



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1920 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 14th April, 2015)

- ALBERT KINOTI1ST CLAIMANT**
- ALLAN ONYANGO2ND CLAIMANT**
- COLLINS ODADA3RD CLAIMANT**
- JAMES WAMBUA4TH CLAIMANT**
- HARRISON WAMBUA5TH CLAIMANT**
- DANIEL MAKAU6TH CLAIMANT**
- JACKSON MUTUA MWANTHI7TH CLAIMANT**
- ENOS WAGULA SITUMA8TH CLAIMANT**
- AMBROSE KISUI KIOKO9TH CLAIMANT**
- JULIUS MAKHASE MISIKOKI10TH CLAIMANT**
- KILATYA NZWILI.....11TH CLAIMANT**

VERSUS

**HAGGAI MULTI CARGO HANDLING SERVICES LIMITED
DEFENDANT**

JUDGMENT

Introduction

1. On the 15th November 2011, the Claimants herein filed their Memorandum of Claim through the firm of Namada & Company Advocates. All the Claimants are male adults of sound mind residing in Nairobi within the Republic of Kenya. The Respondent on the other hand is a Limited

Liability Company Incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya.

By consent of the parties, this case proceeded through consideration of witness statements and submissions filed by both parties.

Claimants case

2. The Claimants case is that all times material to this case, they were employees of the Respondent in various departments and worked thereat continuously with due diligence to the satisfaction of the Respondent. Their last salaries were computed at Kshs.12,150/= per month for the 1st to 10th Claimants and Kshs.8,250/= per month for the 11th Claimant.

The Claimants aver that they were employed by the Respondent on different days being 3rd January 2003, April 2003, 4th April 2004, 12th January 2004, July 2004, 22nd July 2003, 1st April 2003, 27th April 2003, 27th March 2003, April 2004 and February 2004 respectively as General Workers.

The Claimants annexed their employment ID card/gate passes as exhibits and in respect of the 7th Claimant, his NHIF certificate of contribution payments schedule showing his employer as the Respondent herein.

3. The Claimants aver that their services were terminated verbally for 1st to 10th Claimants in April 2010 and for 11th Claimant February 2009 when they were informed not to report to work until such a date when the Respondent would call them back. It is the Claimants' position that the action of the Respondent amounts to an unlawful, unfair and wrongful termination of their services and therefore their demand for payment of terminal dues and compensatory damages as tabulated in their statement of claim.

Respondents' case

4. The Respondents filed their Memorandum of response on 3/7/2012 through the firm of M/s Oronga Esonga & Company Advocates. The Respondent admits that the claimants were their employees in various departments. However, it is the Respondents position that they never verbally terminated the Claimants services. It is their averment that on or about 23rd and 29th March 2010 by letters in writing, the Respondent specifically communicated to each and every Claimant 1st to 10th the decision by its Principal Kapa Oil Refineries Limited to discontinue and close down its Plastic Plant wherefore the Claimants were however transferred to the loading bay in the same company and in the same capacity. They also deny terminating the 11th Claimant as alleged.
5. The Respondents further aver that upon transferring the 1st to 10th Claimants to loading bay, the 10 Claimants absconded duty without any reasonable and/or unlawful cause and refused to resume work.

The Respondents admit that demand was made and notice of intention to sue issued but they failed to compensate the Claimants for reasons given above. The Respondents therefore pray that this suit be dismissed for being bad in law, incompetent, misconceived, frivolous and therefore an abuse of the court process.

The Respondents exhibited various letters apparently addressed to the 1st to 10th Respondents dated 23rd and 29th March 2010 transferring them to the loading bay of Kapa. The witness statements of the various Claimants and Respondents witness were also filed before this court.

Issues for determination

6. Upon considering the evidence of both sides and submissions filed herein, the issues for determination are as follows:

1. **Whether Claimants were terminated or they absconded duty.**
2. **Whether the termination was fair and lawful.**
3. **If not, what remedies if any the Claimants are entitled to.**

7. On the 1st issue the Claimants have informed court that they were verbally employed and verbally terminated. The Respondent on the other hand insists that the Claimants absconded duty after being transferred to various departments.

From the evidence on record, after the Claimants were apparently dismissed, they reported to the Labour office. The Labour officer wrote various letters to the Respondent asking them to attend a meeting at the Labour office to discuss the issues – one such letter required the Respondents to appear on 13/7/2010 at 2 pm.

There is no evidence that the Respondent ever attended the meeting even to indicate that the Claimants had absconded duty. A demand letter was also written to the Respondents before this claim was instituted and it is dated 20/6/2011. There was also no reply to the same.

The Respondents assertion that they transferred Claimants to other departments does not have proof as there is no proof that letters written to the Claimants were received.

8. The Respondents had acted in bad faith towards Claimants by not giving them appointment letters. This court has in many decisions addressed the issue of non-issuance of appointment letters (*see Samson Kimani Gachara vs Auto Springs Manufacturers Limited case No. 2321/12*). Failure to issue an appointment letter in this case contravened the provisions of Section 9 (1) and (2) of Employment Act which states that:-

1. ***A contract of service:-***

- a. ***for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
 - b. ***which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.***
2. ***An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).***

In the absence of a letter of contract Section 10(7) of Employment Act 2007 states that:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

In this case that as the Claimants allege, burden of proof to disprove what is alleged lies on the Respondent. Such issue of transfers to other departments which Claimants seem unaware of, would have been lastly resolved if there was an appointment letter. It is therefore the finding of this court that the Claimants were terminated as stated and the assertion of “transfers” has no basis.

9. Having stated as above, was this termination lawful?. The answer to this question is found in Section 41 of Employment Act 2007 which states that:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment

of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

There is no hearing that was accorded to the Claimants before being terminated and if the termination was considered on account of redundancy, the Section 40 of Employment Act 2007 would have had to be adhered to. Section 40(1) of Employment Act 2007 states as follows:

- a. *Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the Labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
- b. *Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the Labour officer;*
- c. *The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
- d. *Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
- e. *The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
- f. *The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
- g. *The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

None of these provisions were followed. It therefore follows that the termination of the Claimants was unlawful and unfair.

Remedies

10. Having found as above, the remedies I award Claimants are as follows:

1. *1 month salary in lieu of notice and for 1st to 10th Claimants = 12,150/= and for 11th Claimants it is = 8,250/=.*
2. *12 months salary as compensation for unlawful termination being = 12 x 12,150 = 145,800 for each of 1st to 10th Claimant and 12 x 8,250 = 99,000/= for 11th Claimant.*
3. *Gratuity payment is not payable there being evidence that each of the Claimants were members and contributors of NSSF.*
4. *Each Claimant will be issued with a Certificate of Service.*
5. *The Respondent will meet cost of this suit.*

It is so ordered.

Dated and delivered in open court this 14th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance Claimant

Esonga for Respondent