th claimant Paul Munene Njiriani testified on his behalf and on behalf of the 2nd and 3rd claimants. The respondent did not call any witness.

Paul Munene testified that all the claimants were appointed as pleaded in the Memorandum of Claim. He referred to the letters of appointment as annexed to the Memorandum of Claim. He further confirmed that their employment was terminated as pleaded in the Claim and Verifying Affidavits, and that they sought prayers as pleaded.

Under cross-examination he admitted that apart from the 3rd claimant none of the other claimants was confirmed into employment. He also admitted not having proof that NSSF and NHIF did not receive remittances of the contributions made on their behalf by the respondent.

In the written submissions on behalf of the claimants it was submitted that the termination of their services was in contravention of Section 47(5) of the Employment Act as the employer failed to justify

the grounds of termination. It was further submitted that the claimants had proved their case and were entitled to orders as prayed.

For the respondent it was submitted as follows:-

That the first claimant's letter of appointment is dated 23rd March 2011 but is not signed by the respondent's Group Human Resource Manager, that the letter did not originate from the respondent. That further the letter is backdated by 2 months as it is dated 23rd March 2011 but is effective from 1st February 2011. It is also alleged that the job description signed on 4th April 2011 is not on letterhead. That no payslip was produced to prove that the 1st claimant earned a salary of Kshs 100,000/=

It was submitted that the 2nd claimant's letter is not signed by respondent's Human Resource Manager and is effective on 1st April 2011 meaning that the letter is back dated by one week. It is also submitted that the appointment letter and job descriptions are not on respondent's letterhead.

For the 3rd claimant the respondent submitted that he had 2 letters of appointment, one dated 23rd March and the other 31st March 2011, that both letters were not signed by the respondent's Human Resource Manager, that they bear signatures of Group Finance Director and Human Resource Team Leader who are unknown to the respondent, and further that the letters did not originate from the respondent. That the letterheads and job description do not belong to the respondent, that both were backdated, one by 6 months and the other by 2 months, and there was no payslip to prove the salary of Kshs 25,000/=.

For the 4th claimant it was submitted that his appointment letter bears the letterhead of an unknown entity namely La Palms Comfort Inn and is not signed by the Human Resource Manager, that the signatures of Group Finance Director and Human Resource Team Leader are strangers to the respondent. That further the 4th claimant had no payslips to prove the salary of Kshs 30,000/=. It is submitted that the 4th respondent was not an employee of the respondent.

The respondent relied on the case of **Van Leer East Africa Ltd (Greif (K) Ltd) A Business of Greif Bros Corporation V Baiba Dhidha Mjidho [2006] LLR 4575 (CAK)**.

It was submitted that since the claimants were not employees of the respondent they are not entitled to the reliefs sought.

I have considered the pleadings, evidence and submissions. The issues for determination are the following:-

1. Whether the claimants were employees of the respondent.
2. Whether the claimants were unfairly terminated.
3. Whether the claimants are entitled to the remedies sought.

1) Whether claimants were employees of the respondent.

The respondent has in its submissions which are neither dated nor signed, submitted that claimants were not employees of the respondent. However in the Statement of Defence at paragraph 6 the respondent pleaded as follows:-

"In the alternative and without prejudice to the foregoing, the respondent avers that due notice of intention to terminate the services of the claimants was issued. Further that the respondent complied with all requirements of the Employment Act; and the claimants' dismissal was proper, justified and for good cause as recognized by law."

Paragraph 6 of defence is an admission that the claimants were employees of defendant and were

dismissed. No evidence was adduced by the respondent. Submissions are not pleadings. The respondent's submissions which are not dated or signed, cannot purport to contest facts that are admitted in the defence.

I find that the claimants were employees of the respondent by virtue of the admissions made in the Statement of Defence and the letters of appointment annexed to the Memorandum of Claim which are not controverted by any evidence from the respondent.

2) Whether the claimants were unfairly terminated.

No evidence was adduced to controvert the averments in the claim, the defence or to challenge the evidence adduced by the 4th claimant on behalf of the the claimants.

I find that based on the evidence on record, the respondent has failed to disprove the allegations of the claimants and by virtue of Section 10(7) of the Employment Act, decide in favour of the claimants. I declare that the termination of the employment of the claimants was unfair.

3) Whether claimants are entitled to the reliefs sought.

Having found that the claimants were terminated unfairly, they are entitled to pay in lieu of notice for days worked and compensation.

The claimants prayed for payment of NSSF and NHIF. They however did not produce statements from both NSSF and NHIF to show that no remittances were received on their accounts for the periods indicated in each of their claims. I therefore find the prayer for NSSF and NHIF not proved and dismiss the same.

On compensation, none of the claimants had worked for a full year. I however note that their termination fell under redundancy and they should have been notified as provided in Section 40 of the Employment Act. I therefore award them compensation of one month each to compensate for notification period of not less than one month as provided in Section 40.

Each of the claimants will thus be paid as follows:-

Thomas Mambo Otwabe (1st Claimant)

- 1 month pay in lieu of notice - Kshs 100,000
- 3 months salary arrears - Kshs 300,000
- 1 month salary compensation - Kshs 100,000

TOTAL = KSHS 500,000/=

Fulgence Ombech Opiyo (2nd Claimant)

- 1 month salary in lieu of notice - Kshs 30,000
- 3 months salary arrears - Kshs 90,000
- 1 month salary compensation - Kshs 30,000

TOTAL = Kshs 150,000/=

Maxwel Amaganga Lugalia (3rd Claimant)

- 1 month salary in lieu of notice - Kshs 30,000
- 3 months salary arrears - Kshs 90,000
- 1 month salary compensation - Kshs 30,000
- Annual leave February to October
2011 (9 months) - Kshs 15,750

TOTAL = Kshs 165,750/=

Paul Munene Njiraini (4th Claimant)

- 1 month salary in lieu of notice - Kshs 30,000
- 3 months salary arrears - Kshs 90,000
- 1 month salary compensation - Kshs 30,000

TOTAL = Kshs 150,000/=

The respondent shall pay costs of the claimants case and the decretal sum shall attract interest at court rates.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)