REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. 9 OF 2020

(Being an appeal from the entire judgment and decree of Hon. S.A Lesootia, Principal Magistrate, delivered on 20.02.2020 at Mombasa in Employment and Labour Relations Cause No. 371 of 2018 in the Chief Magistrates' Court at Mombasa)

BENARD MAITHYA MATU..............................1ST APPELLANT

DENNIS MWENDWA SAMUEL......................2ND APPELLANT

JOHN MWEMA MULIVI.................................3RD APPELLANT

MATANO MUSUNYE MBITHA.......................4TH APPELLANT

SAID KAZUNGU CHARO.................................5TH APPELLANT

MUNGA LEWA MUNGA.....................................6TH APPELLANT

- VERSUS -

ACME CONTAINERS LIMITED............................RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd April, 2021)

JUDGMENT

The appellants filed the memorandum of appeal on 03.03.2020 through C. Masinde & Company Advocates. They appeal against Hon. Lesootia, Principal Magistrate delivered on 20.02.2020 in the suit filed by the appellants against the respondent. The appeal raises grounds of appeal as follows:

1) Whether the learned Magistrate erred in finding that the termination of the 1st, 2nd, 3rd, 4th and 6th claimants was substantively and procedurally fair or lawful.

2) That the learned Magistrate wrongfully found that the 1st, 2nd, 3rd, 4th, and 6th claimants were not entitled to any award including severance pay, leave arrears and notice in lieu.

3) The learned Magistrate erred in fact and law by totally disregarding the 1st, 2nd, 3rd, 4th and 5th appellants' evidence and submissions.

4) That the learned Magistrate erred in fact and in law by considering factors which he ought not to have considered and disregarding factors which he ought to have considered.

The appellants pray for judgment for:

a) The Honourable Court allows the appeal and set aside, varies the judgment of the lower Court accordingly.

b) Costs.

The appellants were the claimants in the suit before the trial Court. They filed a memorandum of claim on 01.11.2018. They alleged that they were each employed by the respondent as loaders on diverse dates as stated in the memorandum of claim. Their further case was that on

18.07.2018 the respondent terminated their services verbally without giving any reason for the termination or giving them a hearing. They stated that they had never been issued with warning letters. Each claimed for and prayed for award as computed in the memorandum of claim upon the headings of 12 months' salaries in compensation for unfair and unlawful termination; accrued or pending leave; and pay in lieu of termination notice. They each also claimed and prayed for certificate of service; costs plus interest; and any other relief the Court deemed fit to grant.

The respondent filed a statement of response to the memorandum of claim on 22.01.2019 through Rotich, Langat & Partners Advocates. The respondent admitted that it employed the appellants as casuals on diverse dates between the year 2009 and July 2018. Further, the appellants did not work continuously but intermittently for the respondent as and when there was work and were paid daily after completion of work. Further, the appellants would on any given day work for several other companies neighbouring the respondent's offices after completing the respondent's work or whenever there was no work available for them at the respondent's premises. Further the appellants had not at any time continuously worked for the respondent. Effective July 2018, business went down as cargo containers were being moved through SGR and the respondent stopped taking casual staff including the appellants. The appellants filed a complaint with the labour office alleging redundancy and the labour officer considered the case and returned findings on 11.10.2018 that the parties were in a contract for service and not a contract of service. The appellants' case before trial Court that they were unfairly terminated was therefore a shift from their earlier position. The respondent's case was that the issue of notice and hearing did not arise and the claimants were not entitled to the claims and the prayers made.

The trial Court delivered the judgment in the suit on 20.02.2020 by finding that the claims had not been established on a balance of probabilities and the entire suit was dismissed with orders that each party bears its own costs of the suit.

The parties to the appeal filed and relied on their respective submissions. The Court has considered all the material on record.

First the Court has considered the memorandum of appeal. Only six (6) appellants are listed. The 5th claimant in the suit one Garama Kalu Kenga is not listed as an appellant but he is purportedly listed in the appellants' submissions as the 5th appellant. Further, while listing Said Kazungu Charo as the 5th respondent, the grounds of appeal in the memorandum of appeal substantially refer to only the 1st, 2nd, 3rd, 4th, and 6th appellants as the aggrieved appellants. The memorandum of appeal then prays for general remedies to apply to all claimants (or appellants) in the suit disregard the stated discrepancies in the memorandum of appeal. The Court considers that such ambiguous pleading should act as an impetus to disallowing the appeal as the final prayers and submissions seek to cover persons who in fact appear not to be appellants or pursuing appeal, on the face of the memorandum of appeal.

Second, this is a first appeal. As submitted for the appellants and the respondent the Court's role includes to re-evaluate evidence on record and to arrive at its own conclusion bearing in mind that the Court did not by itself take the evidence of the witnesses as was the trial Court's primary role to do so.

Third, the main issue in dispute in the appeal is whether, in view of the evidence on record, the claimants were in continuous employment of the respondent as casual workers. To answer that issue, the trial Court stated as follows, "**I have sampled out the number of days worked and compared it against the petty vouchers and persons against whom the payments were made and indeed the same are consistent. I have also considered the claimants' testimony that the payments made were for overtime worked. While CW1 confirmed that he received payments indicated in the voucher as overtime worked, the claimants' name and identity card numbers variously appear in lists attached to the voucher as recipients. In the list it is indicated the number of bags on various containers that were off loaded on respective days. Indeed, the claimants signed against their names the total sum received for a specific number of bags and or container and size thereof. The payment is consistent with the price per bag as testified by RW1 of Kshs. 3.00 and Kshs. 4.00 per bag. To put it into perspective on 3rd April 2018 the claimants were collectively paid Kshs. 3, 520.00. They signed for the same for loading a total of 880 as described in the schedule. At Kshs. 4.00 per bag it works out to the sum received and acknowledged above. On the basis above I therefore find it difficult to believe the claimants and their allegations that the sum paid as indicated in the payment voucher was for overtime worked. The above confirms the respondent's claim that the claimants were paid per day and on the basis of the work done. On the same breath I'm convinced that the claimants were not employed or engaged by the respondent continuously**."

The trial Court further found that the appellants had not worked for the respondents continuously to warrant the conversion of their casual employment to term contract as contemplated under section 37 of the Employment Act, 2007.

While it is true, as submitted for the appellants, that RW1 contracted himself in his testimony when he testified that the appellants were not employed by the respondent and then testified that they were employed as casual employees paid upon completion of assigned work, the Court has considered the payment vouchers exhibited for the respondent and finds that the trial Court did not misdirect itself in its observations and findings. The payment vouchers show that the appellants were paid at agreed rate per bag as loaders. The Court therefore finds that it is clear from the evidence that parties were in piece work arrangement. Section 2 of the Employment Act, 2007 defines "**piece work**" to mean any work the pay for which is ascertained by the amount of work performed irrespective of time occupied in its performance. In **Safari Joseph Ngala &2 Others –Versus-Rapid Kate Services Ltd [2017]eKLR** (Rika J) the Court found that there was nothing wrong with an arrangement whereby a person engages an independent contractor to provide labour to perform on piece work basis – in which case the independent contractor employs his own staff to perform the task under agreements to which the beneficiary of the contracted services is not privy. In the instant case, the appellants by themselves appear to have been contracted to perform the piece work and as much as the respondent was privy, it was a piece work contract and not strictly casual employment convertible into a contract of service subject to minimum statutory provisions as envisaged in section 37 of the Act. The arrangement was that the respondent pays the appellants at the agreed rate per bag loaded and in that arrangement it is obvious that time worked by each claimant was irrelevant and what was material was the number of bags loaded by each appellant within own discretionary time. Further, the Court has considered the appellants' submissions invoking section 37 of the Act and finds that the same was not pleaded at all and trying to invoke the section is clearly an afterthought and contrary to trite law that a party is bound by his or her pleadings.

Further it was submitted for the appellants that they worked continuously but looking at the evidence, there was no evidence of such

continuous work but the evidence was for piece work arrangement at the agreed rate of pay per bag loaded and as already found by the Court.

The evidence being that parties were in piece work arrangement the Court has further carefully considered the parties' respective submissions on whether there would be unfair termination. The Court upholds its opinion in **Mboo Wambua and 30 others-Versus- Export Trading Company Limited [2018]eKLR** thus,

> "**It was suggested and urged for the respondent that since there was a piece rate or work arrangement, the parties were not in a contract of employment. The Court holds that piece work arrangements are not inconsistent with the contract of employment. Under section 2 of the Employment Act, 2007 "piece work" means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. Thus the Court finds that piece work or piece rate arrangements are justifiable as a pay structure in a contract of employment. The Court follows its opinion in Amalgamated Union of Kenya Metal Workers –Versus- Kenya Vehicle Manufacturers Limited [2015] eKLR, thus, "While making that finding, the court has considered that "piece work" as used in the Employment Act, 2007 is facilitative of the unique payment system as defined in the Act and as further amplified in section 18 of the Act thus, "18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled? (a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier." It is the opinion of the court that piece work arrangements are pay arrangements between the employer and the employee, such terms are capable of inclusion in the collective agreement, such terms do not bar the affected employee from union activities and such arrangements do not make the other minimum terms of service in the Act inapplicable. The arrangements only serve a pay for labour system within the provisions of the Act."**

In that case the Court further stated, "**Thus, in piece work arrangement, parties will set targets. The employee despite being paid at the piece rate, the employer has a legitimate expectation that the employee will attain the minimum productivity targets or performance targets. Conversely, the employee has a legitimate expectation that the employer will provide sufficient work to enable the employee meet the agreed minimum targets of performance. It is the opinion of the Court that as long the work is available, within the piece work arrangement the employer would need to follow due process and show a reasonable justification where the employment is to be terminated. It is the further Court's opinion that if indeed the work becomes genuinely unavailable, then the employer in such arrangement will be entitled to terminate the contract of service within the minimum statutory contractual terms.**

The extent to which the Employment Act, 2007 will apply in event of the termination of the contract of service in piece work arrangements will vary from case to case based on the parties' agreement, practice and circumstances of the individual cases. One clear position is that time based claims may not be available. Thus in Nyevu Sibya Maithya & 14 others –Versus- Krystalline Salt Limited [2017]eKLR (Rika J) held, "23. The prayers they seek are all time-based. They seek the equivalent of 12 months' salary in compensation for unfair termination; 1-month salary in lieu of notice; house allowance based on a percentage of their monthly salary; overtime; severance pay; and underpayment of wages. Without establishing a rate of pay per day, week, or month, it is impossible for the Court to have a reasonable assessment of the prayers sought. How is the Court to know the hourly rate in computing overtime; daily or monthly rate in considering compensation, notice pay, severance pay and underpayment of wages?" In that case the Court further opined, "24. …. It does not appear right, that a worker, who has worked on piece rate for 25 years, for the same employer, in continuity, leaves employment without recognition and reward for the years of service, and without other routine benefits due to regular Employees. This is a gap in legislation which cannot be cured by the Courts. It can be cured by Parliament through review of the current law, or mitigated through robust collective bargaining in the salt industry. Unfortunately, there does not seem to be strong Trade Union representing the industry. It will take time before this labour market imbalance in the salt industry is corrected. There is need to have legislative focus on the Salt Industry, without which some players in the industry, will continue to manipulate wage compensation mechanisms and exploit Workers, as Courts look on helplessly."

The Court in **Mboo Wambua and 30 others-Versus- Export Trading Company Limited [2018]eKLR** further stated, "**The Court considers that the challenges facing employers and more particularly the employees in the Salt Industry as referred to by the Court in the cited case are true of the other employees on piece work or rate arrangements and time has obviously past for legislative intervention towards balancing the rights and obligations of the employees and the employers in the piece work or rate contracts of service. For that purpose, the Court considers that this judgment will be served upon the Attorney General, the Cabinet Secretary for the time being responsible for labour matters, COTU, and FKE, towards appropriate legislative intervention in that regard**."

In the instant case, the appellants allege redundancy took place contrary to section 40 of the Employment Act, 2007. As submitted for the respondent, the claimants did not plead that they had been terminated on account of redundancy and the submission is clearly an afterthought. Further, as to whether minimum terms of service applied to the parties' piece work arrangement, the Court finds that such was a matter not urged at all. The claimants' case was that their casual service converted to one subject to minimum statutory terms per section 37 of the Act but which the Court has found not to have been the case. In other words, the claimants urged their case in a manner that was clearly inconsistent with the obtaining piece rate arrangement and the case as urged is therefore found to have been misconceived. The Court further finds that the appellants urged for unfair termination but oblivious of the piecework arrangement so that it is difficult to determine whether unfair termination was conceivable or took place whereas parties' respective pleadings and submissions in that regard are not before the Court.

The Court has already re-evaluated the evidence and found that parties were strictly in a piece work arrangement based on agreed rate of pay per bag loaded. The appellants seek compensation based on section 49 of the Employment Act, 2007 which prescribes a maximum of 12 months' gross salaries. They also claim pay in lieu of accrued leave and notice pay. The Court finds that like was held by Rika J in **Nyevu Sibya Maithya & 14 others –Versus- Krystalline Salt Limited [2017] eKLR,** how then can the court determine a monthly pay then compute the time based claims and prayers? It is that the appellants were to work within such time per their individual discretion and earn at the agreed rate per bag loaded. How then can the Court find that they were unfairly terminated for want of redundancy procedure and provisions in section 40 of the Act whereas the appellants were not bound to work for the respondent on daily basis because the parties

agreed on rate per bag loaded and not hours or tenure of service? The Court finds that in view of the evidence on piece work arrangement (where time worked by the claimants did not matter) the issues of unfair termination and accrued or earned annual leave do not begin to arise in the present case in which parties agreed on bags loaded and not time worked or tenure served which was immaterial in the piece work arrangement.

Each appellant alleged and testified before the trial Court that the monthly pay was Kshs. 12, 000.00. It was then submitted for the claimants thus, "**Neither is it in dispute that the claimant was employed by the respondent in as a General worker earning a monthly salary of Kshs. 12, 000.00. The Honourable court should take judicial notice that the Respondent failed to submit any evidence to show that the claimant did not earn a monthly salary of Kshs.12, 000.00 and this fact is not disputed in the Respondent's Response to claim.**" It is in paragraph 2 of the memorandum of claim that the appellants set out their claims on the monthly payment. The Court has revisited the response to the claim. The respondent pleaded at paragraph 3 that the appellants did not work on continuously but intermittently for the respondent as and when there was work and were paid daily after completion of the work. The respondent then offered evidence that the appellants were paid on piece work basis at an agreed rate of Kshs. 4.00 per bag loaded. The respondent then exhibited the payment vouchers duly signed by the claimants to confirm the piece work and pay per bags loaded as was agreed. Section 10 (7) of the Employment Act, 2007 places on the employer the burden of proving or disproving an alleged term of employment. In view of the respondent's evidence as shown by the payment vouchers exhibited, the Court returns that the respondent has discharged the burden of disproving the claimants' case and allegation that each claimant was paid Kshs. 12, 000.00 per month and instead, the respondent has established that the arrangement was that for each bag loaded, the pay rate was Kshs. 4.00. Thus, once again the Court returns that the evidence was that parties were in piece work arrangement and since payment was at the end of each day, the parties were as well, as it appears from their respective pleadings and submissions, misconceived that they were in a casual arrangement.

Fourth, in view of the findings the Court returns that the trial Court did not misdirect itself in fact or law taking into account the pleadings and the evidence that was before it. The remedies prayed for the appellants will therefore fail.

Sixth, the Court has considered the pertinent issue that has emerged in this appeal which is whether, in piece work arrangements, the relationship between parties is cable of being subject to the statutory minimum terms of a contract of service and related time bound remedies. The Court has also considered the apparent complexity of the arrangement between the appellants and the respondents which was misconceived as casual whereas it was piece work arrangement clothed as casual relationship. The Court has further considered the complexity the issues surrounding piece work arrangements and the growing jurisprudence and the Court returns that each party will bear own costs of the suit.

In conclusion the appeal is hereby dismissed with orders that each party to bear own costs of the appeal.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 23rd April, 2021.

BYRAM ONGAYA

JUDGE