Odongo & 7 others v International Committee of the Red Cross (ICRC) (Cause 69 of 2017) [2022] KEELRC 1617 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1617 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 69 OF 2017

B ONGAYA, J

JULY 29, 2022

BETWEEN

PATRICK ALWAL ODONGO ..... 1ST CLAIMANT

CHARLES BENARD ALWAL ..... 2ND CLAIMANT

ONGASIA OSANO ODERO ..... 3RD CLAIMANT

KOMBO KIVASI NYASI ..... 4TH CLAIMANT

JOANES OMONDI GAUNYA ..... 5TH CLAIMANT

ZABLON KYUMBU MUTEMI ..... 6TH CLAIMANT

MWACHILI ALI MWACHILI ..... 7TH CLAIMANT

JAMES KAMAU MAINA ..... 8TH CLAIMANT

AND

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ..... RESPONDENT

JUDGMENT

1. The claimants filed the statement of claim on January 24, 2016 through Omollo Onyango & Company Advocates. They prayed for judgment against the respondent for:

    a) Order directing the respondents to pay the claimants for notices, leave, years of service, terminal and statutory benefits amounting to Kshs 4,737,000.00.

    b) A declaration that the claimants' dismissal was unlawful and unfair.

    c) Costs of the suit.

d) Any other relief the honourable court may deem fit and just to grant.

2. The claimants pleaded as follows. The respondent initially employed them in 2000 and deployed them at Changamwe but its main office was at Uni-Plaza. Each earned Kshs 150.00 per day making Kshs 4,500.00 per month. The wage was increased to Kshs 840.00 per day thus Kshs 25,200.00 per month.

3. The claimants have further pleaded as follows.

> "4. That in March 2016, Ms Caroline a superviser from Nairobi came to the claimants' work station and told the claimants to arrange tapeline in ascending order upto height of 30 feet which usually are arranged upto 13 or to the height of 14 feet, for safety. The claimants agreed but only arranged the tapeline to the height of 23 feet. The tapeline stayed for 3 days and the claimants were again given orders to reduce them to 19 feet since the height of 23 feet was dangerous. The claimants reduced the tapeline height but thereafter demanded for payment after rearranging the tapeline but the said superviser became rude and brought the security guard who locked them out of the work premises, claiming that they were no longer employees of the organisation. The claimants did report to work the next day but the door/ gate to the claimants' work stations was locked. The claimants aver that they were neither given any reasons nor notice of the same and were never given any leave while still employed by the respondent".

The claimants allege suffering anguish, trauma, financial constraints, loss and damage. Each claims upon headings of one-month payment in lieu of termination notice, leave for 3-years, gratuity for 3-years worked, and, compensation for the unfair termination. The claim for each claimant is computed as follows:

a) Notice payment Kshs 25,200.00.

b) Leave for 3-years Kshs 75,600.00.

c) Gratuity 15-years x ½ x 25,200.00 = Kshs 189,000.00.

d) Compensation for unfair termination 12-months x 25,200.00 = Kshs 302,400.00.

4. The respondent filed the memorandum of reply on March 15, 2017 through Oraro & Company Advocates. The respondent stated that it is an International Humanitarian Organisation registered in Switzerland but with a Headquarters Agreement with Kenyan Government. The respondent pleaded as follows:

a) It never employed the claimants as permanent workers but rather contracted a gang leader who in turn hired piece rate workers on need basis and their wages were settled as per the rates specified in the DATA/KSCWWU Daily Paid Casual Workers Agreement. The gang workers' engagement terminates at the end of each day, after signing for daily wage.

b) The respondent's Mombasa offices are and have always been at the Kenya Red Cross Premises, Aga Khan Road, off Moi Avenue and have never been at Uni-Plaza.

c) Caroline was not a superviser from Nairobi but is the respondent's head of the Mombasa warehouse. The warehouse has a standard arrangement system. The claimants in defiance of the instructions given to them refused to stack the goods as required.

d) Claimants 4 and 5 are still part of the gang contracted by a gang leader to execute the respondent's tasks. They never stopped executing through their gang the tasks assigned by the

respondent. They were taken upon their application and intervention by the union and gang leaders.

e) Claimants 6 and 7 stopped working for the respondent long before the March 2016 incident. They were reengaged by the respondent on April 8, 2016 but insisted that the respondent hires the whole gang but which request was not feasible as the respondent required only four loaders. Thus, they rejected the task and went away. The action was in violation of section 6.0 (a-c) of the IRCC policy on casual labour. Regardless of the same, the respondent reconsidered to re-engage the two claimants on June 21, 2016 in presence of their union representative but they denied the offer.

f) The claimants were not terminated by the respondent but rather refused to take on the work offered to them by the respondent.

g) The claim has no basis in law and the claimants are not entitled to reliefs sought as they were casual workers hired on a need basis and their wages settled as per the rates specified in the Data/KSCW Daily Paid Casual Workers Agreement.

5. The respondent prayed that the suit be dismissed with costs.

6. The 1st claimant testified on behalf of the claimants (CW). The respondent's witness (RW) was George Nabwera, the respondent's Head of Logistics Department, Mombasa. Final submissions were filed for the parties. The court has considered the pleadings, the documents, the oral submissions, and all material on record and returns as follows:

7. The 1st issue for determination is whether the court lacks jurisdiction on account the respondent enjoys diplomatic immunity. At the beginning of the hearing of the suit as was scheduled on February 21, 2022 at 1035 hours, counsel for the respondent Mr Kiragu addressed the court thus,

> "I have a preliminary objection. I have not filed it. Is about jurisdiction. The respondent is an international humanitarian organisation. It enjoys diplomatic immunity pursuant to Headquarters Agreement with the Government of Kenya."

Counsel for the claimant Mr Okoko objected stating that the preliminary objection was being raised at the bar and the suit had been filed in 2017, directions for full hearing taken, and, he was surprised the preliminary objection was being orally lodged belatedly at the hearing time. He prayed for an adjournment for the preliminary objection to be formally filed and determined by the court. Counsel for the respondent then submitted that the preliminary objection be urged in the main suit. The court ordered that the preliminary objection be urged in the final submissions and after taking parties' testimonies so that the hearing of the suit proceeded.

8. The respondent has submitted that in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696 it was held,

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion."

The respondent also relies on the Court of Appeal in *Karen Njeri Kandie v Alssane Ba & Shelter Afrique* [2015] eKLR thus,

> "A plea of immunity from legal process is such as was raised by the respondents before the court below appears to us to be approver subject of a preliminary objection which raised

> a threshold issue to be determined in limine. It has to be so because its effect is to raise a procedural bar to the court's jurisdiction and it behooves the court to first address and pronounce itself on it before it can embark, if at all, on hearing the rest of the dispute."

9. For the claimants it is submitted that the suit was filed on January 24, 2017, thereafter mediation initiatives failed, and, parties took directions for hearing of the suit. It is submitted that in *Local Authorities Provident Fund v Joseph Njogu Gathu & another* [2016] eKLR Mativo, J held that a preliminary objection is to be taken in a suit at the earliest time possible if there are sufficient material on record for it to be determined because, howsoever nicely a hearing may be conducted, all is a nullity without due jurisdiction.

10. Counsel for the respondent admitted that the preliminary objection had not been pleaded and no notice had been filed and served in that regard. In so far as in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696 it was held that a preliminary objection must be raised out of pleadings and the preliminary point was not pleaded as a bar to jurisdiction, the court finds that the oral application purporting to raise the preliminary objection was misconceived. The respondent pleaded expressly admitting the court's jurisdiction and it appears to the court that it is bound, accordingly. As a preliminary point raised prior to hearing of the suit, it would fail as not pleaded expressly. However, as a substantive issue for determination, the court returns that the parties are entitled to urge their respective positions based on all material on record. While the respondent admitted jurisdiction, the court considers that such admission by the parties of the jurisdiction would not confer the court jurisdiction. The court finds that jurisdiction is outside the authority of the parties and even the court because it is conferred by the *Constitution* and statutes but not consents of the parties or even court orders. The court must therefore consider all the material and arguments and decide the jurisdictional question as a substantive issue.

11. The evidence has been taken and as a substantive issue for determination, it is urged and pleaded for the respondent that it is an international humanitarian organisation registered in Switzerland but with a Headquarters Agreement with Kenyan Government. The agreement which was signed on August 10, 1994 is exhibited for the respondent. Article 3 of the agreement states,

> "The ICRC, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal and administrative process unless the ICRC has expressly waived its immunity."

It is submitted that in the instant case the respondent had not expressly waived its immunity. Further, no constitutional issues of access to justice, fair labour practices, or the right to human dignity have been raised. In absence of such issues, then the court cannot address the issue of whether the diplomatic immunity was absolute. For the claimant it was submitted that the preliminary objection was belated.

12. The court has considered the submissions and returns that by reason that the respondent admitted the court's jurisdiction without raising the issue of diplomatic immunity amounted to a sufficient indicator that it waived the immunity, if any, as envisaged in article 3 of the Headquarters Agreement with Kenyan Government. The waiver was manifested not only by the claimant submitting to the jurisdiction as pleaded but also by engaging in mediation after the suit was filed. As submitted for the claimant, the objection was an afterthought.

13. As submitted for the respondent, the issues of whether the diplomatic immunity was absolute appear not to be in issue in the instant case and the court will not delve into that issue.

14. To answer the 2nd issue, the court returns that by its own pleading the respondent has confirmed that it employed the claimants through their gang leader to perform casual work whose payment was on

piece rate payable at the end of the day. The court returns that parties were in employment relationship upon those terms. The gang leader was merely a coordinator and not employer. At most, in this case the gang leader was an agent of the principal employer, the respondent. The respondent paid the claimants and it was the employer as defined in the *Employment Act, 2007*. For the purpose of that employment, RW testified that the claimants were not members of a trade union but the claimants were paid by the respondent in accordance with the agreement the respondent had signed with the trade union setting out the piece rate of payment for all employers in the industrial sector engaging piece workers – the agreement gave guidance for payment of all piece rate workers in the sector. In that employment relationship, RW testified that the role of the gang leader was to recruit the group members of the gang in the morning and on need basis. CW confirmed that arrangement when he testified that the claimants were casual employees and he had never been given a contract of employment. The court finds that the claimants were casual employees hired on need basis and paid per the piece work rates per the sector agreement concluded by the sector trade union and the employers.

15. To answer the 3rd issue for determination, the claimants ceased to be considered for casual employment when they had a difference with the respondent's head of warehouse in Mombasa one Caroline. While pleading that they rearranged the tapeline and were denied payment, there was no claim of unpaid wages for work done on the disputed day; suggesting they were fully paid and the casual engagement for that day lapsed accordingly.

16. To answer the 4th issue, the court returns that the there was no unfair termination because the contract of service lapsed on each day worked and the service was with breaks and, was not continuous. There was no evidence that the claimants worked without a break and they were free to serve elsewhere.

17. To answer the 5th issue, the court returns that the claimants' casual and piece work payment regime was inconsistent with all the remedies they purport to seek in the instant case. They will all be declined as not justified. While submitting that the claimants' service converted to one subject to minimum statutory terms per section 37 of the *Act*, the same was not pleaded at all and the claimants provided no evidence to satisfy such conversion upon the conditions set out in section 37 of the *Act*. In any event, they were paid on piece rate, based on work an individual actually performed. How then can the court determine the piece work each performed and therefore the payment each received? In absence of such determination, it appears to the court to be impossible to determine the base for an award as prayed for.

18. The court has considered all circumstances of the case, the nature of the casual and piece work arrangement that was fluid, the claimants' position as casual workers, and, there will be no orders on costs.

In conclusion, the suit is hereby dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH JULY, 2022.

BYRAM ONGAYA

JUDGE