



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 646 OF 2017

TONY SULEIMAN MWANZIWI.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANY.....RESPONDENT

J U D G M E N T

1. The claim herein was filed by the Claimant on 4th August 2017 vide a Memorandum of Claim dated the same date (4th August 2017). The Claimant pleaded, *inter alia*,

a. that he was employed by the Respondent in July 2012, earning a monthly salary of ksh.4,080 which was eventually reviewed upwards to ksh.9,600 before being reviewed again downwards to ksh.4,248.

b. that the Claimant worked for the Respondent until in or about 2014 when the employer/Respondent terminated the Claimant’s employment without any prior notice, and without affording him audience to respond to reasons underlying termination of the his employment.

c. that the Respondent refused to pay the Claimant’s terminal benefits, salary in lieu of notice, leave allowance and salary arrears resulting from unlawful payments that were below minimum statutory wage.

d. that the Respondent’s actions were manifestly unfair and were in violation of mandatory provisions of the Employment Act 2007 and contravened the Claimant’s right to fair labour practices as enshrined in Article 41 of the Constitution of Kenya 2010 and rules of natural justice.

e. that termination of the Claimant’s employment was devoid of justifiable grounds, was unfair and did not accord with justice and equity as the dismissal was not based on any valid reason and the Claimant was not given any hearings and/or fair hearing prior to the termination.

2. The Claimant sought the following reliefs:-

a. One month salary in lieu of noticeksh.10,954.70

b. Unpaid annual leave for two yearsksh. 15,335.60

c. An equivalent of 12 months salary for unlawful termination (ksh.10,954x12).....ksh.131,456.40

d. Salary arrears resulting from unlawful payments which are below the statutory wageksh.64,355

Total.....ksh.222,101.70

3. The Claimant also filed a witness statement signed by himself and dated 4th August 2017. He further filed a list of documents dated the same date, listing some three documents. The documents listed by the Claimant included NHIF data summary on the Claimant covering the period July 2012 to April 2014, and reflecting NHIF contributions submitted on the Claimant by the Respondent, the Claimant’s National Identity Card and a demand notice dated 21st June 2017.

4. The Respondent entered appearance on 6th September 2017 and pleaded, *inter-alia*:-

- a. that due to the nature of the Respondent's operations, its human resource needs vary greatly from time to time, thus necessitating recruitment of casual labourers on temporary basis as and when work is available.
- b. that the Claimant was engaged by the Respondent from time to time intermittently as a casual labourer at a daily rate of ksh.210 upto 2014, payable weekly in arrears without fail.
- c. that in the month of May 2014, there was little work to be done and thus the Claimant could not be hired as a casual.
- d. that the Claimant was not capable of being terminated as he was a casual employee hired on need basis from time to time.
- e. that the Claimant was paid in accordance with the requisite minimum wage orders applicable to the agricultural industry.
- f. that the Claimant has, in his pleadings, failed to plead accurate and concise particulars regarding which month he was terminated from employment and by whom, thus disadvantaging the Respondent.
- g. that the Respondent disputes the Claimant's entitlement to the reliefs sought.
- h. that this Court's jurisdiction is not admitted since the suit is time barred under Section 90 of the Employment Act.

5. The Respondent also filed a list of documents dated 30/11/2017, listing wage orders for the years 2011 and 2013 and a witness statement of one Gibson Kabue.

6. When the suit came up for hearing, the Claimant adopted his filed witness statement referred to in paragraph 3 of this judgment, which replicates the averments made in the Memorandum of Claim. He further produced in evidence the documents listed in his list of documents, also referred to in paragraph 3 of this judgment. He further testified:-

- a. that he started working for the Respondent in the year 2012, and initially worked in the shamba, earning ksh.4,080 per month.
- b. that he was eventually prompted to the post of a security man, earning ksh.9,600 per month, which post he held upto 2014.
- c. that he started having health problems and was demoted, and started earning ksh.4,248, until he was terminated in 2017.
- d. that due process was not followed in terminating him; as he was not issued with any letter (notice) and was not paid anything upon termination.
- e. cross examined, the Claimant stated that he was not terminated (dismissed) in 2014, though his memorandum of claim and witness statement stated that his employment was terminated in 2014. He confirmed that his demand notice also stated that he was terminated in 2014.
- f. that the date and month of his termination are not stated/pleaded in the memorandum of claim.
- g. that he (the Claimant) had nothing to show that leave to file suit out of time had been sought and obtained.

7. The Respondent called one witness (Gibson Kabue –RW1), who testified, *inter alia*,

- a. that the Claimant was engaged by the Respondent as a casual on need basis, earning ksh.210 per day; and was particularly so engaged during the Respondent's cane planting and harvesting seasons.
- b. that usually sowing seasons lasted one to three months while harvest seasons lasted one to five months respectively.
- c. that casuals were not given written contracts but were given payslips.
- d. that the Respondent last engaged the Claimant in April 2014, this being the last month the Respondent remitted NHIF contributions on the Claimant.
- e. that the Claimant was not engaged on continuous basis, and that the Respondent made continuous NHIF contributions for the Claimant from July 2012 to April 2014.
- f. that contributions were made for every month that the Claimant worked.
- g. that different amounts were remitted to NHIF depending on the number of weeks the Claimant worked (in a month)and that not always that the Claimant worked for thirty days in a month.
- h. that the last NHIF payment was made in April 2014.

i. that the Claimant never worked after April 2014.

j. that the Claimant was being paid in accordance with the applicable wage regulations. The Claimant produced in evidence the 2011 and 2013 wage regulations.

8. Having considered the pleadings filed and evidence tendered by both parties, issues that fall for determination are as follows:-

a. whether the Claimant's suit is time-barred, and if so, whether this Court has jurisdiction to entertain the same.

b. whether the Claimant's employment was capable of being terminated by the Respondent and if so, whether termination thereof was unfair.

c. whether the Claimant is entitled to the reliefs sought.

9. On the first issue, I must state that parties are always bound by their pleadings. **The Claimant pleaded that his employment with the Respondent was terminated in the year 2014. He stated as much in his recorded and filed witness statement. The Claimant did not, however, plead the date and month in which his employment was terminated (in 2014). In the letter of demand issued by the Claimant's Advocates on 21st June 2017, it was stated that the Claimant's employment was terminated in January 2014.** In his oral evidence in Court, however, the Claimant contradicted himself and maintained that his employment was terminated by the Respondent in the year 2017.

10. On its part, the Respondent pleaded, and its witness testified and demonstrated, that the Claimant was in the Respondent's employment until April 2014.

11. The Claimant did not demonstrate, on a balance of probability that he was in the Respondent's employment past the month of April 2014. Indeed the Claimant, for whatever reason, failed to plead and to specify the date and month in the year 2014 on which his employment was terminated. Instead of addressing this issue in his evidence, the Claimant appeared to change goal posts by alleging that his employment was terminated in the year 2017.

12. I find candid and founded the Respondent's evidence that the Claimant last worked for the Respondent in the month of April 2014. This position is backed up by the NHIF Data Summary filed and produced in evidence by the Claimant.

13. It is my finding that the Claimant's employment with the Respondent terminated or was terminated, whichever way, in April 2014.

14. The suit herein was filed on 4th August 2017. This was over three (3) years after termination of the Claimant's employment, which is the subject matter herein. Section 90 of the Employment Act 2007 provides:-

"Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall be or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof."

15. On the issue of limitation, the Respondent referred the Court to the Court of Appeal's decision in Rift Valley Railways (Kenya) Limited -vs- Hawkins Wagonza Musonye & Another where the Court held:-

"...for it is clear from our reading of Section 90 aforesaid that there are no exceptions to the three years' limitation period save for cases of continuing injury or damage where action or proceedings must be brought within 12 months after cessation thereof."

16. In sum, the Claimant's suit herein is statute barred. Having made this finding, I need not consider the remaining two issues.

17. The Claimant's claim is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance

Miss Wamboi for Claimant

Mr. Kulecho & Mr. Njuru for Respondent