



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2619 OF 2019**

**JOSEPH MAINA KAMAU.....1<sup>ST</sup> CLAIMANT**

**JOSEPH NDUNG’U MBACO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**CHANIA TRAVELLERS SACCO.....RESPONDENT**

**JUDGMENT**

1. The Claimants sued the Respondent Chania Travellers SACCO seeking various relief. The 1<sup>st</sup> Claimant Joseph Maina Kamau averred that he was employed through an oral contract in January 1997 and subsequently promoted to field officer on 27<sup>th</sup> December 2011 and worked till 10<sup>th</sup> March 2015. He averred that he was paid Kshs. 300/- a day until his promotion when pay was enhanced to Kshs. 500/- and issued with a work identification card and later promoted to head all stage terminals and paid Kshs. 700/- a day. He averred the terms of service were that he was not entitled to annual leave due to the nature of the job. The 2<sup>nd</sup> Claimant Joseph Ndung’u Mbaco averred that he was employed in September 2002 on an oral contract as a stage attendant and that he worked till 20<sup>th</sup> April 2015. The 2<sup>nd</sup> Claimant averred that he was not entitled to annual leave. The Claimants averred that pursuant to the execution of the contracts referred to, the Claimants took up the roles assigned to them and dutifully performed the same whereupon the Respondent paid them their rightful remuneration. It was averred that the 1<sup>st</sup> Claimant gave notice of one month of his intention to terminate his employment with the Respondent. It was averred that the 1<sup>st</sup> Claimant sought to be paid the following dues after the expiry of the termination notice-

- a. Service gratuity under Section 35(5) of the Employment Act for 18 years at 15 days salary for each completed year of service totaling Kshs. 189,000/-,
- b. Outstanding annual leave for 18 years totaling Kshs. 378,000/-,
- c. Sundays worked for 18 years at Kshs. 688,896/-,
- d. Public holidays worked for 18 years at Kshs. 145,728/-
- e. Overtime worked for 18 years at Kshs. 379,894/-
- f. Certificate of service.

2. It was averred that the 2<sup>nd</sup> Claimant gave notice of intention to terminate his employment vide a letter dated 20<sup>th</sup> March 2015 and sought to be paid the following dues after notice of termination of his employment expired.

- a. Service pay according to Section 35(5) of the Employment Act for 12 years at 15 days’ salary for each completed year of service totaling Kshs. 90,000/-,
- b. Outstanding annual leave pay for 12 years at Kshs. 126,000/-,
- c. Sundays worked for 18 years at Kshs. 318,000/-,
- d. Public holidays worked for 18 years at Kshs. 55,578/-,

e. Overtime worked for 12 years at Kshs. 397,894/-,

f. Certificate of service.

3. The Claimants averred that demand for payment of the sums sought was made but the Respondent has since failed, neglected and/or refused to pay their terminal dues as per the Employment Act, cap. 226. The Claimants averred that by refusing to pay their dues is infringing on their fundamental rights as provided for under Constitution of Kenya 2010. The Claimants thus sought a declaration that the action by the Respondent amounts to refusal to pay terminal dues to the Claimants, the terminal dues sought as per particulars in paragraphs 1 and 2 above, costs of the suit and any other relief the Honourable Court deems fit. The 2 Claimants filed witness statements that reiterated the averments in their memorandum of claim.

4. The Respondent in its defence denied the Claimants were entitled to any of the prayers in their memorandum of claim and in the alternative, and without prejudice to the foregoing, it averred that the Claimants were paid all their dues and there is no outstanding amount due. The Respondent averred that it had not breached any of the Claimants' fundamental constitutional rights as alleged and put the Claimants to strict proof of the averments in their claim. The Respondent filed witness statements by Peter Kinuthia Ndungo and John K. Gicharu. They both stated that the Claimants were all paid the monies that had accrued by the time they terminated their employment and that the terminal benefits were calculated from 2001 when the Respondent was created to 2015. The witnesses stated that the overtime claims were all false as the employees were allowed to work at any given time and could work and close at any time that they wished. They stated that the Claimants were paid vide cheques issued to them through the Respondent's advocate.

5. The matter came up for hearing on 27<sup>th</sup> January 2021 and Joseph Maina Kamau testified for the 2 Claimants. He stated that he was employed in 1997 and his colleague in 2002. He testified that they reported to work at 6.00am and worked till 9.00pm and that they worked from Monday to Sunday. He stated that they never went on annual leave and that they even worked on public holidays. He stated that they thus sought payment for all Sundays worked as well as pay for the public holidays worked and the sums enumerated in the claim together with costs of the suit.

6. In cross-examination he testified that from 1997 to 2001 Chania was a self-help group and from 2001 it was registered as a SACCO. He stated that he was paid daily in cash. He testified that there were documents that they would sign and leave at the Respondent's. He stated that his staff card was the only proof of employment. He denied that he had any off days. He stated that one could just work even refusing to go on off. He testified that his work was casual and that it was his effort that led to him being paid. He stated he worked and was not given permission to take off day and there was no indication that they could just rest. He said he could have rested on Sunday and that he used to seek permission to go to Church but was denied. He admitted that he had nothing to show that he asked the chairman for off. He sought payment for overtime as he reported at 6.00am and left at 9.00pm. He testified that he was the in charge and had to wait for them to close accounts and then he would place cash in the safe for banking the next day. He stated that he had to wait for cash from Thika-Nairobi, Thika-Makuyu, Thika-Matuu, Thika-Makongeni. He said he had no documents as he travelled in their vehicles for free. He stated that he had nothing to show but the staff in those stages know. He testified that only Joseph had some come and was under his supervision in Nairobi.

7. In re-examination he testified that he was casual and was paid on a daily basis and that he resigned on 10<sup>th</sup> March 2015 after joining the Respondent in 1997. He stated that the 2<sup>nd</sup> Claimant was employed in September 2002 and resigned in March 2015. He testified that for casual employees the period to work as a casual is 90 days and thereafter become permanent. He said that he had no employment document and that he would request for rest on Sunday and he was told if he wished he could stop coming to work on Sunday and go to Church. He stated there was a book they would sign at Chania for attendees and that he was stationed at Thika and those employed at the stages know. He testified that the documents are at the Respondent's Thika office.

8. The defence was in contravention of a Court order and was thus denied audience when the case came up for the hearing of the defence case and its case closed. Parties were to file written submissions and only the Claimants' submissions were on record at the time of penning this decision. The Claimant submitted that the issues for determination were whether the Claimant were casual or permanent employees, whether the Claimants are entitled to the terminal dues and/or reliefs sought in the memorandum of claim and finally, who should bear the costs of the suit and interest.

9. As to whether the Claimants were casual or permanent employees, they submitted that their testimony was that they were orally employed in 1997 and 2002 as casuals earning different salaries. They submitted that they resigned in 2015 because the Respondent wanted to employ them on contract basis without paying them their dues for the previous years prior to signing the contract agreements which the Claimants failed to sign. The Claimants submitted that under Section 37 of the Employment Act, there was conversion of casual employment to term contract. It was submitted that in light of the provisions of Section 37 one therefore cannot be employed as a casual employee or worker for over three months especially where one is doing the same job on a continuous basis. The Claimants submitted that the law also envisages that an employer is duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under Section 9 of the Employment Act. It was submitted that the Respondent in this case failed to issue the Claimant with the contract letters until 2012 when they were given contracts to sign contract which did not cover their previous years. The Claimants submitted that employed as casual employee cannot be indefinite and that the Respondent had engaged them for continuous periods as casual employees which flouted the law. They cited the case of **Sikuku Nzuvi Ngii v Gacal Merchants Ltd [2015] eKLR** per Makau J. and submitted that the nature of the employment relationship between the Respondent and the Claimants was therefore not casual but permanent in terms of Section 37(1) of the Employment Act.

10. As to whether the Claimants were entitled to terminal dues and/or reliefs, the Claimants submitted that they were entitled to service pay for the 18 and 12 years worked respectively. The Claimants submitted that the Respondent had not made any effort to demonstrate that it had complied with statutory requirements and regulations to deduct and remit the applicable statutory dues to Kenya Revenue Authority, the National Social Security Fund and to the National Hospital Insurance Fund. The Claimants submitted they were therefore entitled to service pay for the period worked. The Claimant cited the case of **Martin Ireri Ndwiiga v Olerai Management Company [2017] eKLR** where Mbaru J. awarded the Claimant service pay at 15 days' for each completed year. In relation to leave pay, the Claimants submitted that for the period they worked for the Respondent they never went for annual leave. They submitted that this was not controverted by the Respondent in the defence filed in Court. It was submitted that it was the duty of the employer to keep all work records with regard to its employees as

stipulated under Section 10(6) and (7) of the Employment Act. The Claimants submitted that in proceedings such as these it was the duty of the employer to submit such records to challenge claims as these. The Claimants submitted that the Respondent has not produced any document to show that the Claimants ever proceeded on annual leave and that given the provisions of Section 28 of the Employment Act the Respondent's failure to prove the Claimants had taken leave, they were entitled to claim the same as due and owing. The Claimants submitted that they were entitled to pay for Sundays worked as well public holidays and overtime. The Claimants submitted that they were entitled to costs of the suit as well.

11. The Claimants admitted that they were casual employees and that in time, having failed to convert their contracts into permanent, the provisions of Section 37 kicked in. Section 37(3) Employment Act provides that an employee whose contract of service has been converted in accordance with Section 37(1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee. The Claimants herein therefore qualified to be monthly employees since by virtue of Section 37(3) they were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employee. The terms and conditions of service the Claimants thus would include annual leave, termination notice and service pay. The Claimants asserted that they worked overtime but did not present any evidence. Mere allegations do not make for evidence. The Claimants also sought payment for work alleged to have been performed on Sundays and on public holidays. No evidence was availed for this and as such no relief can be granted in the absence of evidence. The Claimants earned Kshs. 500/- a day which if calculated on a monthly basis would total Kshs. 16,800/- for the 1<sup>st</sup> Claimant and Kshs. 12,000/- for the 2<sup>nd</sup> Claimant. Since they resigned the sums due would exclude notice as their contracts were not terminated by the Respondent. The only relief they proved was severance pay which is only payable for the period they served the Respondent. The Respondent came into existence in 2001 and therefore only the period after its incorporation would apply. The Respondent averred that the Claimants had been paid their terminal dues but did not provide any evidence of payment.

12. Given the foregoing and the evidence adduced as well as the applicable law, the Claimants are partly successful and the reliefs the Claimants are entitled to are as follows:-

- i. 1<sup>st</sup> Claimant – 14 years service pay at 15 days for each year worked – Kshs. 117,600/-
- ii. 2<sup>nd</sup> Claimant – 13 years service pay at 15 days for each year worked – Kshs. 78,000/-
- iii. Certificate of service
- iv. Costs of the suit
- v. Interest on i) and ii) above at Court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of April 2021**

**Nzioki wa Makau**

**JUDGE**