



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.78 OF 2015

GEOFREY SHAKWIRA..... 1ST CLAIMANT
STEVEN EMOJONG KIZIRA.....2ND CLAIMANT
GILMO GIDO KIZIRI.....3RD CLAIMANT
MARY MUTHONI GITAGIA.....4TH CLAIMANT
MARGRET WACHEKE KAMANDE.....5TH CLAIMANT
JULIUS MUNYOKI MUSYOKI.....6TH CLAIMANT
VERONICA NJERI GITAU.....7TH CLAIMANT
EDNAH MORAA NYANGARESI.....8TH CLAIMANT
ESTHER MORAA KIMONDE.....9TH CLAIMANT
BEATRICE MOTHOKIMANI.....10TH CLAIMANT
GABRIEL OILE WASIKE.....11TH CLAIMANT
MILLY KASANDI ADIKA.....12TH CLAIMANT
CATHERINE WANJIRU NGIGI.....13TH CLAIMANT
ALICE CHEROTIN KEBENGWA.....14TH CLAIMANT
LEAH NYABORO KARANJA.....15TH CLAIMANT
VERONICA MATINA EKWENYE.....16TH CLAIMANT
HANNA WANJIRU KAMAU.....17TH CLAIMANT
CATHERINE KANYIUA MWANZA.....18TH CLAIMANT

VERSUS

(Before Hon. Justice Byram Ongaya on Friday 13th November, 2015)

JUDGMENT

The claimants filed the memorandum of claim on 12.05.2015 through Namada & Company Advocates. The claimants prayed for judgment against the respondent for:

- a. A declaration that the respondent's action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.
- b. An order for the respondent to pay the claimants their terminal dues and compensatory damages as pleaded in paragraph 7 of the memorandum of claim totaling to Kshs.6, 338, 757.00.
- c. An order for the respondent to pay the claimants' costs of the claim plus interest thereon.

The respondent filed the response to the memorandum of claim on 28.05.2015 through Githinji & Associates. The respondent prayed for orders:

- a. The claimants' claim as pleaded in the memorandum of claim be dismissed.
- b. In alternative to (a) above, the claimants' entire claim against the respondent be dismissed.
- c. A declaration that the termination of the claimants' employment by the respondent was lawful, justified and fair.
- d. The respondent is awarded costs of the claim.

Parties agreed to file their respective affidavits in support of their respective cases. Each of the claimants filed an affidavit on 16.06.2015 and the respondent filed on 24.09.2015 the affidavit of Liwen Hua sworn on 23.09.2015 in opposition of the suit. The parties filed the final submissions and agreed that judgment be delivered by the court on the basis of the pleadings, affidavits and exhibits on record.

The court has considered the pleadings and the affidavits and the facts of the case are as follows:

1. It is not in dispute that the claimants were employed by the respondent in diverse capacities. The 3rd, 4th, 5th, 6th, 10th, 14th were employed in April 2013; the 1st claimant was employed in April 2012; the 2nd claimant was employed on 20.03.2014; the 7th claimant was employed on 22.04.2013; the 8th claimant was employed 28.04.2013; 9th claimant was employed 10.03.2013; 11th claimant was employed 10.04.2013; 12th claimant was employed 4.04.2013; 13th claimant was employed on 05.04.2013; 15th claimant was employed 06.04.2013; 16th claimant was employed on 05.12.2013; 17th claimant was employed on 03.04.2013; and the 18th claimant was employed in September 2013.
2. The claimants were terminated from employment after a continuous service without a break and on diverse dates being in November 2014, 27.04.2014, 31.08.2014, 31.08.2014, 10.10.2014, 27.09.2014, 15.01.2015, 3.04.2013 and 15.02.2015.
3. The reason for the termination of the claimant's employment was redundancy as the respondent told the claimants that there was no job for the claimants to perform. The claimants dispute that there was redundancy because they submit other persons were employed in their place and they submit the reason for their termination was calculated to deny them their respective permanent terms of service as per the minimum terms provided for in the Employment Act, 2007. The claimants' case was that there was no termination notice to each of the claimants or the labour officer and the summary dismissal was inhumane as it was unlawful and against fair labour practices.
4. The court has considered the opposing affidavit filed for the respondent. It is not denied that the claimants worked without offs or rest days, that they worked on public holidays, they worked overtime and for the periods of service as pleaded in the statement of claim and as supported in the

affidavits filed for the claimants.

The **1st issue** for determination is whether the minimum terms of service in the Employment Act, 2007 applied to the claimants. For the claimants, it was submitted that the claimants were employed by the respondent on diverse dates and worked until their termination on diverse dates set out earlier in this judgment. It was submitted that each claimant worked continuously without a break for over one month and therefore the casual employment converted to employment subject to minimum terms of service under the Act as per section 37 of the Act. Thus, under section 37(1) and (3) of the Act, the terms of service for the claimants was converted from casual employment by operation of section 37(1) (a) of the Act. The respondent cited the court's opinion by Onyango J in **Wilfred Bukachi Opwaka –Versus- Ready Consultancy Company Limited, Cause 671 of 2012 at Nairobi.**

Section 37 of the Act provides as follows:

“37. (1) Notwithstanding any provisions of this Act, where a casual employee?

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot 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 or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

2. In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 88 of this Act shall apply.”

A casual employee is defined under **section 2 of the Employment Act, 2007** to mean a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.

It is clear that the claimants were employed on daily rate and worked for more than a month. For the claimants' employment to have converted under section 37(1), it must be established that either the claimants worked for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month; or that the claimants performed work which cannot 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 or more. The material on record shows that the claimants satisfy the first limb for the conversion. The court returns that their initial casual employment converted to employment subject to minimum terms of service as provided for in the Act.

The 2nd issue for determination is whether the termination was unfair and unlawful. The court finds that the claimants have established that the respondent failed to comply with the mandatory provisions of section 40 of the Employment Act, 2007. The court has considered that the respondent failed to prepare the claimants for the redundancy and further failed to show the criteria used to select the claimants for the redundancy. It is suspect that the claimants have stated that other persons were employed in their place and the respondent has specifically failed to address that concern in the opposing affidavit. It has not been explained by evidence that the retained staff held different skills from those held by the claimants.

The court finds that the respondent subjected the claimants to unfair labour practices by failing to comply with clear provisions of section 40 of the Act, failing to pay the claimants the terminal dues upon redundancy and the claimants did not contribute to their termination in any manner. The claimants are therefore entitled to the 12 months' salaries for compensation in view of the unfair termination and as prayed for. While making that finding the court upholds its opinion in Kenya Plantation Agricultural Workers Union –Versus- Harvest Limited [2014]eKLR thus,

“Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that the employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skills, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court’s opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in section 40(1) (c) of the Act failing which, it is difficult to establish compliance with the section. The court also holds that the selection parameters in section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but none can be applied in exclusion of the others.” In the present case, the court finds that the respondent failed to comply with the law as cited in the opinion and the redundancy was unlawfully undertaken as it amounted to unfair and sudden termination of the claimants’ employment.

The 3rd issue for determination is whether the claimants are entitled to the other remedies as prayed for. The court finds that the claimants have established that they worked without offs or rest days, they worked on public holidays, and they also worked overtime and for the periods of service as pleaded in the statement of claim and as supported in the affidavits filed for the claimants. The claimants are entitled to service or severance pay as computed in the memorandum of claim and to annual leave due but not taken. The termination has been shown to have been abrupt and the claimants are entitled to one month pay in lieu of the termination notice. Thus the court returns that the claimants are entitled to the remedies as prayed for.

In conclusion judgment is entered for the claimants against the respondent for:

- a. The declaration that the respondent’s action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.
- b. The respondent to pay the claimants their terminal dues and compensatory damages as pleaded in paragraph 7 of the memorandum of claim totaling to **Kshs.6, 338, 757.00** by 01.01.2016 in default interest at court rates to be payable thereon from the date of this judgment till full payment.
- c. The respondent to pay the claimants’ costs of the claim.

Signed, dated and delivered in court at Nyeri this Friday, 13th November, 2015.

BYRAM ONGAYA

JUDGE

