



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 491 OF 2010**

**BEN OPONDO .....1<sup>ST</sup> CLAIMANT**

**HENRY MUSONYE .....2<sup>ND</sup> CLAIMANT**

**PATRICK KIOKO .....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**VIAZI LIMITED ..... RESPONDENT**

**JUDGMENT**

The Claimants BEN OPONDO, HENRY MUSONYE and PATRICK KIOKO filed suit against the Respondent by Memorandum of Claim dated 10<sup>th</sup> March 2010 and filed on 5<sup>th</sup> May 2010. They allege that they were employed on diverse dates as waiters and or cooks, that they were never issued with letters of appointment, that they were paid salary monthly through salary vouchers and that they were all dismissed from employment on 13<sup>th</sup> September 2009 on allegations of theft of unspecified items from the Respondents. They allege that the Respondent did not make any statutory contributions. That the last salary of the Claimants were as follows;

Ben Opondo Kshs.13,000

Henry Musonye Kshs.10,000

Patrick Kioko Kshs.10,000

The Claimants pray for the following reliefs;

**1<sup>st</sup> Claimant**

- |  |              |
|--|--------------|
| a. Unpaid salary for days worked in September 2009 | Kshs.5,629   |
| b. 3 months' pay in lieu of notice                 | Kshs.39,000  |
| c. Accumulated leave days (2 years)                | Kshs.26,000  |
| d. Service pay from July 2007 to Sept. 2009        | Kshs.13,000  |
| e. Leave Allowance                                 | Kshs.26,000  |
| f. 12 months compensation                          | Kshs.156,000 |

**2<sup>nd</sup> Claimant**

- a. Unpaid salary for days worked in September 2009 Kshs.4,329
- b. 3 months pay in lieu of notice Kshs.30,000
- c. Accumulated leave days (3 years) Kshs.30,000
- d. Service pay (February 2006 to September 2009) Kshs.13,000
- e. Leave Allowance Kshs.112,000
- f. Compensation Kshs.120,000

### **3<sup>rd</sup> Claimant**

- a. Unpaid salary for days worked in September 2009 Kshs.4,329
- b. 3 months pay in lieu of notice Kshs.30,000
- c. Accumulated leave days (2 years) Kshs.20,000
- d. Service pay (July 2006 to September 2009) Kshs.10,000
- e. Leave Allowance Kshs.20,000
- f. Compensation

The Claimants further claim costs, exemplary damages and interest.

The Respondent filed its Memorandum of Defence on 8<sup>th</sup> June 2010 in which it admits that the Claimants were its employees, that they were issued letters of appointment copies of which are attached to the Defence as appendix v-1(a) (b) and (c). The Respondent state that the Claimants were paid salary but were not paid service pay as they had not worked for 4 years, and that they were paid for all annual leave days. The Respondent further pleads that the Claimants were not registered with NSSF and NHIF. The Respondent alleges that Claimants were dismissed for gross misconduct, that they conspired to steal Respondents stolen cooking fat and sold the cooking fat on diverse dates, that the matter was reported to Central Police Station and booked as OB75/2/12/09. The Respondent alleges the dismissal was justified and legal, that the Claimants were the authors of their own misfortune. The Respondent denies that the Claimants are entitled to the prayers sought in the Memorandum of Claim and prays that the claim be dismissed with costs.

The case was first mentioned before Justice Charles P. Chemuttut the then Principal Judge (now retired) on 24<sup>th</sup> May 2010 when the case was fixed for hearing on 23<sup>rd</sup> August 2010. When the case came up for hearing on 23<sup>rd</sup> August 2010 it was adjourned and fixed for hearing on 5<sup>th</sup> October 2010. On 5<sup>th</sup> October 2010 the parties sought leave to proceed by way of written submissions which leave was granted. The case was thereafter mentioned on 16<sup>th</sup> November 2010 and 22<sup>nd</sup> February 2011 when parties had not complied with directions on filing submissions. On 5<sup>th</sup> July 2011 the court confirmed compliance by the parties and the court reserved the award on notice. Justice Chemuttut retired upon reconstitution of the court in July 2012 before preparing the award and the file was reallocated to me. The case was fixed for mention before me on 5<sup>th</sup> December 2012 when none of the parties appeared in court. The case was again fixed for mention on 1<sup>st</sup> February 2013 when again the parties failed to attend court prompting me to mark the file as stood over generally.

The Claimants finally fixed the case for mention on 4<sup>th</sup> June 2013 when Ms. Makori held brief for Mr. Masafu for the Claimants and Mr. Maloba held brief for Mr. Chigiti for the Respondent. The parties confirmed to the court that they had filed all necessary pleadings and submissions and the court could go ahead and write the judgment.

I have perused the record on the file, the pleadings and the written submissions by the parties. I have also perused the list of documents and authorities.

The issues for determination in my opinion are whether the dismissal of the Claimants was fair and justified, and whether they are entitled to any of the prayers sought.

On whether the dismissal was justified and fair, the Respondent has admitted dismissing the Claimants on the grounds of stealing and selling cooking fat belonging to the Respondent. Section 44 of the

Employment Act gives the circumstances when an employer may summarily dismiss an employee. However section 41 provides for the procedure before dismissal as follows;

**41. Notification and hearing before termination on grounds of misconduct**

***(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.***

In the present case the Respondent has pleaded that the only action he took before summarily dismissing the Claimants is to report the matter to Central Police Station.

Criminal prosecution is not provided for in the Employment Act. The relationship between an employer and an employee is a personal contract that must be terminated either as provided in the contract or by the Employment Act. The only relevance that criminal proceedings have to termination of employment is that the arrest and custody of an employee for more than 14 days, and the committal of an employee of a criminal offence against the employer or to the substantial detriment of the employer are both grounds for summary dismissal. In both cases, the law requires that the employer complies with section 41,43 and 45 of the Employment Act which provide respectively for the process, validity of reason and fair procedure. Having failed to comply with the law the termination of the Claimants employment was unprocedural and therefore unfair.

**Are the Claimants entitled to the prayers sought?**

The Claimants have each prayed for the following;

- a. Unpaid salary for days worked.
- b. Pay in lieu of notice.
- c. Accumulated annual leave.
- d. Service pay.
- e. Leave allowance.
- f. Compensation.
- g. Exemplary damages
- h. Costs and interest.

I will consider each head separately.

**a. Unpaid Salary for days worked**

Every employee is entitled as of right to payment of salary for days worked. The Respondent has admitted that it did not pay the same and is willing to pay. I therefore award each Claimant salary for days worked up to 13<sup>th</sup> September 2009 as follows;

1<sup>st</sup> Claimant Kshs.5,676.80. This is based on monthly salary of 13,100 per month.

2<sup>nd</sup> Claimant Kshs.4,333.30 based on salary of Kshs.10,000 per month.

3<sup>rd</sup> Claimant Kshs.4,333.30 based on salary of kshs.10,000 per month.

**b. Pay in lieu of Notice**

Having been dismissed unfairly all the Claimants are entitled to 1 month's salary in lieu of notice as provided in their letters of appoint as follows;

1<sup>st</sup> Claimant      Kshs.13,100/=

2<sup>nd</sup> Claimant      Kshs.10,000/=

3<sup>rd</sup> Claimant      Kshs.10,000/=.

**c. Accumulated Annual Leave.**

The Respondent submitted that he paid all leave due to the Claimants. No evidence was adduced by the Respondent to prove the same. As provided in Section 10 (7) of Employment Act, it is the duty of an employer to disprove any allegation by an employee where the employer fails to produce employment records. Having failed to disprove the allegation by the Claimants, I award the Claimants leave of 24 days each year as provided in their letters of appointment. This works out as follows for each Claimant.

**1<sup>st</sup> Claimant**

2 years leave = 48 days. Kshs.20,960.

**2<sup>nd</sup> Claimant**

3 years leave =72 days. Kshs.16,000.

**3<sup>rd</sup> Claimant**

2 years leave = 48 days. Kshs.16,000.

**d. Service Pay.**

Section 35(5) of the Employment Act provides for payment of service pay. The rate has been set by precedent and practice at 15 days per year worked borrowing from severance pay as provided in Section 40 of the Act. The parties are in agreement that the Respondent did not register the employees with NSSF or any other, scheme and therefore the Claimants do not fall under the exceptions in Section 35(6) of the Act. For these reasons each Claimant is entitled to service pay as follows.

1<sup>st</sup> Claimant – 2 years' service      Kshs.13,100

2<sup>nd</sup> Claimant – 3 years' service      Kshs.15,000

3<sup>rd</sup> Claimant - 2 years' service      Kshs.10,000

I award them service pay accordingly.

**e. Leave Allowance**

According to their letters of appointment each Claimant is entitled to leave allowance of Kshs.150. I therefore award them Leave Allowance as follows;

1<sup>st</sup> Claimant (2 years)      Kshs.300

2<sup>nd</sup> Claimant (3 years)      Kshs.450

3<sup>rd</sup> Claimant (2 years)      Kshs.300

**f. Compensation**

I have already found that the termination of employment of the Claimants was unfair. They are therefore entitled to compensation. I however find that full compensation of 12 months' salary is excessive taking into account their length of service and the reasons for termination. I therefore award them compensation as follows;

1<sup>st</sup> Claimant – 2 months salary at Kshs.26,200.

2<sup>nd</sup> Claimant 3 months salary at kshs.30,000.

3<sup>rd</sup> Claimant 2 months salary at Kshs.20,000.

**g. Exemplary Damages**

The Claimants have prayed for exemplary damages. As submitted by the Respondent and as held in the case of Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR exemplary damages are not payable in employment contracts.

The claim for exemplary damages is dismissed.

**h. Costs**

The Respondent had valid reason to dismiss the Claimants. It only failed to follow the proper procedure. For this reason the Claimants are not entitled to payment of their costs.

I therefore order that each party bears its own costs.

In summary therefore I give judgment to the Claimants as follows;

1<sup>st</sup> Claimant Kshs.79,336.80

2<sup>nd</sup> Claimant Kshs.83,783.30

3<sup>rd</sup> Claimant Kshs.60,633.30

Read in open Court this .....24<sup>th</sup> .....day of .....July.....2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

..... for Claimants

.....for Respondent