



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 770 OF 2017

GORDON OTIENO NYANGAO.....CLAIMANT

VERSUS

ABBAS TRADERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 22.09.2017 through Matete Mwelese & Company Advocates. The claimant alleges as follows. The respondent employed him in April 1995 as a casual loader at Kshs. 200.00 per day and later to Kshs. 500.00 per week. He worked with a clean record until 28.12.2016 when the respondent's director one Raizy Fazel called him and told him that the work load had gone low and he was thereby terminated from employment on account of redundancy but in breach of sections 40 and 41 of the Employment Act, 2007. Further his employment converted to one subject to minimum terms under the Act per section 37 of the Act. He claimed service pay for period served until 01.06.2015 when he was registered for NSSF Kshs. 165, 000.00; leave days not taken Kshs. 330, 000.00; notice pay Kshs. 15, 000.00 per section 35 of the Act; severance pay for 22 complete years of service Kshs. 165, 000.00 at 15 days for each year served; and the total claim for Kshs. 1, 434, 000.00. He also claimed 12 months' payment for compensation for unfair termination Kshs. 180, 000.00 and a certificate of service per section 51 of the Act. He prayed accordingly and for costs of the suit.

The respondent filed the memorandum of response on 20.11.2017 through Munyithya, Mutugi, Umara & Muzna Company Advocates. The respondent denied employing the claimant but admitted that it registered the claimant with NSSF and NHIF alongside other members of his gang of workers. Further, such registration was to avoid collision with the law and it did not amount to employment relationship as alleged for the claimant. Further the claimant was a casual employee engaged on need basis and the sections of the law cited on due procedure in termination were not applicable. He was a periodic casual labourer availed by the Gang Leader whenever work was available and the claimant was never in the respondent's payroll. The work of loading and off-loading was based on arrival of consignment and packaging and dispatch of consignment and was not continuous as alleged for the claimant. The respondent prayed that the statement of claim be dismissed with costs.

The **1st issue** for determination is whether parties were in a contract of service.

The evidence by the claimant is that he came to know Khuzema Harun (who was also the respondent's witness – RW1) sometimes in 1995 and RW1 was not a gang leader. He testified that he was employed orally by the respondent in 1995 and was paid a daily wage of Kshs. 200.00 paid on weekly basis having worked 6 days per week. Further he testified that he used to be paid by RW and he would sign a payment voucher. His testimony was that the director Raizy Fazel directly communicated to him. Further he testified thus, **"I was employed by the respondent. Karisa Ngumbao Mwambire was my co-worker. I had no contract of service with Ngumbao. Director Raizy Fazel had direct communication with me. My job was as loader. I used to grade tea and pack it. I loaded as well as graded tea. The job was available all days I worked for respondent. Harun Khuzema was cashier. We related at work. He used to pay us as the cashier. I was employed by the respondent and they knew me."** In cross-examination the claimant insisted that his job was continuous and he testified thus, **".... The job to load and off load was on Monday to Saturday. I do not recall a day with no order. We worked on a daily basis."**

RW1 testified that he worked for the respondent as an accountant effective in 1996. The respondent was a tea exporting company employing 26 permanent staff and the respondent had no casual employees. Further, they had a gang leader who was the respondent's agent dealing with casual employees RW1 stated thus, **"A gang leader is an agent appointed by the respondent to manage all casuals. Karisa Ngumbao Mwambire was gang leader.... Gang leader is paid for daily work done by loaders. He is paid as he pays casuals. Respondent does not know casuals. Gang leader paid after 2-3 days depending on work workload. Gang leader may sometimes not bring casuals – when there is no work. I do not know the claimant."** RW1 further testified thus, **"In 2015 NSSF visited our premises and demanded all loaders working with the respondent be registered with the respondent. We complied."**

The respondent witness No. 2 (RW2) was Karisa Ngumbao Mwambire. He testified that he was the respondent's current gang leader. He testified that a gang leader took up work from a company, in this case the respondent. He further testified, **"...I then get casual workers say 10-20 depending with work available. Am still the Gang Leader. I started 1994. We signed agreements on record 1994 and 2000. I know claimant. I employed him. It is long time ago. I recruit casuals at the door or gate. It could be 1996 or 1995 that I started to recruit him as casual. He was not a gang member. He was casual. He was not employed by the respondent in 1995. He was a casual worker. I did loading, off-loading. Tallying, bulking etc. Am respondent's gang leader per contracts of 1994 and 2000 I recruited casual workers. The casuals came to sites with work. They knew where job was available. They can be many so that I do not recruit all of them."** RW2 further testified that the tea auction was held on Monday, Thursday and Wednesdays and thereafter loading was needed to transport the tea so that each day had its own payment. Further payment was by piece rate or piece work say 1.5 kg loaded or off loaded for a shilling and paid on daily basis. RW2 stated that he supervised the amount work done by each loader and a loader was free to work elsewhere and indeed, the claimant and 5 others had left RW2's gang and gone to work for a neighbouring enterprise that had a lucrative sugar consignment. RW testified thus, **"Claimant stopped coming for my recruitment when he moved to neighbour's sugar warehouse and he was employed there as a clerk. He told me his new employment as he left. I let him go..."** Further, in compliance with NSSF officers' demands, the claimant and others had been registered with NSSF.

As relates to how RW2 made his income as the gang leader, RW2 testified thus, **"My job is to ensure job is well done. I earn from pay of the assignment. We have different assignments such as mixing and loading etc. I recruit casuals. For instance, to load 20 tonnes am paid 25, 000.00. we then load and I pay myself."**

On payment of claimant's NSSF, RW2 testified thus, **"Claimant was registered for NSSF and respondent paid NSSF for him. It was law for NSSF to be paid. I requested respondent to pay for NSSF."**

The respondent exhibited the memorandum of agreement relative to terms and conditions of service between gang leaders and the respondent, one dated on 4.02.1994 and the subsequent one dated 01.08.2000 introducing new wage rates as had been agreed upon and to be revised from time to time as required. The agreement stated that it covered daily contract workers and piece rate gang members working for the respondent.

The Court has considered the evidence. The issue for determination is whether RW2 had an outsourcing contract with respondent to provide labour by way of his gang members or daily casuals and a contractor to do so; or RW2 was an agent of the respondent in organising the casual employees and gang members on piece work or rate engagement.

It is submitted for the claimant that the gang leader did not work for himself but was the respondent's agent in undertaking the assignments per the terms of the memorandum of agreement. The arrangement is clearly pleaded for the respondent at paragraph 7 of the memorandum of reply that the claimant was a casual labourer employed on need basis and at paragraph 8 thus, **"... The Respondent reiterate that the Claimant was a periodic paid per day labourer who was availed by Gang Leader whenever work was available. The Respondent does not have the claimant in its payroll and has never continuously assigned duties to him and considered him an employee."**

For the respondent it was submitted that the gang leader RW2 recruited the claimant as a casual worker and RW paid the claimant so that there was no employer-employee relationship between the parties. The respondent relied on Everret Aviation Limited –Versus- Kenya Revenue Authority (2013) eKLR where Kimondo J held, **"...In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical."**

The Court has considered the parties' respective submissions. Sections 2 of both the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 define **"employee"** and **"employer"**. Employee means a person employed for wages or salary and includes an apprentice and indentured learner. Employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The Court considers that the definitions should be mapped against the appellants' claims and the parties' evidence.

First, the memorandum of agreement signed is clear that the respondent was setting wage rates for daily contract workers and piece rate gang members. The respondent and not the gang leader, RW2 was setting the rates of payment. To that extent, the Court finds that the gang leader, RW2 was the respondent's agent for implementing the payment rates. Second, the gang leader, RW2 was empowered to recruit the workers on behalf of the respondent and was to ensure that there were enough gang members to undertake all tasks as listed per operation effectively in liaison with the respective supervisors – and there was enough staff to carry out the work as given by the respondent. In that regard, the gang leader was an agent to recruit staff. Thirdly, the respondent provided the money to pay the claimant as a gang member and the gang leader could not on his own bear the burden to so pay so that the gang leader was not working for himself with a sole responsibility for losses or for profits. Fourth the respondent agreed to provide the gang leader materials in time to complete the tasks assigned and where the materials' supply would delay, the same would be notified to gang leader in advance. The respondent also required the gang leader to provide to the respondent full details, names and identification (IDs) of their members while the gang leader retained the responsibility to recruit and pay the gang members. Thus, again the respondent retained the gang leader as a leader of the gang members for specified agency authority.

Fifth, as submitted for the respondent, in Katiwa Kanguli –Versus- Bamburi Cement Limited [2015] eKLR the Court of Appeal held thus, **"Estoppel is a set of doctrines in which a court prevents a litigant from taking an action the litigant normally would have the right to take, in order to prevent an inequitable result. In such a case, it is presumed that both parties understood the full implications of the undertaking and promise so given, and the promisor cannot thereafter be allowed to renege on his promise or undertaking."** Further, in Serah Njeri Mwobi –Versus- John Kimani Njoroge [2013] eKLR it was held that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement. Again in Mulji Jetha Ltd –Versus- Commissioner of Income Tax [1967] EA 50 it was held that the principle of estoppel cannot be invoked as a sword but a shield to protect a right that has accrued by law. The Court has considered that submission against the submission made for the claimant that the respondent having paid the claimant's NSSF dues, the respondent had thereby admitted the employment relationship and is

estopped from denying that relationship. The Court finds that indeed the undisputed evidence was that the respondent agreed to pay the claimant's NSSF and in absence of any other arrangements to justify that action, the payment of NSSF established that the respondent was the claimant's employer - the employment relationship and attached rights having thereby accrued, the respondent is estopped from asserting otherwise.

To answer the 1st issue for determination the Court returns that the respondent was the claimant's employer and the gang leader RW2 was the respondent's agent for specified human resource functions as per the memorandum of agreement. RW2 and the respondent would both fit the statutory definition of employer and the respondent being the principal employer, it was irrelevant that the gang leader RW2 had not been sued. In any event, the respondent's pleadings were consistent with the evidence that the gang arrangement was a mere managerial system for managing its casual and piece rate gang members.

To answer the 2nd issue for determination the Court returns that the evidence is that the claimant was recruited by RW2 as a casual and piece rate gang member or employee within the framework of the memorandum of agreement. By that evidence, the claimant was paid by piece rate based on piece of work performed per wage rates in the memorandum of agreement. The claimant was at liberty to report to work or to fail to do so and, even to work elsewhere as per RW2's testimony. The claims for leave, notice pay, service pay, unpaid house allowance, severance pay, compensation for alleged unfair termination, and certificate of service are therefore found to be inconsistent with the casual and piece rate engagement. It was discretionary for the claimant to report and get recruited by RW2 or to opt not to so report and he could work elsewhere. In any event, the wages as attached to the piece rate payments were clearly outside the monthly wage contemplated in section 49 or other sections of the Employment Act, 2007 for establishing the base for computing the monthly or daily wage for purposes of award under the headings of the claims and prayers made. Thus the claimant was ambiguous in his wage payment as a base of his claims when he pleaded at paragraph 3 of the memorandum of claim that his daily payment in 1995 was Kshs. 200.00 and the same amount increased to Kshs. 500.00 payable on weekly basis. It was not clear when such increment was effected and how the base of that weekly pay was invoked in arriving at the amounts claimed under the various headings. The Court has revisited the claimant's submissions and now has the base for calculating the amount claimed been justified in view of the pleadings and evidence. The Court finds that such base has remained at large and more so due to the casual, piece work and piece rate arrangement. The prayers will therefore fail for being inconsistent with the casual, piece work and piece rate payment arrangements that parties appear to have engaged in. In view of the evidence, there is no reason to doubt RW2's evidence that the claimant stopped reporting for RW2's recruitment when the claimant was employed as a clerk in the neighboring sugar consignment enterprise. Further, in view of the casual piece work or rate system, the Court finds that section 37 on conversion of casual employment to one subject to minimum statutory terms did not apply to the instant case. While making that finding, the Court considers that section 18 of the Act entitled the parties to conclude a piece work and piece rate payment arrangements.

The Court has considered the parties' respective margins of success and all circumstances of the case and the Court returns that each party will pay own costs of the suit.

In conclusion the suit is hereby determined with orders:

- 1) The memorandum of claim is hereby dismissed.
- 2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11TH MARCH, 2022.

BYRAM ONGAYA

JUDGE