REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1400 OF 2015

1. BERINA NTHENYA MUSILA

2. SERAH KATHEU MWANIA

3. FELISTA KASUKE MUTISO

4. JOSEPHINE LEVA MORRIS.....CLAIMANTS

VERSUS

EAST AFRICAN GROWERS LIMITED.....RESPONDENT

JUDGMENT

1. The four Claimants instituted this suit vide a Memorandum of Claim dated 3rd August 2015 against East African Growers Limited, for unfair and wrongful termination of their employment and seeking payment of their terminal dues. They each wrote Witness Statements dated 12th June 2019 in support of their case. The Claimants aver that they were employees of the Respondent from December 1999 but were never issued with written contracts of employment and that at the time of termination of their employment, they each were earning Kshs. 470/- per day (Kshs. 14,570/- per month). That they all worked for the Respondent's night shift duty as Packers until 27th August 2012 at around 6.00pm when they reported for their usual night shift duties and found the Respondent had locked its gate with instructions to the security guards that it was no longer undertaking night shift duties in the premises. That thereafter their efforts in getting the Respondent's representative/management to officially address them and to compute their terminal dues were in vain. They assert that they filed this claim after getting no response either expressly or impliedly that the Respondent was keen on making payments to them. They further aver that they never proceeded for leave and public holidays for all the years they worked for the Respondent and have also never been paid for the same because the Respondent stated that those on night shift duty were not entitled to the said rights. They averred that they have worked overtime for all the years they were employed by the Respondent and without compensation since they worked from 6.00pm to 8.00am or sometimes till 9.00am of the next day. The Claimants averred that the Respondent never factored their housing allowance in their wages or provide them with reasonable accommodation and that it also never granted them 1 day of rest per week. The Claimants averred that the Respondent never informed them of the reasons for terminating their services as other night shift employees were absorbed for the day shift duties and contends that if their services were superfluous then the Respondent failed to adhere to the relevant law on redundancy. They thus seek payment of one month's salary in lieu of notice, unpaid leave days, unpaid public holidays, unpaid overtime, house allowance, one rest day, service pay and damages for wrongful termination. The Claimants pray for judgment against the Respondent for:

(a) An order that the Respondent's termination of the Claimants was unfair and wrongful.

(b) An order that the Respondent do issue a Certificate of Service to each Claimant indicating that they were employed from the period of December 1999 until August 2012 as packers, within 7 days from the date of delivery of the judgment in the cause.

(c) The sum prayed for in (b) above to be paid by the Respondent together with interest thereon at Court rates from the date of filing suit until payment in full in the event of default of payment within the time frame prayed for.

(d) Costs of this suit together with interest at Court rates.

(e) Such further or other relief as this Honourable Court may deem fit and just to grant

2. The Respondent filed its Memorandum in Reply dated 11th November 2016 averring to have employed the Claimants casual basis at all material times and that they earned a daily wage of Kshs. 470/-. The Respondent averred that the Claimants were engaged when there was excess work to be performed and were never employed on a seasonal or permanent basis and that the Claimants were also aware of the nature

of the work they were doing and that as such, no notice was required to be given to them before termination of their services. It further denies that the Claimants demanded for their terminal dues averring that in any case the nature of their employment never warranted payment of terminal benefits and that they are not entitled to any of the claims sought. The Respondent prays that the Claimants' claim against it be dismissed with costs as it is an afterthought and was brought in bad faith. The Respondent also filed a Witness Statement by its Human Resource Manager, Vitalis Osodo dated 22nd February 2021. He states that on the basis of the records produced before Court, the 1st Claimant appeared on the muster roll as at 27th August 2012 and was on duty on 30th June 2012 and 29th February 2012 and that there are no records showing that the other 3 Claimants were employees of the Respondent as at 27th August 2012 as alleged. He further states that the muster rolls show the 2nd Claimant was an employee in July and August 2007, 2008 and 2009 and that if indeed the Claimants did not have rest days, they should appear in the 2012 Labour payroll together with the 1st Claimant, but they do not. It is his statement that the Claimants were terminated in the proper manner and that the prayers for unpaid leave days, public holidays, overtime, house allowance and rest days are filed out of time as the suit was filed on 12th August 2015.

3. The 2nd Claimant, Serah Katheu Mwania testified on her behalf and on behalf of the other 3 Claimants. She adopted the 4 witness statements filed by the Claimants together with their filed documents as part of their evidence. She stated that they used to pack cargo for export being vegetables, courgettes, and runner beans among others and confirmed that the Claimants were all from the same department. She stated that she was never given show cause or invitation for hearing and that the Claimants do not know why they were dismissed. She further stated that they were also not paid any dues on dismissal and asserted that the Respondent paid NSSF for them. She stated under cross-examination that they found a notice plastered at the gate and confirmed that the 4 of them joined the Respondent at the same time and left on the same day. She confirmed that the 1st Claimant is indicated in the list for 30th June 2012 as having been paid and signed for the same but she could not see her name or the names of the other Claimants and did not know why as she was at work. The 2nd Claimant stated in re-examination that she worked for all the years from 1999 until 27th August 2012 and had a sign-in register and that the Respondent would need to bring all records to allow the Claimants ascertain the truth. She stated that the Respondent has produced piecemeal records because they worked for more than one day and while referring to the Respondent's bundle stated that the list relates to 2nd table when in fact they had 12 tables and she would have been on one of the other tables. Further, that the Muster roll produced in the Respondent's Further List is only for 3 years and that it would have been better for the Respondent to bring the Muster roll for the entire period. She also confirmed that the date of termination of employment in the Memorandum is the correct date i.e. 27th August 2012, which is the date they rely on.

4. The Respondent's witness Vitalis Osodo (RW1) urged the Court to consider his written statement as his evidence and to further adopt as exhibits the Respondent's List of Documents dated 26th January 2017 and Further List dated 13th May 2019. He stated under cross-examination that the claim herein had already been filed when he joined the Respondent in December 2017 and that his evidence is from the documentation. That the Claimants were not in continuous employment and were casual employees and that he disowned the 2nd, 3rd and 4th Claimants in his statement based on documents he found, such as the payroll. He admitted that the Muster rolls before Court could not fully reveal whether the Claimants had been employed and stated that the worksheets in Court are payment sheets for night shift staff paid on a daily basis. He further confirmed that they were not paying NSSF and that he had not seen evidence of a hearing before dismissal. RW1 affirmed in re-examination that the 2nd, 3rd and 4th Claimants were not their employees as at 2012.

5. The Claimants submit that the only point of departure from the Respondent is that it engaged them as casual labourers for the entire period of their employment with the Respondent and that the Respondent has failed to provide any material evidence demonstrating and proving the same. That the Respondent witness failed to explain how the Claimants would have been retained as casuals for a prolonged period and continuously between December 1999 to 27th August 2012. The Claimants submitted at it is trite law under Section 37 of Employment Act 2007 that where an employee works for a period or a number of continuous working days which amount in the aggregate to equivalent of not less than one month; or where an employee performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate of three months or more, the contract of service shall be deemed to be one where wages are paid monthly and termination notice would thus be as provided for at Section 35(1)(c) of the Employment Act. The Claimants submitted that as a legal consequence, their engagement was converted to permanent employment by dint of mandatory provisions of Section 37(3) of the Employment Act and that they are therefore wholly entitled to such terms and conditions of service provided for under the Employment Act 2007. They submit that the Respondent failed to follow the law prior to terminating their contracts as it never issued them with the aforementioned requisite notice or pay them in lieu of notice in line with Section 36 of the Employment Act. The Claimants submitted that they were also never notified in a language they understand of the reasons why the Respondent was considering termination, no hearing/disciplinary session was convened, no charges were framed that required them to respond and they were never given an opportunity to defend themselves as stipulated at Section 41(1) of the Employment Act. That the 2nd Claimant led undisputed evidence on the same and on behalf of the Claimants and that since the Respondent failed to discharge its burden under Section 43(1) of the Employment Act, it has failed to prove that the reasons assigned to the Claimants' termination were valid as required under Section 47(5) of the Act. It is the Claimants' submission that they were therefore unfairly terminated under Section 45 of the Act and they rely on the case of **Pamela Nelima Lutta *v* Mumias Sugar Co. Ltd. [2017] eKLR**. The Claimants submit that the preliminary objection raised by the Respondent alleging that the Claimants have approached the court three years after termination of their employment is misplaced and an afterthought since it also alludes that they were never its employees. That the said preliminary objection does not meet the threshold set out in the *locus classicus* of **Mukisa Biscuits Manufacturing Co. Ltd *v* West End Distributors [1969] E.A. 696** and recently restated by the Supreme Court in **Independent Electoral & Boundaries Commission *v* Jane Cheperenger & 2 Others [2015] eKLR**. That it is now settled that for the objection to be considered, it must be purely on a settled and crisp point of law to the intent that its application to undisputed facts leads to the conclusion that the facts are incompatible with that point of law. They pray this Court allows their claim as presented and award them as sought in the Memorandum of Claim and their respective Witness Statements.

6. The Respondent submits that it raised a preliminary objection dated 21st February 2021 to wit; the Claimants' cause of action is time barred by virtue of Section 90 of the Employment Act, 2007 with regard to a continuous injury being filed one year after the date of cessation of the action. The Respondent submitted that the injuries complained of by the Claimants were continuing in nature and ceased at the time of termination on 27th August 2012 and that the Claimants ought to have filed claim within 1 year from the date of termination in respect of the mentioned prayers i.e. 27th August 2013 but they instead filed this suit on 12th August 2015. That Section 90 of the Employment Act provides:

> Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

7. The Respondent submitted that this Honourable Court while expounding on the issue of continuing injury in **Ephraim Gachigua Mwangi *v* Teachers Service Commission & Board of Management Thogoto Teachers College [2018] eKLR** held that: *"….By parity of reasoning, after dismissal a person may suffer economic hardship and his social standing irreparably altered or damaged. That does not however entitle the dismissed employee to claim 4 or 5 years later on account of the dismissal being a continuing wrong since the effect of the dismissal may be continuing. This is an incorrect reading of the law."* That similarly in the case of **Peter O. Magero *v* Board of Governors, St. Augustine Soysambu Secondary School & Another [2017] eKLR**, Radido J. while defining a continuing injury stated that:

> "11. I discussed the question of continuing injury in Stephen Kamau Karanja v Family Bank Ltd [2014] eKLR thus
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> > 22. Two, the two decisions have not attempted to define or put contours to what a continuing injury or damage is. The Employment Act, 2007 has not defined what a continuing injury or damage is.
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> > 23. It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines continuing injury as **An injury that is still in the process of being committed - An example is the constant smoke or noise of a factory**.
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> > 24. To the examples given, I would add payment of wages below the prescribed minimum rates would be a continuing injury.
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> > 25. In my view, once the services of an employee have been wrongfully, unprocedurally or unfairly terminated or he has been dismissed, he suffers a violation of the rights above mentioned, and the injury becomes a fait accompli.
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> 12. In my view, an employee suffers a legal injury or legal wrong at the point of termination..."

8. The Respondent submitted that the 2nd Claimant's testimony revealed that the Claimants relied on their sworn witness statements dated 12th June 2019 but which statements had discrepancies; the 2nd Claimant stated that her services were engaged on September 1999 and the 3rd and 4th Claimants gave different dates of termination of their employment. That the 2nd Claimant's testimony further brought before the Court fresh evidence that that there was a letter affixed to the main gate. The Respondent submitted that a party is bound by their own pleadings and in this case, the Claimants are bound by the evidence given before the Court. It cites the case of **Daniel Otieno Migore *v* South Nyanza Sugar Co. Ltd [2018] eKLR** where the Court stated that it is now settled by precedence that any evidence, however strong, which tends to be at variance with the pleadings must be disregarded. It submitted that the burden of proof in Section 37 of the Employment Act is on the Claimants to prove on a balance of probabilities that they were engaged continuously by the employer for a period aggregating to more than one month so that the Court can convert their casual daily contract to a term contract. The Respondent submitted that it produced in Court a muster roll which showed the days the Claimants were engaged on diverse dates and also produced payment sheets showing that payment was done on a daily basis. The Respondent submitted that it therefore follows that since the Claimants were paid on a daily basis, their contracts of service was terminable by either party at the close of the day and without notice and are also not entitled to compensation. Further, that the Claimants' claim for service pay fails by virtue of Section 35(6)(d) of the Employment Act and the 2nd Claimant having confirmed in testimony that NSSF was being paid.

9. A party seeking recompense for a continuing injury must move the Court within the time frame stipulated under Section 90 of the Employment Act. As held by Radido J. in **Peter O. Magero *v* Board of Governors, St. Augustine Soysambu Secondary School & Another** (*supra*) the nature of this claim being a continuing injury had a limitation in respect of the claims for overtime pay, leave and pay for public holidays worked. The Claimants were therefore bound to institute the claim on or before 27th August 2013 since their alleged date of dismissal was 27th August 2012. In my view, the decision by Radido J. on the limitation of continuing injury claims is sound and applies herein. As such the Claimants' suit is for dismissal and I hereby dismiss the claims by each of the Claimants albeit with no order as to costs.

It is so ORDERED.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE