



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1014 of 2012

CLEOPAS PIRI AND 6 OTHERS CLAIMANTS

VERSUS

SPEARS SHIP CONTRACTORS..... RESPONDENT

JUDGMENT

The Respondents in this case are Cleopas Piri, Michael S. Mwasi, Ali Abdalla, Hassan Jiwe, Mwakusanya Mwatembo, Hamadi Rama and Erick Davis Nyange. Their memorandum of claim is dated 14th June, 2012 and is signed by the 5th Claimant. They were represented by Rakoro & Company Advocates. The Respondent is the Spears Ship Contractors Limited. They filed the Amended Respondent's memorandum in Reply on 22nd August, 2012 through Buyuja Obonyo & Company Advocates. The initial reply had been filed on 23rd July, 2012.

In the memorandum of claim the claimants are seeking prayers against the Respondent for:

- (a) Unconditional reinstatement without any loss of benefits to all the claimants and the claimants be treated in all respect as if their respective employment had not been terminated up to the date of determination of this claim, and payment of the arrears of salary so accruing from June 2011 till the date of the award.
- (b) Alternatively the Respondent be compelled to pay to each claimant the claims particularized under paragraph 10 of claim amounting to a total of Ksh.3,168,986/=.
- (c) Cost of the suit plus interest at the court rates.

The case came up for hearing on 15th May, 2012 and the parties called one witness each. The claimants' witness was Makusanya Mwatembo, the 5th claimant. The Respondent's witness was one Mr. Mohammed Murbe, the Administrative Manager of the Respondent.

The claimants were employed by the Respondent up to 31st May, 2011. The 1st to 6th Claimants were employed with effect from 1st June 2004 while the 7th Claimant was employed with effect from 1st May, 2004. The letters of employment were Appendix 1 annexed on the memorandum of claim.

As at termination on 31st May, 2011 the 1st to 6th claimants earned a basic salary of Ksh,20,420/= with a house allowance of Ksh,2,820/=. The 7th claimant earned Ksh.33,620/= and house allowance of

Ksh.2,820/= per month.

The claimants' witness testified that on 31st May, 2011 they were terminated orally and the termination was not on account of disciplinary misconduct or poor performance of work. Prior to the termination the claimants were not served with any termination notice or given any hearing as to the reasons for their termination and upon termination, they were paid their May 2011 salary and no any other benefits were paid.

The letter of termination dated 31st May, 2011 and delivered to each of the claimants at the Respondent's offices on the same date read as follows:

"RE: TERMINATION OF EMPLOYMENT

Due to the ongoing decline in trade volumes in the shipping industry faced by the company, it is with sincere regret to inform you that your employment at Spears Ship Contractors has been terminated from the date hereof.

As required by the law, you will be paid all your dues including one month salary (basic plus house allowance) in lieu of termination notice.

On behalf of the management of Spear Ship Contractors Ltd, I take this opportunity to thank you for the services that you have rendered to this company and to wish you best of luck in your future endeavours.

Sincerely,

For: SPEARS SHIP CONTRACTORS LTD

SIGNED

MAHMOUD A. MURBE

ADMINISTRATION MANAGER"

The claimants at all material times were members of the Kenya Shipping, Clearing and Warehouses Workers Union (KSCWWU). The Union had concluded a Collective Agreement with the Respondent signed on 21st April, 2004 and registered in the court on 5th August, 2004. The copy of the Agreement was Appendix 4 on the memorandum of claim.

Following the termination, the Union negotiated with the Respondent on behalf of the Claimants. However, no settlement was forthcoming and the claimants decided to personally and directly negotiate with the Respondent. The parties produced response attached to their respective pleadings as evidence of negotiations.

The Respondent paid some money to the claimants on 11th May, 2011 as per the respondent's Annexure SSCL3 on the Amended Memorandum of Reply. It was the claimants case that the payments were not in accordance with the Collective Agreement. The claimants raised their concerns through the letter to the Respondent marked SSCL4 on the Amended Memorandum of Reply and they raised the following key issues:

- (a) The number of the pending leave to each of them had been slashed.
- (b) The calculations were done without involving the claimants.
- (c) The number of days payable per each completed year of service were slashed.

(d) The respondent had failed to consider the element of unfair termination.

The claimants therefore stated that they had not withdrawn their claims against the respondent. The Respondent received that letter on 19th June 2012.

The Respondent pleaded that the Claimants had been terminated from employment on account of redundancy and that the claimants had been paid their terminal dues.

The issues for determination are only two, namely:

1. Whether the claimants termination was unfair.
2. Whether the claimants are entitled to the remedies as prayed for.

For the first issue, the court finds that the Respondent unfairly terminated the services of the claimants because:

(a) the Respondent alleged redundancy on account of declining volumes of trade in the shipping industry. The allegation was never proved and the Respondent did not submit or prove that the offices held by the claimants in the respondent's establishment had been abolished. Thus the reasons for termination were not genuine as they were not matters the Respondent believed existed at the time of the termination as envisaged under Section 43 of the Employment Act, 2007; and

(b) for the Respondent, even if the reason for redundancy had existed, there was no compliance with Section 40 of the Act governing the termination on account of redundancy. The Respondent did not give the claimants the prescribed notice and hearing. The court finds that a mere casual meeting between the employer and the employee at which a termination letter is flushed out as it happened in this case does not amount to a notice and a hearing as provided for in Sections 40 and 41 of the Employment Act.

The second issue for determination is whether the claimants are entitled to the remedies as prayed for. As the Respondent has alleged that there may be no work for the claimants to perform in its establishment, the court finds that it would be impractical or inconvenient to both parties for the court to order a reinstatement. In the circumstances, the prayer for reinstatement shall fail.

The prayer for payment of the particularized amounts as stated in the memorandum of claim was opposed only on the account of the submission of the Respondent that the termination had been fair and the Respondent had paid the terminal dues. The court has found that the termination was unfair and the claimants are entitled to the payments as particularized in the memorandum of claim and as restated in their written submissions. However, the amounts already paid to the claimants shall be deducted from the entitlements calculated as follows:

(a) 1st Claimant

Total due	-	Ksh.419,760.00
Less	-	Ksh.100,930.00
Net due	-	<u>Ksh.318,830.00</u>

(b) 2nd Claimant

Total due	-	Ksh.423,280.00
Less	-	Ksh.103,630.00
Net due	-	<u>Ksh.309,650.00</u>

(c) 3rd Claimant

Total due	-	Ksh.411,460.00
Less	-	Ksh.103,630.00
Net due	-	<u>Ksh.307,830.00</u>

(d) 4th Claimant

Total due	-	Ksh.411,460.00
Less	-	Ksh.112,310.00
Net due	-	<u>Ksh.299,150.00</u>

(e) 5th Claimant

Total due	-	Ksh.420,933.00
Less	-	Ksh.112,435.00
Net due	-	<u>Ksh.308,498.00</u>

(f) 6th Claimant

Total due	-	Ksh.411,460.00
Less	-	Ksh.103,630.00
Net Due	-	<u>Ksh.307,830.00</u>

(g) 7th Claimant

Total due	-	Ksh.411,460.00
Less	-	Ksh.179,307.00
Net Due	-	<u>Ksh.232,153.00</u>

All the claimants are entitled to a certificate of service in accordance with Section 51 of the Employment Act, 2007.

Accordingly judgment is entered for the claimant against the Respondent for:

- (a) payment of a sum of Ksh.2,083,941.00/= to the claimants plus interest at court rates from the date of the judgment till full payment;
- (b) issuance to each of the claimants a certificate of service; and
- (c) to pay costs of this cause.

Signed, dated and delivered this 26th day of October, 2012.

BYRAM ONGAYA
JUDGE