Owino v Platinum Outsourcing & Logistics (EA) Ltd (Cause 1181 of 2018) [2023] KEELRC 3093 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3093 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1181 OF 2018

NZIOKI WA MAKAU, J

NOVEMBER 28, 2023

BETWEEN

BERNARD OWINO ..... CLAIMANT

AND

PLATINUM OUTSOURCING & LOGISTICS (EA) LTD ..... RESPONDENT

JUDGMENT

1. In a Statement of Claim dated 10th July 2018, the Claimant instituted this suit against the Respondent claiming unlawful and unfair termination of his employment. The Claimant's case was that the Respondent employed him on 1st September 2016 as a Loader and Sorter at the Kenya Breweries Limited (KBL) Plant in Ruaraka. That he worked with the Respondent in various capacities and diligently offered his services until the Respondent summarily dismissed him on 21st April 2017. He averred that the Respondent's actions were unjustified and that he was not given any opportunity to defend himself and thus prayed against the Respondent for the following reliefs:

    a. A declaration that the Respondent did not and could not terminate the services of the Claimant.

    b. A declaration that the Respondent is in breach of the employment contract entered between the Claimant and the legal provisions relating to his employment.

    c. A declaration that the Claimant's right to fair labour practices were infringed and he is therefore entitled to exemplary, aggravated and general damages.

    d. A declaration that the termination of the Claimant's employment is unlawful, unfair and offends the mandatory provisions of the *Employment Act*.

    e. An order that the Respondent does calculate the full amount due to the Claimant.

f. An order that the Respondent remit to the Kenya Revenue Authority such tax which is due and payable in respect of the Claimant's employment for the full employment.

g. Costs of this suit.

h. Interest at court rates.

i. Any other relief this Honourable Court shall deem fit to grant.

2. The Claimant asserted in his Witness Statement that he was entitled to a month's payment in lieu of notice at an interest and that he was earning Kshs. 21,501/- per month at the time of termination of his employment. That despite several demands, the Respondent had failed to pay him his terminal dues and severance pay merited upon the termination of his services.

3. The Respondent's reply in its Response dated 25th May 2023 was that the Respondent is an outsourced labour and logistics service provider in Kenya and that Bollore Transport and Logistics Limited is a duly appointed supplier of outsourced labour services at the KBL brewery in Ruaraka. That the said Bollore Transport and Logistics Limited appointed the Respondent company as an approved sub--contractor for supply of outsourced labour services at the KBL in Ruaraka effective 1st September 2016. That apart from the Bollore and Respondent companies, other companies on site at the brewery were KK Security Services and Riley Security Services, who were contracted by KBL and the main Contractor to man the gate and grounds and the warehouses respectively. That at all material times, the said companies on site at the brewery were bound by KBL policies and procedures on safety and security at the workplace. The Respondent averred that it engaged the Claimant to load and offload beer on a piece-rate basis at a fixed rate of 0.65 cents per case of beer. That during the course of the contract, the Bollore management team directed the Respondent to initiate a 3-shift working plan and the proposal was communicated to the Claimant and others during meetings held on various dates in March 2017. That on 21st April 2017, the Claimant was consequently addressed on the said 3-shift plan and the rate increase as follows:

a) Loading and offloading beer - 0.65 cents (status quo remains)

b) UDV loading - 0.65 cents to 0.75 cents

c) Keg loading – 0.65 cents to Kshs. 1.00

4. The Respondent further averred that the Claimant, among others, rejected the 3-shift proposal and wanted to continue with the 2-shift working plan and rate increase and that he demanded that the rate be Kshs. 1.00 for loading and offloading beer and for UDV loading and Kshs. 3.00 for Keg loading. That after the said workers also gave the Respondent and Bollore an ultimatum of two hours to adjust the rates as per their demands, the two companies went into consultation and after three hours, addressed the Claimant and his colleagues outside the KBL premises, advising them that the rates would not be adjusted any further. That the said workers were further advised that those willing to return to work at the revised rates were to resume work but they refused, downed their tools and went on strike. That the KBL security then dispersed the Claimant and others from the premises for security reasons. According to the Respondent, 98 workers accepted to return to work at the revised rates the following day but the Claimant never resumed work.

5. It was the Respondent's case that the dispute was referred to the Nyayo House County Labour Office and was the subject of a Conciliation Meeting and a Ruling that indicated that the Claimant engaged in an unprotected strike and had no claims against the Respondent. That following the conciliation meeting, the Claimant left the business on his own accord, cleared with the Respondent and was paid all his final dues. The Respondent thus denied having wrongfully, unfairly and unjustifiably

terminated the Claimant from service and further denied having received any demand from him. It prayed that the suit be dismissed with costs. The Claimant thereafter filed a rejoinder in his Reply dated 4th July 2023 wherein he prayed that the Respondent's Response be struck out with costs together with interest thereon and that judgment be entered against the Respondent as prayed in the Statement of Claim.

6. In evidence, the Claimant testified that they used to work as casuals and were paid at the end of the month. That he was dismissed from employment without being given any warning, notice and termination letter and that he was earning Kshs. 21,500/- at the time of dismissal. He denied the assertion that he never went back to work, testifying that the Respondent never called him or wrote to him. He prayed to get his benefits, notice, severance and payment for working at night. Under cross-examination, the Claimant asserted that his salary was not equal as it was 25,000/-, 18,000/-, 22,000/- or 21,000/- at times. He stated that they wanted to get a rate of 2/- per payment and the increase was for rate but that the Respondent declined.

7. The Respondent's witness, Mr. David Musundi (RW1), testified that the Claimant was a casual and that his salary was varied based on the volume of production. That around March 2017, the Claimant and others sought for review of their terms through Bollore. He further testified that since payment was piece rate wage, the Labour Office said that the workers did not have a further claim. RW1 asserted that the workers were not entitled to any claim as they had been paid. Under cross-examination, RW1 stated that the Claimant was paid monthly and used to work 6 days and that the workers would work on public holidays when necessary. He confirmed that their pay was subject to statutory deductions, that the Claimant worked from September 2016 until April 2017 and that no termination letter was issued to the Claimant.

Claimant's Submissions

8. The Claimant submitted that the issues for determination by this Court are: what the Claimant's employment status was; whether the Claimant was wrongfully, unfairly and without any justifiable cause, terminated without notice; and whether the Claimant is entitled to remedies sought as pleaded. It was the Claimant's submission that under section 74 of the *Employment Act*, 2007, an employer is expected to keep written employment records of all employees and that importantly, section 10(6) of the *Act* states that the employer shall keep the written particulars prescribed in the provision for a period of five years after the termination of employment. He submitted that since he was never issued with any contract of employment, the burden shifted to the Respondent to adduce his employment particulars as envisaged in the foregoing provisions of law. That the Respondent however failed to adduce any of his employment records and the terms of his employment and therefore never controverted his claim.

9. On whether he was a piece-rate worker or a casual worker, the Claimant submitted that nowhere in its pleadings had the Respondent pleaded in its Response the employment status of the workers involved in the dispute before Court. That the evidence he adduced in Court and also admitted by the Respondent was that he was paid on a monthly basis and was deducted KRA, NSSF and NHIF. That more importantly, he was employed for more than six (6) months and it was further admitted that he would work from 7am to 7pm for 6 days. The Claimant cited the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017]* eKLR in which the Court of Appeal addressed the types of

contracts of service as under the *Employment Act* and the piece work form of employment and stated that:

> " ...Piece work form of employment is defined in section 2 to mean;
>
> > "...any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance"
>
> In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.
>
> .....
>
> A contract of service, by section 35 may be terminated upon either party giving notice in the following three circumstances based upon the intervals of payment of salaries or wages. First, a contract of service in which wages are paid on a daily basis is terminable by either party at the close of the day without notice. Secondly, in those cases where wages are paid periodically at intervals of less than one month, the contract would be terminable by a notice of not less than one month and, in the third instance, a notice of 28 days will apply where wages or salaries are paid periodically at intervals of or exceeding one month."

10. It was the Claimant's submission that he relied on the holding of the Krystalline Salt Limited case (supra) that even a piece rate worker is entitled to a 28 days' notice before termination of service as prescribed under section 35(1)(c) of the *Employment Act*. As to whether this Court could convert his piece rate or casual employment status to term contract, the Claimant submitted that this Court should find that he worked for the Respondent for more than six (6) months and was thus a permanent worker as per section 37 of the *Employment Act*. The Claimant submitted that the alleged letter dated 26th May 2017 from the Ministry of Labour & Social Protection simply made a blanket reference to 'former employees' which category could include anyone. That the recommendation and conclusions thereof could not bind an amorphous group called 'former employees' and that as each claimant had a personal employment contract, to generalize all the claimants who attended the meeting as 'former employees' was inconsequential. He submitted that the said letter or report thus had no evidential value to the Respondent's case.

11. It was submitted by the Claimant that the Respondent failed to issue him with a termination notice prior to terminating his services as provided under section 35 of the *Employment Act*. That the importance of giving a notice was underscored in the case of Alex Muruiki Bundi v Kakuzi Ltd [2012] eKLR wherein Odunga J. (as he then was) cited a publication of the ILO's 82nd Session of 1995 titled "Protection Against Unjustified Dismissal" in which the Committee of Experts in their report at paragraph 247 on page 92, stated as follows:

> " The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled to compensation in lieu of notice. Such compensation should correspond to the

remuneration the worker would have received during the period of notice if it had been observed"

12. That the learned Judge further relied on the case of *Mukawa Hotels Holding Ltd v Beat Koch [2011]* eKLR in which the Court of Appeal was of the view that the purpose of a termination notice is to warn the party receiving the notice of the impending change so that they may prepare for the impending change. Further, that as a matter of logical and procedural fairness, he should have been notified and given a minimum period of one-month notice before any decision was taken to terminate his employment. That section 41 of the *Employment Act* provides for notification and hearing before termination on grounds of misconduct and where an employer fails to follow the provision, which is couched in mandatory terms, the process is bound to be unfair. It was the Claimant's submission that an employee must be informed of the charges through a notice and given a chance to submit a defence followed by a hearing, in due cognizance of the fair hearing principles and the tenets of natural justice.

13. The Claimant submitted that since the Respondent did not comply with the law as regards prior notice, the termination of his employment was thus unfair and unprocedural and that section 45 of the *Employment Act* is explicit on unfair termination and provides under section 45(2) that termination is unfair if the employer fails to prove that the reason for termination is valid and fair and that the termination was in accordance with fair procedure. Lastly, it was the Claimant's submission that Exhibit 1 showed his dues at entry number 127 as totalling Kshs. 393,151/-, which the Respondent did not challenge and that this Court should thus award him as claimed.

Respondent's Submissions

14. The Respondent submitted that while the Claimant submitted he was a casual worker, its argument was that he was a piece rate worker on piece rate basis of a fixed rate of 0.65 cents per case of beer. That under Part 2 of the *Employment Act*, 'piece work' means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. That RW1 confirmed in his testimony that the Claimant's pay check indicated "variable basic pay" meaning the payment would be different each month depending on the availability and amount of work done by an individual. Further, that though the worker was being paid monthly, it did not negate the fact that they were piece rate workers. According to the Respondent, emphasis should be put on the amount paid to the workers for offloading each crate of beer after computing the total amount of work done by an employee through the number of crates or barrels one carried multiplied by the fixed rate amount of 0.65 cents. It submitted that the same went to the core definition of piece rate basis and it relied on the decision in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR wherein the Honourable Judges of the Court of Appeal stated that in a piece work or piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it and that although a piece rate employee is not entitled to all or some of the benefits of other forms of employment, they are at least entitled to minimum wage. The Respondent further relied on the case of *Joash Ogara Mainga & Christopher Munyoki Munene v DHL Exel Supply Chain (K) Limited [2021]* eKLR wherein the Court held that:

> "The Respondent's witness testified that the work of the Claimant was that of a loader, shifting crates at the Respondent's ware house. And that the Claimant's salary was dependent on the number of crates he moved per a day and cumulatively in a month. This is a clear pointer that the type of employment that the claimant was engaged in, was a piece-rate employment. The evidence tendered by the Claimant is consistent with this type of employment for instance, there is a clear difference between the salary that the Claimant earned on various months, others [months] which were successive to each

other. The Pay slips on record for the other Claimant whose claim was compromised as hereinabove indicated were of this character too. It is apparent that two loaders doing same work were making different earnings in same months, giving an inescapable impression that the earnings were anchored on tasks completed.

15. It was the Respondent's submission that for piece rate or casual employment to convert to a term contract, the same ought to have initially began as casual for it to convert to a term contract under section 37 of the *Employment Act*. That in the instant case, the Claimant at the time of being engaged in employment worked as a piece rate worker and was paid in accordance to the work load done. Moreover, the dispute arose when the shifts were being reduced from three (3) to two (2) shifts, which would have impacted the number of days they worked and to compensate for the increase in shifts, the Respondent increased the amount of loading the beer crates and barrels to a certain proposed amount. That Ocharo J. observed in the case of *Joash Ogara Mainga* (supra) that in order for the court to engage and give effect to the provision in section 37(4) of the *Act*, it must be established as a precondition that the employee started working as a casual worker and continued to so work for a time that would allow operation of the law to set in for the conversion and since the precondition was not satisfied in the case, the Court found that casual employment did not exist thereof.

16. The Respondent further relied on section 18 of the *Employment Act* providing for when wages or salaries for various categories of employees become due. It submitted that the wording of section 18 demonstrates that piece rate workers can be paid at the end of each month in proportion to the amount of work done. It also argued that deduction of PAYE, NSSF and NHIF was a matter of statutory compliance and is not proof of the nature of contract between an employer and employee. The Respondent thus urged this Court to hold that the Claimant was a piece rate worker whose employment could not as such be converted to permanent employment as was held in the case of Krystalline Salt Limited (supra). The Respondent submitted that the termination of the Claimant's employment was justifiable and fair considering the circumstances leading to the termination. That though the letter dated 26th May 2017 indicates "former employees", the details were in line with the Claimant's statements indicating the reduction of the number of working days as a result of increase of off days and that the same was of probative value to the Respondent's case as it showed that due process was followed before the termination. In conclusion, it was the Respondent's submission that as the pay slips presented before Court indicated "variable basic pay" and the return-to-work forms indicated the mode of payment as that of per piece of work done, this Court should hold that the Claimant was a piece rate worker and that no legal entitlements are payable for a contract for service apart from payment for the task performed.

17. The Claimant from all accounts declined to undertake work offered by the Respondent. The work he performed was piece rate meaning the margins of increase could only be miniscule given the units he loaded or offloaded from trucks at Kenya Breweries Ruaraka. The Claimant seeks a declaration that the Respondent could not and did not terminate his services. If the Respondent did not terminate his services, why is he before the Court? Secondly, his claim is inarticulate and he seeks inter alia that the Respondent calculates the full amount due to the Claimant and that the Respondent be ordered to remit to the Kenya Revenue Authority such tax which is due and payable in respect of the Claimant's employment for the full employment (sic). As a person who offered his services for piece rate work, the Claimant is not eligible to pay tax. He earned varied sums for the tasks he performed and worked on a shift basis that placed him in a position where his wages were by and large tax free. He therefore had no tax obligations. If there was any, he is the one who would then declare his earnings to KRA, compute the tax due and pay accordingly. He was not a salaried employee of the Respondent. The Claimant's claim therefore is unmerited and is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE