



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE 105 OF 2018

ERICK KABANGABA WEKESA.....1ST CLAIMANT
AINEA ESKURI KOMBA.....2ND CLAIMANT
WESLEY KIPLANGAT KOECH.....3RD CLAIMANT
FRANCIS NJEHIA MWANGI.....4TH CLAIMANT
CHARLES MAINA MACHARIA.....5TH CLAIMANT

-VERSUS-

MAVJ KAJI & BROTHER LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants herein filed a Memorandum of Claim dated 13th April, 2018 on the 17th April, 2018 through the firm of Munene Chege and company Advocates seeking for the following reliefs; -

- 1) A declaration that the Claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair/wrongful dismissal.
- 2) An order directed at the Respondent to settle all accrued and outstanding payments due to each of the Claimant as per paragraph 23 of this Memorandum of the claim.
- 3) Compensation for unfair termination.
- 4) Cost of the suit and interest thereof at Court Rates.
- 5) Any other relief that this Court may deem fit to grant.

2. The 1st Claimant was employed on March, 2016, The 2nd Claimant on September, 2014, the 3rd Claimant on April, 2016, the 4th Claimant in August, 2014, the 5th Claimant in April, 2015.

3. The 1st, 2nd and 3rd Claimants were employed as General laborers at a daily wage of 325 which was increased to Kshs 400 at the time of termination while the 4th and 5th Claimants were engaged as carpenters on casual basis at a daily wage of Kshs. 800 at the time of termination.

4. The 1st and 3rd Claimants were terminated from employment in June, 2017 while the 2nd, 4th and 5th Claimants were terminated from employment in August, 2017. For all the Claimants the termination was verbal and no notice was given prior to the termination.

5. It is averred that the 1st, 2nd and 3rd Claimants were underpaid and the particulars of the underpayment particularized under paragraph 12 of the memorandum of claim.

6. The Respondent entered appearance on the 11th May, 2018 and filed a response to claim on the 17th July, 2018. The Respondent avers that it took the Claimants as casual employment to work on a project which it was contracted to construct and upon completion of the project the Respondent did not have any other work to give to the Claimants and both the Claimants and the Respondent left the site after completion of the project.

7. It was stated that the Claimants as rightly pleaded were casual employees/ project casuals who were contracted on availability of work basis and paid a daily wage as indicated in their pleadings following the number of hours worked by each casual.

8. The Respondent contends that the Claimants were never terminated as alleged rather that the contracted project had been completed. It thus urged this Court to disallow the claim with costs.

9. The Claimant's case proceeded for hearing on the 19th November, 2019 where the 2nd Claimant, Ainea Eskuri Komba testified as CW-1 on his behalf and on behalf of the other Claimants. The witness testified that they were all employed in the various capacities as casual employees and were not given any documents. He testified that they were informed by the Respondent that work had stopped for 2 weeks and after the said two weeks they were not contacted by the Respondent. He testified that when the work was completed the Respondent moved to Nairobi without communicating to them. That they were paid on a daily basis. That they were not given house allowance, leave, NSSF and NHIF or any other benefits entitled to employees. The witness then stated that they were Respondent's employees and therefore the Respondent ought to have paid them terminal dues upon completion of the said project.

10. Upon cross examination by Kamau advocate, CW-1 testified that he has been working in construction industry since 2012 and that construction work depends on the daily allocation. He testified that he was paid on a daily basis mostly on Wednesday and Saturdays and only on the days worked. No pay was given on off days sought or on any day not worked. He then averred that upon completion of the hotel project the Respondent should have paid them service pay however that the Respondent left the site without notice.

11. The Respondent's case was heard on the 15th November, 2021 where the Respondent called one witness Lalji Hizani, the director of the Respondent as RW-1 who adopted his witness statement dated 5.11.2018 together with the bundle of documents dated 11.11.2018.

12. Upon cross examination, RW-1 testified that he has worked as a contractor for about 20 years and that he managed to interact with some of the Claimants. He testified that he employed the Claimants on casual basis to undertake the construction of the hotel project which was foreseen to take about 1 year however that the said project stalled for some time and the project was later completed in August, 2017. He further testified that the Claimants were paid as pleaded and worked for 6 days a week and on Saturday for half a day. That the work was depended on availability and was never continuous.

Claimant's Submissions.

13. The Claimants submitted that they were ordinary employees and not casual employee as defined under section 2 of the Employment Act. It was argued that as much as the Claimants were paid on a daily basis they worked for the Respondent for over a year from 2014 to 2017 therefore that their employment converted from casuals in accordance with section 37 of the Employment Act. The Claimants then buttressed their arguments by citing the case of **Silas Mutwiri Vs Haggai multi cargo handling services Limited cause no. 107 of 2010**.

14. The Claimants submitted that their employment was a contract of service and not a contract for service as defined in the case of **Stanley Mungai Muchai V National Oil Corporation Kenya [2012] eKLR**.

15. Accordingly, it was argued that since the employment status of the Claimant was converted from casual as per section 37 of the Employment Act, they ought to have been given notice for termination and paid their terminal dues. It was argued that the failure by the Respondent to subject them to due process before termination or issue them with redundancy notices under section 40 of the Employment Act, was unfair and therefore that the claim ought to be allowed as prayed. The Claimants therefore cited the case of **Thomas Odol Ojwang Vs Kenol Kobil Limited [2015] eKLR**.

Respondent's Submissions

16. The Respondent submitted that the Claimants were hired as casual employee to undertake a project which was for construction of Sarova Woodland Hotel which construction was to commence in September, 2013 and end on 2nd November, 2014 however that due to unforeseeable issues the project was completed on 15th July, 2017. It was argued that the Claimants were discharged from their duties upon completion of the project therefore that they were never dismissed as alleged neither were they rendered redundant.

17. It is the Respondent's submission that the Claimants' could only have pleaded unfair termination successfully if their services were stopped before the completion of the project as was held in the case of **Ronald Kai Tsuma & 4 others V China Jianqxi Kenya Limited [2019] eKLR**.

18. The Respondent also submitted that the project was completed as pleaded by the parties and therefore there was no more work to be undertaken by the Claimants thus the separation of the parties was as a result of project completion and not termination or redundancy as urged by the Claimants. The Respondent then urged this Court to disallow the claim with costs.

19. I have examined the evidence of the parties herein plus submissions filed. When CW1 was cross examined concerning the nature of his engagement with the Respondent, he stated that he was paid twice a week on Wednesdays, Saturdays, and only on days worked. He however contended that upon completion of the hotel work, the Respondent should have paid them service pay.

20. From the evidence of the Respondents, the Claimants were hired specifically for the construction of Sarova Woodlands Hotel. The

Respondents averred that the Claimants were discharged from their obligation upon completion of the project.

21. It is true as admitted that the Claimants were employed by the Respondent on a particular project to construct Sarova Woodlands Hotel. The project was completed in 2017. This in my view is what is defined as a contract for service which is defined;

“A contract for a job undertaken by an independent contractor as opposed to an employee.”

22. In the relationship between the Claimant and Respondent the contract though not being with an independent contractor the Claimants were aware that they were coming to serve the Respondent on a particular project – the Sarova Woodlands Hotel.

23. No promise was given to them for further employment after the end of the project. There is no indication that the Claimants were continuously serving the Respondent on any other project.

24. The claim for unfair termination in my view does not stand as prayed and is therefore dismissed.

25. There is no indication that the Claimants were declared redundant as the project under which they were employed also came to an end.

26. I find that there is no tangible claim against the Respondents and dismiss the Claimant’s case accordingly.

Dated and delivered in open Court this **9TH** day of **MARCH, 2022**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Daye for Claimant – present

Kamau for Respondent – present

Court Assistant - Fred