



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 453 OF 2018

ALEXANDER MUTISYA MUYA.....1ST CLAIMANT
RACHAEL MUKHOBI ONDELE.....2ND CLAIMANT
JUMA BAKARI MWANG'OMBE.....3RD CLAIMANT
CELESTINE WANGA BULUMA.....4TH CLAIMANT
MERI NDARO MAUNGA.....5TH CLAIMANT
MOSES KITI MWANGALA.....6TH CLAIMANT
KAHINDI JUMA MNGOMA.....7TH CLAIMANT
BAKARI KENGA PAKA.....8TH CLAIMANT

VERSUS

JONA PESTCON LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

JUDGMENT

The claimants filed the memorandum of claim on 28.06.2018 through Annette Mbogoh Advocate. On 15.02.2022 the claimants changed their advocates to Sharia Nyange Njuguna & Company Advocates. The 1st, 2nd, 3rd, 5th, and 7th, claimants state that they were employed by the respondent by written contracts of service effective 15.06.2014 respectively. The 4th, 6th, and 8th claimants plead that they orally employed by the respondent effective 22.02.2017, 01.04.2015 and 12.01.2015 respectively. The claimants plead that they were all hired as cleaners at a gross monthly salary of Kshs. 8, 000.00 in 2014 increasing to Kshs. 8, 500.00 in January 2015 and in March 2015 to Kshs.10, 000.00. On Monday to Friday they worked 9.5 hours and on Saturdays for 5.5 hours and they also worked during public holidays but they were not compensated at all. Further, the respondent failed to remit statutory deductions of NSSF and NHIF. They were not paid house allowance and which was not included in the gross monthly pay. Their further case is that on 31.01.2018 they reported to their work station at KPA Staff House in High Level, Mombasa County. Their supervisor was one Samuel Mwachupa who informed them to go to the respondent's offices. Upon reaching the offices, respondent's Managing Director (MD) John Kivinzi Musyoka told the claimants that their employment was terminated. They were not given a reason for the termination of their respective services and they were not given a termination notice. Each claimant has claimed payment of final dues upon the headings of notice payment; public holidays worked; severance pay at half salary for each completed year served; underpayment; accrued leave for 2 years; compensation for unlawful and unfair termination at 12 months' salaries; and house allowance.

The claimants issued a demand letter dated 21.03.2018 and the respondent replied that the dispute was before the labour officer. No amicable resolution of dispute was reached and the parties filed the present suit. They prayed for judgment against the respondent for:

- 1) A declaration that the termination of the claimants' employment was unlawful and unfair.
- 2) Payment of terminal dues in the sum of Kshs.2, 248, 790.15 as particularised in the memorandum of claim.

- 3) Payment of compensation for unlawful and unfair termination for each claimant as particularised.
- 4) Costs of the suit.
- 5) Interest on (1) and (2) until full payment.
- 6) Any other or further relief as the Honourable Court deems just.

The response to the memorandum of claim was filed on 07.08.2018 through Gikandi & Company Advocates. The respondent pleaded as follows. That the claim from 2014 to June 2015 is time barred under section 90 of the Employment Act, 2007. The relationship between the respondent and the claimants was governed by a written contract of services for a period of 6 months or the lifespan of the contract the respondent had with the Kenya Ports Authority (KPA). The respondent granted the claimants off days and annual leave per sections 27 and 28 of the Employment Act, 2007. As per records on annual leave entitlement, leave sheet records and the work report registers exhibited, only some of the employees attended work on public holiday but they would immediately be granted an off the following day. As per exhibited documents, NHIF and NSSF were deducted and remitted.

The respondent's further case was pleaded as follows. On 11.05.2016 the respondent informed the claimants that its contract with KPA for provision of landscaping and cleaning services had come to an end. Thus the respondent would have no option but to terminate the services and that was conveyed by the exhibited internal memo of 11.05.2016. A meeting was held on 27.08.2016 and all employees including the claimants were informed accordingly. The claimant's employment was terminated following a letter or notice by KPA to the respondent dated 03.01.2018 conveying that the contract for provision of landscaping and cleaning services between the respondent and the KPA had not been extended. The contract lapsed on 31.01.2018 and the claimants were duly informed that their respective employment had ended. The respondent therefore denied the claims and prayers made for the claimants. Further the dispute was presented to the labour officer and fixed for hearing per summons dated 16.02.2018. The respondent attended but the claimants were all absent at the labour office. The claim was filed in court prior to exhausting and concluding the proceedings before the labour officer so that the suit was premature.

The respondent prayed that the memorandum of claim be dismissed with costs.

The consent order of 07.12.2021 was that the suit be determined on the basis of pleadings, documents on record duly admitted in evidence, and the parties' final submissions. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

To answer the **1st issue**, the Court returns that the parties were in a contract of service. The contracts of service exhibited confirm the pleadings that the respondent employed the claimants to work as cleaners during subsistence of the landscaping and cleaning contract between the respondent and KPA.

To answer the **2nd issue** for determination, the claimants pleaded and the respondent confirmed that the claimants were deployed to do cleaning at the KPA premises and the Court returns that the respective contracts of service lapsed on 31.01.2018 when the outsourcing contract for landscaping and cleaning between the respondent and KPA was not extended. The Court finds that the employment was for a specific assignment and once the assignment became unavailable or completed, the respective contracts of service lapsed as agreed between the respondent and the claimants. The contract expressly provided thus, **"We are pleased to have you work with us as a Cleaner on 6 months Contract Basis renewable upon your personal ability to work and the lifespan of the Contract Job."** The parties are bound by that contract and the allegations of unfair termination are found unjustified. The respondent's submission in that regard is upheld.

To answer the **3rd issue**, the Court returns that the claimants are not entitled to the remedies as prayed for as none has been established or shown to be justified. In particular, the Court returns as follows:

- a) The Court holds that section 35(1) of the Employment Act is clear thus. **"(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be – (terminable per prescribed notice periods)"** The Court has already found that the instant contracts of employment were for the claimants to undertake specific work with specific reference to time to do so, namely, to undertake cleaning services at KPA premises while outsourcing contract for landscaping and cleaning services between the respondent and the KPA subsisted. The Court therefore returns that it was misconceived for the claimants to claim and pray for pay in lieu of termination notice as section 35 (1) exempts their kind of contract, to undertake a specific assignment, from the minimum notice period prescribed thereunder. While the contract for service between the parties did not expressly provide for termination notice, section 35(1) permitted the parties to conclude such a contract terminable abruptly upon or consequential to extinction of the specific work subject of the contract of service. The Court therefore returns that the parties did not contract outside the minimum terms of service as to termination notice or pay thereof as was envisaged in section 35 of the Act.
- b) The respondent has exhibited records showing that the claimants took leave and offs. The job attendance register shows offs taken. On some public holidays like 10.10.2015 some employees were on off and while others may have worked, there is no grievance established by evidence that they were not paid. The claims on leave days, public holidays and offs will fail for want of strict evidence to establish the same. As submitted for the claimants each claimed different days of work on public holidays but no evidence was provided to justify the claims.
- c) The Court has found that the termination was within the contractual clause to perform specific work as agreed between the parties. The suggested redundancy and therefore prayer for severance pay is declined as unjustified especially that the parties appear to have operated upon six months' term contracts, renewable.
- d) The basis for the claim for underpayment was not pleaded at all. In the submissions it is stated for the claimants that the regulation

of wages general order of 2017 applied with a minimum wage of Kshs.11, 541 for cleaners in Mombasa. However, the claimants have not pleaded the specific periods for which underpayment is claimed. The claim and prayer will collapse for want of strict evidence needed in establishing such special or liquidated claims. The respondent's submission is upheld in that regard.

e) The claimants have pleaded that they agreed upon a gross monthly pay. The Court finds that the pay must have been consolidated as envisaged in section 31 of the Employment Act, 2007, inclusive an element of house rent.

f) The claims on service pay are found unjustified because the evidence was that the claimants were members of NSSF and are precluded from claiming service pay per section 35(6) (d) of the Act. While the respondent may not have deducted or remitted NSSF dues, the Court considers that the claimants would be entitled to a remedy per relevant statutory provisions on failure to deduct and remit NSSF on the part of an employer.

g) As submitted for the respondent, it appears the claimants filed suit prior to exhausting dispute resolution as invoked before the area labour officer. However, the suit was not premature because, under section 47 (3) of the Employment Act, 2007, the right of an employee to present a complaint to a labour officer is in addition to the right to complain to the Court. The Court finds that the suit was not premature in that regard.

h) The Court has considered the claimants' otherwise clean record of service with the respondent in circumstances of unpredictable renewal or extension of the outsourcing contract between the respondent and KPA defining the specific work the claimants were engaged to perform. The Court has also considered some of the claimants' pay slips showing that NSSF may not have been deducted and remitted, the claimants otherwise having been registered with the NSSF. The Court therefore balances justice that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimants for:

- 1) Dismissal of the memorandum of claim herein.
- 2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH MARCH, 2022.

BYRAM ONGAYA

JUDGE