



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 691 OF 2015**

**MARTIN JUMA KUNDU.....CLAIMANT**

**VS**

**KEMU SALT PACKERS PRODUCTION LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant has brought this suit claiming terminal dues plus compensation for unlawful termination of his employment by the respondent on 28.3.2015. The claimant avers that the termination of their services was unfair and unlawful under the constitution and Employment Act and as such he is entitled to the said damages and Certificate of Service.

2. The respondent has denied that the claimant was her employee as alleged in the suit or at all and avers that the claimant was independent contractor employed with others on piece rate basis as and when work was available. She further denied ever terminating the claimant's employment and avers that he left on his own accord after the completion of the job he had been contracted to do. She therefore prays for the suit to be dismissed with costs.

3. The suit was heard on 18.11.2015 when the first claimant testified on behalf of the other claimants' as Cw1 while the respondent called Mr. Anannia Jibo Wario and James Mumba Chome as Rw1 and 2 respectively. Thereafter the counsel for the two sides filed written submissions.

**Claimant's case**

4. Cw1 told the court that he was employed by the respondent in 2004 as a supervisor earning daily wage of shs. 500/= payable weekly in arrears. That no written contract or payslips were ever issued to him but he used to sign attendance register and a payroll. On 28.3.2015, he attended work as usual but after lunch break, he was barred from entering the workplace up by the RW2 acting on instructions of the manager Mr. Koja. That in his view, that termination of his employment was unfair because there was no lawful cause shown and he was not accorded any hearing or prior notice. That he reported the matter to the Labour office at Malindi and the respondent was served with a letter which she declined to honour. That on 9.3.2015 his lawyer served a demand letter and thereafter brought this suit.

5. On cross examination Cw1 denied that he was a piece work contractor and contended that he was not

among the persons employed on piece rate basis. He maintained that he was a regular employee earning kshs.500 per day and he could not absent himself without permission from the personnel manager. He however admitted that his name was in the record for piece rate workers produced by the defence and that he never used to be deducted taxes from his monthly pay but he maintained that the piece rate pay was over and above the daily fixed pay of kshs. 500 for which he used to sign separately in the office. That his name was included in the list for piece rate pay because he is the one who used to bring the casual workers.

### **Defence case**

6. Rw1 stated that he is a loader and also the supervisor in charge of the packaging and loading of salt in the respondent since 2005. His duties includes recruiting piece rate labourers, supervising them, keeping record of the number of sacks loaded into the truck per labourer and pay them for the work done. He contended that the claimant was one of the loaders who were working for the respondent on piece rate basis as and when work was available. That the claimant just like the other piece rate labourers was free to absent himself from work any time he wished to without any punishment from the employer. That he was not entitled to any leave or notice before termination. Rw1 however admitted that the claimant differed with the boss and was told that he should not be seen again at the respondent's premises.

7. On cross examination Rw1 admitted that he found the claimant working at the respondent and he did not know the terms of the agreement between the two. He also admitted that he was a loader while the claimant was his boss and supervisor. He further admitted that it is the claimant who was allocating duties although Mr. Wicliff Otete, another loader, was more senior to him. He added that only the casual and permanent employees were signing attendance register but not the piece rate labourers. He maintained that unlike the casual and permanent staff, the piece rate labourers used to wait at respondent's gate until work was availed to them on piece rate basis and if no work came, they would go home without any pay. That the pay also depended on the amount of the work done such that in a good day one could earn kshs.1000 or kshs.10 on a bad day.

8. Rw2 is the Personnel manager for the respondent. He was employed there in 2003 as security guard but he was later promoted to the current position. He is in charge of employees' records in the company. He explained that the claimant was employed by the respondent on piece work basis at different times as evidenced by the record of piece work labourers he produced as exhibits. That loaders were only hired when there was work for loading or packaging and as such they used to wait outside the gate for any opportunity and if none presented itself the loaders left to try another day. In that respect therefore, the loaders including the claimant had no access to the office to sign the attendance register but the permanent and the contract employees are the ones who sign register and receive pay slips and are taxed monthly. He further contended that Cw1 was not entitled to annual leave or any notice before termination of their engagement. He therefore denied that CW1 was dismissed from work and averred that he left on his accord.

9. On cross examination Rw2 stated that Cw1 joined the respondent in 2006 when he (RW2) was the Receptionist. He maintained that loaders do not report to the management and as such they do not sign the daily attendance register. That they wait outside the gate until they are called in only when piece work arises and thereafter they are paid according to the work done. He admitted that on 28.3.2015, he was send by the General manager to stop the claimant from doing an undesirable act he was caught on CCTV doing.

### **Analysis and Determination**

10. The issues for determination arising herein are as follows:-

- (a) Whether the claimant was employed by the respondent under a contract of service or as independent contractor.
- (b) Whether the claimants' contract of employment was unfairly terminated.

(c) Whether the claimants are entitled to the relief sought.

### **The Employment Contract**

11. The onus of proving that he was employed under a contract of service lies with the claimant. In this case I find that he has failed to discharge that burden on a balance of probability. Under section 2 of the Employment Act an employee has been defined as:

***“a person employed for wages or salary and includes an apprentice and indentured learner.”***

12. At common law an employee is one who:

(a) is required to comply with the employer’s instruction about when, where and how he or she must work.

(b) has been trained by the employer to gain experience for purposes of working for the employer.

(c) has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer.

(d) must render services personally

(e) has assistants hired, supervised and paid by the employer

(f) has worked continuously for a long time

(g) has specific working hours set by the employer

(h) is working substantially full-time for an employer and is not free to work for other employers

(i) performs work on the employers premises

(j) is required to submit regular oral or written report to the employer

(k) has his business trips or travel expenses paid for by the employer

(l) has tools, material and other requirements met by the employer

(m) is easily dismissed at the will of the employer

(n) has the right to terminate his contract without incurring any liability.

13. After considering the pleadings, evidence and submission, I find that the claimant has not proved on a balance of probability that he was employed by the respondent under a contract of service. On the contrary the court finds in favour of the respondent that the claimant was independent contractor employed under a contract for services on piece work basis. Under section 2 of the said Act piece work has been defined as:

***“any work for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”***

14. The testimonies by Rw1 and Rw2 are consistent in proving on a balance of probability that the claimant was never part of the respondent's establishment despite his many years of serving the respondent on piece work basis. In my view, the defence has adduced overwhelming evidence that demonstrate that the claimant was piece work employee on hire as and when work was available; that his pay was determined by the amount of work done and on an agreed piece rate; that he did not need any

permission to absent himself from work and no notice was required before terminating his services.

15. The claimant has relied on the decision in *Mary Kistao Ngowa & 37 others vs Krystalline Ltd [2014] e KLR and kwekwe Mwakela vs Krystalline Ltd [2014] e KLR* but I find that that the facts of this case are different from those in the cited precedents because in the said cases the employer admitted that the claimants' were casual employees and also the claimants had pleaded and adduced evidence to prove that they served continuously and their casual employment had converted to regular term contract under section 37 of the Employment Act. In this case however, the claimant did not plead and prove that he served continuously on full time basis and the respondent has maintained that the claimant was neither casual nor permanent employee but an independent contractor who was hired on piece work basis as and when there was loading and packing.

### **Unfair termination**

16. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure. In this case however, the nature of employment was such that the requirement for substantive and procedural fairness guaranteed under section 35, 40, 41 and 45 of the Employment Act was not applicable. As opined herein above the respondent has proved on balance of probability that the claimant was an independent contractor and even if the General Manager dismissed him before finishing the piece work he was assigned, I find that he was not entitled to the substantive and procedural fairness guaranteed under the aforesaid sections of the Act.

### **Reliefs**

17. In view of the finding herein above that the claimants were an independent contractor, offering labour on piece work basis, the reliefs sought are regrettably declined.

### **Disposition**

18. For the reasons stated herein above, the suit is dismissed. Each part to bear his or her own costs.

**Signed, dated and delivered at Mombasa this 25<sup>th</sup> day of November, 2016.**

**ONESMUS MAKAU**

**JUDGE**