



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 342 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 27th November, 2014)

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|--------------------------|---|-----------------|
| 1. COSMAS OCHIENG OTIENO | } | |
| 2. ERICK OCHIENG OJUKA | } | |
| 3. WADIRA GEORGE GOGO | } | |
| 4. RICHARD AZIZ OWANDE | } | |
| 5. CLIVE SAMSON ODHIAMBO | } | |
| 6. JAMES MBOGO AYIEKO | } | CLAIMANTS |

-VERSUS-

EQUATOR BOTTLERS LTD RESPONDENTS

JUDGMENT

The claimants herein filed their memo of claim on the 20.12.2013 through the firm of D. A. Oluoch & Associates. All the claimants contend that they were wrongfully and unlawfully terminated by the respondents herein. Each claimant told court that they were employed by the respondents herein on different dates as per their letters of appointments (**App 1(a) (b) (c) (d) (e) & (f)**). They aver that they served the respondents diligently until September 2013 when the respondents Managing Director without color of right claimed that the claimants were hatching a plan to eliminate him and he reported the matter to the police and investigations were carried out by the office of the DPP – CID File No. 8/2013.

The police investigations yielded no results against the claimants clearing the claimants of all allegations. In the meantime, the respondents tried to coerce the claimants to resign, a demand which the claimants declined to yield to but to their surprise their employment was wrongfully terminated on 20.9.2013 as per the **App-III** – the bundle of termination letters.

The claimants contend that their employment was wrongfully terminated and they were forced to clear with the respondents before being given their terminal dues (**App-IV**). The claimants aver that despite the claimant's clearing, the respondents made illegal deductions in respect of broken glasses and liquids which ordinarily should have been accounted for by the distributors since claimants were salesmen seconded to the respective distributors.

The claimants want to be paid for the wrongful termination as per para 8 of the statement of claim. The claimants contend that they were wrongfully terminated without being accorded any hearing as provided under S. 41 of Employment Act.

The respondents on the other hand filed their memo of reply on 21.1.2014. They contend that the claimants were terminated as per their letter of employment contract which provided for 1 month salary in

lieu of notice and they paid all the claimants their terminal dues. In respect of deductions from the terminal dues, they contend that these were liabilities previously acknowledged. They further contend that the claimants faced criminal charges in Criminal case no. 336/2013.

I have considered evidence from both parties. The issues for determination are as follows:-

- 1. Whether respondents had valid reasons to terminate the services of the claimants.**
- 2. Whether the claimants were accorded due process.**
- 3. Whether claimants are entitled to the prayers sought.**

On 1st issue, the termination letters given to the claimants did not give any reasons for the termination. This is in total disregard to S. 43 of the Employment Act which states as follows:-

“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

The employer does not have a right to fire without reasons even if the letter of employment provides that he can give 1 month's notice.

On 2nd issue, no hearing was also accorded to the claimants as envisaged under S. 41 of Employment Act which states:-

“(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 reasons 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 sub – section (1) make.”

The claimants were given their terminal benefits but this did not cover for the illegality meted against them and it is the finding of this court, that they were unlawfully and wrongfully terminated. They are therefore entitled to the following remedies:-

- 1. Each claimant is entitled to 12 months salary as damages for unlawful termination being;**

1st claimant - 58,753.16 X 12 = Kshs 705,037.92

2nd claimant - 52,500.00 X 12 = Kshs 630,000.00

3rd claimant - 49,527.14 X 12 = Kshs 594,325.68

4th claimant - 38,801.11 X 12 = Kshs 465,613.32

5th claimant - 43,175.00 X 12 = Kshs 518,100.00

6th claimant - 131,215.14 X 12 = Kshs 1,574,581.68

2. In addition, the 2nd and 5th claimants are entitled to moneys deducted from them in form of broken liquids and empty bottles being as follows:-

2nd claimant - Kshs 133,165.15

5th claimant - Kshs 675,756.00

3. The respondents will also issue each claimant with certificate of service.

4. The respondents will meet costs of this suit.

HELLEN S. WASILWA

JUDGE

27/11/2014

Appearances:-

Omondi for claimants present

Miss Olango for Respondents present

CC. Wamache