



Tole (Suing as the administrator of the Estate of Javan Shako) v Consolbase Limited & another (Cause 211 of 2017) [2023] KEELRC 2374 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 211 OF 2017
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

**VALENTINA WALEGWA TOLE CLAIMANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JAVAN SHAKO**

AND

**CONSOLBASE LIMITED 1ST RESPONDENT
SPEARS LOGISTICS LIMITED 2ND RESPONDENT**

JUDGMENT

1. Javan Shako (deceased) filed his claim on March 20, 2017 on the grounds that his employment was unlawfully terminated without payment of terminal dues by Consolbase Limited, 1st respondent.
2. on July 24, 2017 the 1st respondent filed a response and denied there was employment between the parties. That the claimant was an employee of Spear Logistics Limited. Through application filed on April 28, 2019, the 1st respondent applied for the joinder of Spear Logistics Limited as 2nd respondent which was allowed and who filed its response to the claim on February 10, 2020.
3. The claimant, Javan Shako died on July 22, 2017 after filing his claim. The administrator of his Estate, Valentina Walegwa Tole filed application dated December 13, 2017 for substitution herein for the estate of the deceased.
4. The claimant's case is that the claimant was employed by the respondents in the year 2006 in the shipping department where he worked until the year 2010 when he was transferred to verification department where he worked until termination of employment.
5. On October 1, 2016 the claimant reported to work but his supervisor directed him not to report back to work the next day. There was no notice, reasons or payment of terminal dues paid leading to unfair termination of employment.



The claimant was seeking the following terminal dues;

- a. Notice pay for one month Kshs 24,000;
 - b. Severance pay for 10 years Kshs 120,000;
 - c. Leave pay for 10 years Kshs 168,000;
 - d. Damages for unfair termination of employment Kshs 288,000; and
 - e. Costs.
6. In evidence, Valentine Walegwa testified that the claimant (deceased, Javan Shako) was the brother and was employed by the respondents. He filed this case on March 17, 2017 and due to illness, he died on July 22, 2017 and has since been substituted upon obtaining letters of administration over his estate.
 7. The deceased was dismissed from his employment by the respondents without the due process and his terminal dues were not paid. The letter of dismissal is not filed. The 2nd respondent has since been joined herein as the employer and the 1st respondent filed application on the grounds that labour had been outsourced to the 2nd respondent who was the employer. The claimant was only aware that the deceased was attending work with the 1st respondent, there are no pay slips traced and it took time to obtain letters of administration and the court process was long.
 8. In response, the 1st respondent's case is that the claimant was employed by the 2nd respondent as indicated in his letter of appointment dated October 29, 2015. The 1st respondent had a contract with the 2nd respondent for provision of labour and only received seconded employees but the employment relations remained with the 2nd respondent who was to maintain work records for its employees.
 9. The claims made with regard to October 1, 2016 are not for the 1st respondent to address since there was no employment relations to justify a claim for payment of salary or terminal dues.
 10. The 1st respondent called Sauda Said the human resource officer who testified that the claimant was initially employed as a casual but this arrangement stopped immediately upon the respondent getting into an employment outsourced agreement and the 2nd respondent issued the claimant with a letter of appointment. The outsourcing agreement was executed in from April 2013 to the year 2018 and the claimant remained an employee of the 2nd respondent. payments were to the and respondent and who in turn paid its employees the due wages and kept the work records. There was no direct contract between the claimant and the 1st respondent.
 11. In response, the 2nd respondent's case is that there was no employment relationship with the claimant as alleged since he was placed at the 1st respondent as the employer. There is no appointment letter issued by the 2nd respondent and any termination of employment arose from the 1st respondent and the terminal dues payable ought to be paid by the 1st respondent.
 12. The 2nd respondent called Michael Muranga who testified that the claimant was never an employee and in his pleadings such matter has not been stated since the 1st respondent was the employer. The 2nd respondent deals with outsourcing of labour and other operations as the port and supply of labour to various companies so as to identify skills needed and place each employee appropriately.
 13. The outsourcing agreement filed by the 1st respondent on February 10, 2020, 3 years after this claim was filed. Each employee recruited by the 2nd respondent is issued with an employment contract which has not been produced in this case. Upon placing employees with the 2nd respondent, payment is done



and based on the list of seconded employees, each is paid for work done. The 2nd respondent has a running contract for labour provision. The claimant was not an employee.

At the close of the hearing, parties filed written submissions.

14. The gist of the claimant's case is that he was employed by the 1st respondent from the year 2006 in the shipping department, he was moved to verification department and worked until October 1, 2016 when the 1st respondent stopped his employment without notice. In response, the 1st respondent denied the employment relationship and that there was an outsourcing agreement with the 2nd respondent to provide labour and the claimant was under such an arrangement.
The claimant did not amend the claim upon these facts.
15. What is clear to the court is that the claimant was working under the 1st respondent, lastly in the verification department.
16. The 1st respondent filed the staff outsourcing agreement with the 2nd respondent for the period of April 2008 to April 2013 and another covering the period of April 2013 to April 2018. These agreements cover the period the claimant was in employment.
17. Save for the agreements between the respondents, the 1st respondent has not filed any list(s) of its seconded employees from the 2nd respondent.
18. Whereas outsourcing of labour is not regulated in law in Kenya, such a business model has gained acceptance and largely in use in various sectors. However, when an employer accepts such an arrangement for provision of labour by a third party, great regard must be taken in securing its rights in the event a claim such as herein arise. The rationale is that, an employer is not allowed to outsource labour that is core to its business and to do so would negate the very essence and heart of the employment relationship so as to avoid liability.
19. The court is addressing such matter in the case of *Wrigley Company (East Africa) Limited v Attorney General & 2 others & another* [2013] eKLR t defined the parameters for a credible outsourcing program as follows:
 - a) Ordinarily employers are not expected to outsource their core functions;
 - b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
20. To rely on the outsourcing arrangement so as to avoid payment of terminal dues is to engage in unfair labour practices after the 1st respondent enjoyed the labours of the claimant. Any payments to the 2nd respondent to ensure the employees placed with the 1st respondent under the outsourcing agreement, if at all, ought and should have been recorded and secured. One such legal security is to ensure that a list of all employees entering the shop floor was recorded as required pursuant to sections 73, 74 and 75 of the *Employment Act*, 2007 and failure to keep and produce such records should attract a sanction.



21. The claimant specifically mentioned his supervisor, an employee of the 1st respondent who directed him not to report to work after October 1, 2016. Such matter is not gone into by the respondents
- The documents filed on July 24, 2017 by the 1st respondent;
- a. Application for employment on October 10, 2016;
 - b. Letter of confirmation for a guarantor;
 - c. Confirmation of residence to the village elder; and
 - d. Assignment of duties dated October 29, 2015;
31. All these cannot remove the employment relationship from the 1st respondent to the 2nd respondent. Indeed, the letter of October 29, 2015 is to the effect that acknowledge receipt of clearance and permission to work at consolbase terminal.
22. Where indeed the respondents enjoy outsourcing agreement to provide labour, all is not lost, between them, upon the judgment, recourse exists. Outside these proceedings, the respondents are at liberty to take account.
23. The attendance by the claimant at the 1st respondent for work is not denied.
24. Termination of the claimant's employment ought and should have been addressed by the 1st respondent in terms of section 35, 41 and 44 of the *Employment Act*, 2007 but under the mistaken belief that there was no employment relationship, there is no material evidence that these legal protections were secured for the claimant. The records submitted that employment terminated at the instance of the 2nd respondent cannot extricate the 1st respondent from liability.
25. Without any due process leading to termination of the claimant's employment notice pay and compensation are due.
26. The claimant was last earning Kshs 24,000 per month. Where the 1st respondent paid the 2nd respondent so that such pay could be accounted for, there is no record of such transactions.
27. The 1st respondent shall pay the estate of the deceased; the claimant notice pay at Kshs 24,000.
28. For the unfair termination of employment without notice, due process or any reasons being given, the court finds one-month compensation as sufficient all at Kshs 24,000.
29. The claimant is seeking severance pay for 7 years. from the evidence, this was not a redundancy.
30. Taking of annual leave is a legal right under section 28 of the *Employment Act*, 2007. However, under section 28(2) of the Act, leave should not be accumulated beyond 18 months without approval by the employer and where the employee fails to demonstrate that he asked for taking of his annual leave and this was declined, this is only due in terms of the law. On the wage of Kshs 24,000, for 18 months the claimant had 32 leave days due assessed at Kshs 25,000 in annual leave pay.
31. Accordingly, judgment is hereby entered for the claimant against the 1st respondent in the following terms;
- a. The 1st respondent terminated the claimant's employment unfairly;
 - b. Compensation awarded at Kshs 24,000;
 - c. Notice pay Kshs 24,000;



- d. Leave pay Kshs 25,000;
- e. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

