



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 74 OF 2014

KENYA BUILDING CONSTRUCTION TIMBER AND

FURNITURE INDUSTRIES EMPLOYEE UNION.....CLAIMANT

VS

WESTON CONTRACTORS (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. This matter has seen many days in the litigation conveyor belt. The claim was filed on 12th March 2014 but the Respondent did not file a Response.
2. The Court (**O.N Makau J**) therefore entered an *ex parte* judgment in favour of the Grievants, Benard Ondieki Osoro and Jackson Kahindi Kiyuge, on 2nd October 2015.
3. Subsequently, the Respondent filed a Notice of Motion dated 16th June 2016, seeking an order to set aside the *ex parte* judgment. In a ruling delivered on 11th November 2016, **O.N Makau J** allowed the Respondent's Motion thus setting aside the judgment dated 2nd October 2015.
4. The Claimant is a trade union registered in Kenya to represent workers in the building and construction sector. The union filed this case on behalf of its members, Benard Ondieki Osoro and Jackson Kahindi Kiyuge.
5. The claim is by way of a Memorandum of Claim dated 11th March 2014. The Respondent filed a Memorandum of Reply on 15th November 2016.
6. The matter proceeded to full trial where the Grievants testified on their own behalf. The Respondent called its Director, Michael Kibiro Kahi.

The Claimant's Case

7. The Claimant states that the 1st Grievant, Benard Ondieki Osoro was employed by the Respondent on 4th May 2008, in the position of Welder Grade III earning a daily wage of Kshs. 500.
8. The Claimant further states that the 2nd Grievant, Jackson Kahindi Kiyuge was employed as a general labourer on 12th June 1997 but was trained on the job as a Carpenter. At the time of leaving employment Kiyuge was earning a daily wage of Kshs. 400.
9. The Claimant pleads that under the Collective Bargaining Agreement signed with the Kenya Association of Building and Civil Engineering Contractors, of which the Respondent was a member, the daily wage of a Welder Grade III was Kshs. 734 while that of a Carpenter was Kshs. 502. In addition, each of the Grievants was entitled to a housing allowance of Kshs. 2,277.
10. The Claimant avers that on 7th March 2012, the 1st and 2nd Grievants were paid their weekly wages by the then Foreman, one Charles who also informed the Grievants that they had been dismissed. Upon demanding to know the reason for their dismissal, the Grievants were informed that the Director had told Charles that they were no longer required by the Company.
11. The Grievants reported to the Claimant Union who approached the Respondent to try and settle the matter but the Respondent refused to

meet the Claimant.

12. The Claimant reported a dispute to the Minister under the Labour Relations Act and the Minister appointed a Conciliator vide letter dated 26th July 2012.

13. The appointed Conciliator invited the parties for a conciliation meeting on 23rd August 2012. The conciliation did not bear any positive results and the Conciliator issued a certificate of an unresolved dispute.

14. The Claimant seeks a declaration that the 1st and 2nd Grievants were unlawfully dismissed from the Respondent's employment and are consequently entitled to the following payments:

1st Grievant: Benard Ondieki Osoro

- a) 2 month's salary as notice pay.....Kshs. 38,168
- b) Annual leave for 3 years.....57,252
- c) Prorata leave for 10 months.....16,515
- d) Severance pay for 3 years.....33,030
- e) Housing allowance.....80,475
- f) Underpayment arrears.....132,756

2nd Grievant: Jackson Kahindi Kiyuge

- a) 2 month's salary as notice pay.....Kshs. 26,104
- b) Annual leave for 14 years.....182,728
- c) Prorata leave for 8 months.....9,036
- d) Severance pay for 14 years.....105,420
- e) Housing allowance.....80,475
- f) Underpayment arrears.....34,164

15. The Claimant further seeks 12 months' salary as compensation to each Grievant for unlawful termination of employment.

16. Finally, the Claimant asks that each of the Grievants be issued with a Certificate of Service.

The Respondent's Case

17. In its Memorandum of Reply dated and filed in court on 15th November 2016, the Respondent states that it was not aware of any Recognition Agreement signed with the Claimant Union. The Respondent adds that the Collective Bargaining Agreement referred to by the Claimant had lapsed on 1st February 2011.

18. The Respondent denies that the Grievants were dismissed and states that the Grievants themselves absconded duty.

Findings and Determination

19. There are two (2) issues for determination in this case:

- a) Whether the Claimant has proved a case of unlawful dismissal of the Grievants;
- b) Whether the Grievants are entitled to the remedies sought.

Unlawful Dismissal?

20. In the Memorandum of Claim filed by the Claimant on 12th March 2014, it is pleaded that the 1st and 2nd Grievants were dismissed on 7th March 2012, soon after being paid their weekly wages by the Respondent's Foreman by the name Charles.

21. At the hearing of the case it emerged that the Grievants and other workers had staged a sit-in, agitating for payment of accrued wages, which were eventually paid. The Grievants testified that the Respondent singled them out for dismissal because of the sit-in.

22. The Grievants however also stated that they had been called back to work but they declined the offer because they had been chased away. They also wanted to be paid for the days they had stayed away from work, a demand that the Respondent did not accede to.

23. The Respondent's request to the Grievants to go back to work was confirmed by its letters to the Claimant Union dated 18th April 2012 and 7th June 2012. This information was also communicated to the Conciliator by letter dated 5th June 2012.

24. This Court has, in the past, held that an employee, who without good cause, turns down an employer's offer to resume duty cannot come to court and complain that their employment has been unfairly terminated (see *Dexter Muye Mwangombe v Mombasa Go-Kart-Garimeli Limited [2019] eKLR* and *Randa Ali Charo v Riley Services Limited: Cause No 230 of 2016*)

25. The condition given by the Claimant Union for the Grievants' resumption of duty, being payment of wages for days not worked has no backing in law. Further, this Court is not bound by the recommendations made by the Conciliator, which were also not supported by any legal provisions.

26. That said, I find and hold that the Grievants have failed to prove a case of unlawful dismissal. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

27. There was no evidence of the Grievants' employment being terminated on account of redundancy. The claim for severance pay was therefore unsupported and is dismissed.

28. From the evidence on record, the Grievants were paid a daily wage, which would ordinarily be inclusive of house allowance. The claim thereon is therefore rejected.

29. The claim for underpayment was not proved and consequently also fails.

30. In the absence of leave records to the contrary, I will allow the claim for leave pay limited to three (3) years being the limitation period imposed by Section 90 of the Employment Act.

31. Ultimately, I enter judgment in favour of the Grievants as follows:

a) **Kshs. 31,500** in favour of the 1st Grievant, Benard Ondieki Osoro being leave pay for 3 years;

b) **Kshs. 25,200** in favour of the 2nd Grievant, Jackson Kahindi Kiyuge being leave pay for 3 years.

32. These amounts will attract interest at court rates from the date of judgment until payment in full.

33. The Grievants are also entitled to Certificates of Service.

34. Each party will bear their own costs.

35. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Miss Chege for the Claimant Union

