



REPUBLIC OF KENYA



KENYA LAW
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Kitonga & 12 others v Shreeji Chemicals Limited & 2 others (Employment and Labour Relations Cause 370 of 2017) [2023] KEELRC 340 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 340 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS CAUSE 370 OF 2017

B ONGAYA, J

FEBRUARY 10, 2023

BETWEEN

FRANCIS MWANZIA KITONGA 1ST CLAIMANT
KEFA MORARA ONTIR 2ND CLAIMANT
AMOS KIBOMU ONTIRI 3RD CLAIMANT
REMJUS OTIENO ODUOR 4TH CLAIMANT
MOSES THETHE NDHUNDHI 5TH CLAIMANT
JOSEPHAT KARANJA ONDITI 6TH CLAIMANT
KENNEDY KOLA KALAMU 7TH CLAIMANT
ALEX CHIVATSI MWASUGA 8TH CLAIMANT
SAMUEL WANGILA MASTEN 9TH CLAIMANT
PATRIC OTIENDE KALANI 10TH CLAIMANT
GEOFFREY MURONI LIKHAKO 11TH CLAIMANT
GEOFFREY KARISA CHARO 12TH CLAIMANT
ANTONY MBASHU MWAMBULA 13TH CLAIMANT

AND

SHREEJI CHEMICALS LIMITED 1ST RESPONDENT
DICKMASH ENTERPRISES LIMITED 2ND RESPONDENT
KHAMSO LAND AGENT & GENERAL CONTRACTORS ... 3RD RESPONDENT



JUDGMENT

1. The claimants filed a memorandum of claim on May 10, 2017 through IRB Mbuya & Company Advocates. Their case is based upon the amended memorandum of claim filed on February 15, 2019. The claimants alleged as follows. The 1st to 14th claimants were employed by the respondents' personnel manager to work in the 1st respondent's gasifier department in various capacities and on diverse dates as pleaded in their individual particulars of claim. Each worked six days per week and for at least 11 hours per day. Several of the claimants retained continuous employment for periods in excess of 3 months so that their employment converted to permanent employment. The employment was oral with no signed contracts. The average daily wage was Kshs 720.00 paid in cash. The claimants further alleged that they were not given annual leave per section 28 of the *Employment Act*, 2007; no written contract was issued per section 9 of the Act; no payslip issued per section 20 of the Act; and they were not provided pension or registered for NSSF. They alleged that each worked diligently with dedication until on February 6, 2016 when the respondents' general manager informed them that the plant was closing down and that the claimants were no longer needed so that they were terminated from employment. The claimants further alleged unfair wrongful termination because there was no valid reason; they were never heard prior to the termination; no termination notice issued; failure to pay accrued terminal dues; and failure to issue a certificate of service per section 51 of the Act. They stated that a demand notice issued.
2. Each claimant claimed upon headings of payment of one-month salary, accumulated leave days, and, maximum compensation for wrongful dismissal and unlawful termination per sections 49 and 50 of the Act. They prayed for judgment against the respondent for:
 - a. Outstanding notice pay at Kshs 243, 360.00.
 - b. Accumulated leave days at Kshs 644, 656.00.
 - c. Maximum compensation under sections 49 and 50 of the Act Kshs 2, 920, 320.00.
 - d. Issuance of a certificate of service to each claimant.
 - e. Any further entitlement or order that the court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on in his final submissions.
 - f. Costs of the cause.
 - g. Interest on prayers (a), (b), (c), (d) & (e) from the date of filing of this cause and on prayer (f) from the date of judgment until payment in full.
3. The 1st respondent filed the response to the memorandum of claim on July 21, 2017 through AB Patel & Patel Advocates. The 1st respondent denied employing the claimants. It pleaded as follows. It does not employ directly but it subcontracts other legal persons to provide it with manpower. In particular, it contracted the 2nd and 3rd respondents through which it was provided with manpower. The 1st respondent exhibited a contract entered with the 2nd respondent on July 11, 2015 to run up to July 10, 2016 for provision manpower to pack, stitch and lad flakes bags as directed and, to provide any other manpower services, at a fee. The 1st respondent further exhibited the agreement for provision of casual workers by the 3rd respondent effective July 10, 2014 until the date of termination of the agreement by either party. The agreement stated that the manpower would be for batch mixing, gasifier



- and any other manual jobs. The 1st respondent therefore pleaded that the claimants had no known claim against the 1st respondent and denied the particulars of the claims as enumerated for each of the claimants. The 1st respondent further stated that the claims, if any, were time barred. The 1st respondent prayed that the suit be dismissed with costs.
4. The 2nd and 3rd respondents were introduced in the amended memorandum of claim following the pleadings by the 1st respondent in the response to the memorandum of claim. The affidavit of service of the amended memorandum of claim by registered post was filed on May 27, 2022. A hearing notice was served by email. The 2nd and 3rd respondents never filed a memorandum of response and did not attend at the mentions or at the hearing.
 5. The claimants' only witness (CW) was Geoffrey Muroi Likhako, the 11th claimant. The 1st respondent's witness (RW) was Caroline MaJuma. Final submissions were filed for the claimants and the 1st respondent. The court has considered all the material on record.
 6. The 1st main issue for determination is whether the claimants were employed by the 1st respondent. CW testified thus, 'I was employed by the 1st respondent. I was employed in 2013. I was employed June 11, 2013 as labourer. I was casual labourer. I was employed by 1st respondent by personnel manager called Caroline Juma. She is present in court.' While testifying that RW assigned them, CW further testified thus 'I did not apply for the job in writing. I wanted the job. I went looking for a job. I went to report. Respondent was looking for manpower. I was given opportunity. I was not told it was permanent. We worked as assigned. We were several. We were in groups. Some were paid weekly and others after 2 weeks. Us we were paid on weekly basis. I do not recall person who paid us. Dickmash and Khamso were also employed by 1st respondent. I do not know if Dickmash and Khamso were paid on weekly basis.'
 7. The court has considered the testimony and finds that it does not establish that the 1st respondent indeed employed the claimants amounting to a permanent service subject to minimum terms of service under the *Employment Act*. While the claimants may have worked at the 1st respondent's enterprise, CW has confirmed that he was a casual employee working as assigned. He did not, by his testimony, establish that the 1st respondent paid the claimants. For the other claimants, CW confirmed by his testimony thus, 'I do not know exact date other claimants started working for the 1st respondent.' By that testimony, the court returns that the other claimants' case that they were employed orally by the personnel manager on the dates stated in their respective claims is found not established at all. On the other hand, the respondent's evidence that it contracted the 2nd and 3rd respondent to provide manpower is found consistent with its pleading. There is no reason to doubt CW's testimony that the claimants were casual employees and they may have been such employees, in the court's inferences, employed by the 2nd and 3rd respondent and more so, as casual employees of the 3rd respondent.
 8. The court finds that there is no established reason to doubt the invoices and tabulated numbers of manpower employed and supplied by the 2nd and 3rd respondents against which, the 1st respondent paid fees. The court returns that the claimants have therefore failed to establish that a contract of service existed between the claimants and the 1st respondent. CW's testimony was that the employer was the 1st respondent and that being the case, it cannot be said that a case was established against the 2nd and 3rd respondents. The suit must fail with costs.
 9. While making that finding the court has considered the exhibits by the claimants being the medical assessments which show that they worked at the 1st respondent's factory. The court has also considered the certificates of good performance and training. The court finds that piece of evidence by itself not to defeat or not to be inconsistent with the 1st respondent's case that the casual workers had been outsourced by the agreements for provision of manpower.



10. The court finds that the claimants pleaded about an average daily wage rather than the actual wage each was allegedly paid and such pleading made their case speculative as to the base applicable in computing their claims. This and other findings by the court herein rendered their case not established at all.
11. In conclusion the memorandum of claim as amended is hereby dismissed with costs; and, the deputy registrar to forthwith return the file to the Mombasa registry.
12. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 10TH FEBRUARY, 2023**

BYRAM ONGAYA

PRINCIPAL JUDGE

