



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1443 of 2010**

**BENARD MOCHAMA ONDUMA.....1<sup>ST</sup> CLAIMANT**

**G. M. N.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**AMOS KIMWOMU NYARIBO ..... RESPONDENT**

**JUDGMENT**

The claimants herein filed their statement of claim on the 18<sup>th</sup> November, 2010 through the firm of Gordon Ogola and Associates. In the statement the claimants aver that they were employees of the Respondent. The 1<sup>st</sup> claimant avers that he was employed by the Respondent in 15<sup>th</sup> January 1998 as a Manager at a basic salary of 6000/= consolidated wage. The 2<sup>nd</sup> respondent avers that he was employed in August, 1998 as a Laundry Machine Operator earning 4500/= consolidated pay per month. The claimants aver that though an employment contract did exist between them and the Respondent they were not issued with any employment letters as required under the Employment Act.

The claimant state that on 7<sup>th</sup> January, 2009 his services were terminated whereas the 2<sup>nd</sup> claimant stated that his services were terminated on 6<sup>th</sup> January, 2009. They indicate that their rights under the Employment Act and ILO Convention No.158 were flouted. The claimants aver that they had dedicated their services to the respondent's work and were unfairly terminated without any notice or warning at all. The claimants exhibited their employment identification cards as exhibits. The claimants further state that the Respondent alleged they terminated the 1<sup>st</sup> claimant on retirement and 2<sup>nd</sup> claimant for reasons that he failed and refused to explain to claimant. The claimants further aver that they were not paid any terminal benefits nor were they issued with any certificate of service. They indicate that they attempted to solve the matter through the Labour Office but were unsuccessful. They then consulted their lawyers who filed the case in court.

The claimants allege that the Respondent actually terminated the services of the 2<sup>nd</sup> claimant, Mr. N on account of his HIV positive status. The claimant contends that the respondent on many occasions complained of the chronic sickness of the 2<sup>nd</sup> claimant and did not accord him due kindness as per rules governing the workers with such conditions. The claimants seek orders from court that the Respondent be ordered to pay them their benefits.

In cross examination CW1 told court that he was in charge of the operation of respondent and he participated in recruitment of staff. He says he was an NSSF contributor. He says he was in charge of banking but is not aware of any loss of money from the business. He denies he was terminated for gross misconduct due to loss of money from the business. He says his salary was Ksh.25,683/= but there is a

muster roll showing Ksh.15,680/=. He also said that he was a member of a Union.

Cross examined further, CW1 said he was not a bank account signatory. He says he is not aware of any money lost.

CW2 also gave evidence and said he was terminated by Respondent who never issued him with any notice of termination and no valid reasons were given for his termination. He says the respondent knew he was HIV positive. He says he was assaulted by a fellow employee and he wrote a letter of forgiveness. He says he worked overtime but was never paid for it. In cross examination CW2 says his salary was Ksh.7,650/= and he was an NSSF contributor. He says his employer knew of his health status.

The Respondent on the other hand filed their memorandum of response on 14<sup>th</sup> February, 2010. They also called 1 witness who gave his oral evidence. The Respondent denied the contention of the claimants. The Respondent aver that 1<sup>st</sup> claimant was employed in 1998 as a supervisor and not a manager at a salary of 6000/= per month and the 2<sup>nd</sup> claimant was employed as a casual labourer in April 1998 at a salary of 2400/= per month. The Respondent further deny they issued the claimants with employment cards. They also deny that the termination of the claimants was contrary to the Employment Act or ILO convention 158 or to any other written law. The Respondents also aver that the 1<sup>st</sup> claimant was given one month notice and 2<sup>nd</sup> claimant was duly paid salary in lieu of notice period. The Respondents further aver that they were justified in terminating the employment of 1<sup>st</sup> claimant for gross misconduct for misappropriating Ksh.78,996/= from the employees Benevolent Fund for which he was a signatory to the bank account and Ksh.100,565/= from the employer Bora Dry Cleaner.

That 2<sup>nd</sup> claimant was terminated for being violent and assaulting a workmate Meshack Ali for which he wrote an apology letter dated 15<sup>th</sup> January, 2009.

The Respondent also denies he had prior knowledge of 2<sup>nd</sup> Claimant's HIV status. The Respondent further avers that the claimants were given an opportunity to defend themselves and there were several correspondences between the Labour Officer and the Respondent's lawyers on the issue of their termination of employment and all the procedures were followed. The Respondent therefore aver that the claimants are not entitled to any payment on account of unpaid leave days as the claimants had taken all their leave entitlements up to the time of termination of their employment. They annexed the leave application forms for the 2<sup>nd</sup> claimant as proof that he went for leave of 25 days from 21<sup>st</sup> May 2008 to 20<sup>th</sup> June 2008.

The parties also filed their submissions in this case.

Having heard both sides, the issues for determination are:

1. Whether the Respondent unfairly terminated the services of claimants.
2. If answer to 1 above is Yes, what remedies the claimants are entitled to.

In answer to question 1, the claimants were employees of the Respondent having been employed in 1998 as supervisor and casual employee respectively. The Respondent contends that the 1<sup>st</sup> claimant was terminated after he misappropriated Respondent's funds. I have noted that the 1<sup>st</sup> claimant did write some letters regarding money transactions. These letters attached to Respondent's supplementary list of documents date back to 2002, 2005 and 2007. They also relate to transactions of a loan request and not on the benevolent fund which respondent indicated was the bone of contention. A report was also never made to the police on the alleged misappropriation. There is also a report of audit dated 2 years after termination and this report would not have formed the basis on which the 1<sup>st</sup> claimant was dismissed. The 1<sup>st</sup> claimant was also not given a chance to be heard before being dismissed. His right to be heard was therefore flouted.

On 2<sup>nd</sup> claimant, it is alleged he assaulted a colleague. The letter of apology written by 2<sup>nd</sup> Claimant indicates that he was actually the one assaulted and he reported same to police. He cannot therefore be victimized for this. He had contended that he was dismissed for his HIV Positive status. Whereas there is no evidence to prove this assertion, I nevertheless find that he was unfairly terminated as he was not accorded an opportunity to be heard.

Having found that the claimants were unfairly and unlawfully terminated, what remedies are they entitled to?

From the onset, as they were not given notice before termination, I will award each claimant one month's salary in lieu of notice. 1<sup>st</sup> claimant's salary at time of termination according to his evidence was 15,680/= in the muster roll and per his salary voucher. He had indicated that the salary was 25,683/= but there is no evidence to attest to this. Since the salary voucher is the indicator, I find 1<sup>st</sup> claimant was earning 15,680/= and so I award Ksh.15,680/= as 1 month salary in lieu of notice. The 2<sup>nd</sup> claimant on the other hand was earning 7650/= at time of dismissal and I award him the same in lieu of notice.

The other prayers sought by claimants is service pay. The claimants have however admitted that they were contributors of NSSF. Under Section 35 (6) of Employment Act;

***“Service pay is not payable where an employee is a member of National Security Fund.”***

The salary voucher for claimant shows such NSSF deductions. 2<sup>nd</sup> claimant admitted he was also an NSSF contributor. The prayer on service pay is therefore not awarded.

Claimants also sought to be paid their leave. There is evidence 1<sup>st</sup> claimant was on leave for leave in 2007 and 2008. For the other years there is no proof. I therefore find for claimants on leave as follows:

1<sup>st</sup> claimant =  $\underline{21} \times 15680$

30

=  $10976 \times 10 = 109,760$

2<sup>nd</sup> claimant =  $\underline{21} \times 7650 \times 10$

30

= 53,550/=

Another claim is for overtime which the claimants have not proved.

The claimants also seek payment on rest days and public holidays which is not proved.

I however also find for claimants and award them house allowance as follows:

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

15% of 15683 x 10  
= **23,524.50**

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

15% of 7650 x 10

