



**Owuor v Rea Vipingo Plantations Ltd (Cause 529 of 2018)
[2022] KEELRC 1452 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 529 OF 2018**

**AK NZEI, J
JUNE 9, 2022**

BETWEEN

GODFREY OTIENO OWUOR CLAIMANT

AND

REA VIPINGO PLANTATIONS LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the claimant against the Respondent vide a statement of claim dated June 29, 2017 and filed in court on June 30, 2017. The Claimant pleaded:-
 - a) that he was employed by the Respondent as a casual worker sometimes in February 2015, earning ksh.9,510, which was later increased to a monthly salary of ksh.10,800.
 - b) that sometimes in October 2016, the claimant, together with ten of his colleagues, were dismissed from work on redundancy basis.
 - c) that the claimant was neither informed of the respondent's decision prior to his dismissal nor given redundancy notice.
2. The Claimant sought the following reliefs:-
 - a) One month salary in lieu of noticeksh.10,800
 - b) Severance pay 15 days for each year completed $\frac{1}{2} \times 10,800 = 5,400$
 - c) Accumulated leave for one year and eight months workedksh.18,000
 - d) Compensation for unfair termination (10,800x12)...skh.129,600Total = ksh.163,800



3. The claimant sought a declaration that termination of his employment was unlawful as well as payment of costs of the suit and interest.
4. The claimant filed a two paragraph witness statement signed by himself on June 29, 2017 and a list of documents dated the same date, both of which accompanied the statement of claim. Documents listed on the claimant's said list of documents included copies of the claimant's national identity card, a bundle of payslips, KRA Pin, Visitors Pass, NSSF statement, demand letter dated March 18, 2017 and a response thereto dated March 30, 2017.
5. The respondent entered appearance on November 3, 2017 and subsequently filed a memorandum of response on September 5, 2018. The respondent pleaded:-
 - a) that she did not have casual employees in her employment and that all her employees were either engaged on contract or on piece-rate basis due to the nature of her business.
 - b) that the claimant was engaged in the year 2015/2016 as a piece-rate employee in the Respondent's brush room.
 - c) that when the respondent has a huge load of sisal harvest which cannot be managed by her workforce, her production team assigns quantities to be managed on piece-rate basis.
 - d) that once piece-rate employees are engaged and have completed the assigned task, they are paid and cleared from the company.
 - e) that the claimant was a piece-rate employee in December 2015/October 2016 and upon completion of his work, he together with other employees were informed to clear with the Respondent (return company tools) for them to be paid, which they did.
 - f) that the claimant was duly paid at conclusion of his piece-rate employment in October 2016 and had no further claims against the Respondent.
 - g) that the claimant was paid according to the days worked and amount of work done.
 - h) that the respondent did not terminate the claimant.
6. The respondent filed copies of the following documents, which accompanied the Memorandum of Response:-
 - a) Attendance register on its B/Room Section.
 - b) A bundle of payslips of payment made to the claimant.
 - c) The Claimant's clearance form dated October 14, 2016.
 - d) Payment records from December 2015 to September 2016.
7. On November 13, 2019, the respondent filed a detailed witness statement of Janet Omulindi, dated November 11, 2019.
8. When trial opened on February 24, 2022, the claimant adopted his filed witness statement as his testimony and produced the documents mentioned in paragraph 4 of this judgment as exhibits. The claimant further testified:-
 - a) that he worked for the Respondent for about one year and ten months; and was being paid ksh.317 per day, paid in cash mid-month and the balance at the end of the month.



- b) that the claimant was not given leave during the period of employment; and was not issued with a certificate of service.
9. Cross-examined, the claimant told the Court:-
- a) that he was a piece-rated employee and that this was written on the pay statements that he had filed in court.
- b) that his salary was not static, but changed from month to month, sometimes going higher and other times going lower.
- c) that he (the claimant) worked from February 2015 to October 2016; was not given any contract and was not given leave.
10. The respondent's witness, Janet Omulindi (RW-1), a human resource manager in the respondent company, adopted her filed witness statement as her testimony and produced the documents filed with the memorandum of response as exhibits. The witness further testified:-
- a) that the respondent engages piece-rated workers when she has big amounts of harvested sisal to assist in the work and such employees are assigned specific tasks and are paid as per the tasks they have completed.
- b) that after the claimant completed the task that he had been assigned to do, he executed a clearance form on October 14, 2016, and that the date, month and year on that form is the same date, month and year that the claimant alleges to have been declared redundant.
- c) that the claimant's salary was not fixed, but it varied depending on work done. That the claimant was paid all what was due to him.
11. Parties herein did not file a joint statement of agreed issues. In my view, issues that present for determination are as follows:-
- a) Whether the claimant was a casual or piece-rated employee.
- b) Whether the claimant was terminated by the Respondent.
- c) Whether the claimant is entitled to the reliefs sought.
12. On the first issue, section 2 of the [Employment Act](#) 2007 defines piecework as follows:-
- “any work the pay, for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”
- On the other hand, casual employee is defined under the same Section of the Act as follows:-
- “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”
13. Although the claimant pleaded that he was engaged by the respondent as a casual employee, the documents produced by him in evidence, and particularly the bundle of his payslips, show that the claimant was a piece-rated employee. The claimant himself testified, under cross examination, that he was a piece-rated employee. He, the claimant, further testified that his salary was not static, but changed from month to month. RW-1 testified that the amount of salary payable to the claimant depended on work done. This variation in payments made to the claimant by the respondent is reflected on the bundle of the claimant's payslips produced by both parties, and the Respondent's record of



payments (to piece-rated employees) for the period December 2015 to September 2016 produced by the respondent as exhibit no. 4.

14. The respondent pleaded and testified that the claimant was a piece-rated employee. The respondent produced in evidence the respondent's payment record/register for piece-rate workers for the period December 2015 to September 2016, and the claimant is shown to have signed/thumb printed the same each month against varying amounts of payments as a piece-rate worker. The claimant did not dispute having signed the said payment register.
15. Further, the respondent produced in evidence a clearance form, duly executed by the claimant as a piece-rate worker on October 14, 2016. The claimant is shown to have executed the said document as piece rate employee. The claimant did not deny or dispute having signed or executed the said document. (the respondent's exhibit no. 2).
16. The respondent also produced in evidence its attendance register for piece-rate employees during the period 2015/2016 (exhibit no.1), and the claimant did not dispute or fault its accuracy and validity.
17. I will not belabor the point any further. I find and hold that the claimant was a piece-rate employee.
18. Before delving into the second issue, I do refer to the court of Appeal decision in [*Krystalline Salt –vs- Kwekwe Mwakele & 67 others*](#) [2017] eKLR where the Court said:-

“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 an employee the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece rate arrangement, though not entitled to all or benefits of the other forms of employment, is at least entitled to minimum wage.”

19. The Court cannot, therefore, be called upon to swap the piece rate form of employment agreed upon by the parties herein with another form of employment. The Court of Appeal further stated in the [*Krystalline Salt Case*](#) (supra) as follows:-

“...we think however that the determination should have been made under Section 18(1) (b) as read with Section 35(1) (c) ... a piece rate worker would, in terms of these provisions, be entitled to a notice of 28 days before termination of service. These are some of the reforms in employment relationship introduced by the [*Employment Act*](#). Where an employee alleges that the termination was unfair, the evidential burden of proof shifts to the employer to demonstrate the existence of circumstances enumerated under Section 45. Relevant to the matter before us, the appellant was expected to prove that the reason for termination was valid, that the reason was fair in so far as it related to the Respondents' conduct, capacity and compatibility. The appellant was similarly required to show that the termination was in accordance with fair procedure.”

20. On the second issue, the respondent testified that the Claimant and other piece rate workers were on October 14, 2016 paid and cleared from the respondent company after they had completed the piece rate work that they had been employed to do; and that the claimant duly executed a clearance form. I find no basis in the claimant's pleading that he was terminated on redundancy without notice.
21. The respondent pleaded and testified that the claimant and other piece rate workers were paid and cleared from the respondent company after they had completed the piece rate work they had been



employed to do. The validity of this position was not disputed by the claimant. Termination of the claimant's piece-rate engagement cannot, therefore, be said to have been on invalid reason.

22. The respondent did not, however, demonstrate that it gave a 28 days' notice to the claimants before termination of the piece rate engagement pursuant to section 18(1) (b) as read with section 35(1) (c) of the *Employment Act*. Neither did the respondent demonstrate that it made any payment to the claimant in lieu of notice. This made the process of severing the piece-rate engagement between the claimant and the respondent procedurally unfair.
23. The claimant prayed for ksh.10,800 being one month salary in lieu of notice. It is not clear how he arrived at this amount as his salary varied from month to month and he did not plead or address the court on the minimum wage for workers in his category at the time. Since the respondent did not, also, address the court on the issue, I accept the sum of ksh.10,800 prayed for by the claimant and award the same to the claimant as one month salary in lieu of notice.
24. The claim for severance pay is declined as the case herein did not involve termination of employment on account of redundancy.
25. The claim for accumulated leave for 1 year and 8 months is declined as the claimant, having been a piece rate worker, is not entitled to the same.
26. On the claim for unfair termination of employment, and having made a finding that termination of the claimant's piece rate engagement from 2015 to October 2016 was procedurally unfair for want of termination notice, I award the claimant six months' salary (ksh.10,800x6) being compensation for unfair termination of employment.
27. Consequently, and having considered written submissions filed by counsel for both parties, judgment is hereby entered for the claimant against the respondent as follows:-
 - a) one month salary in lieu of noticeksh.10,800
 - b) six months' salary being compensation for unfair termination (ksh.10,800x6)64,800Total ksh.75,600
28. The sum awarded is subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
29. The claimant is also awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 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:



No Appearance for Claimant

Miss Opol for Respondent

