



**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

AT NAIROBI
(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 1392 OF 2013

MOSES N. OSORO **CLAIMANT**

VERSUS

CENTRAL GLASS LIMITED **RESPONDENT**

AS CONSOLIDATED WITH 1466 OF 2013

PETER MUTINDA MULULU **CLAIMANT**

VERSUS

CENTRAL GLASS LIMITED **RESPONDENT**

JUDGMENT

1. The above two claims were consolidated for hearing since they involved the same set of facts.

2. Vide their memorandum of claims dated 28th August 2013 and 5th September 2013, the Claimants aver that their dismissal was illegal/wrongful, unfair and inhumane and that they were not given an opportunity to be heard. The Claimants pray for orders against the Respondent as follows –

(i) A declaration that the Respondent's dismissal or termination of the Claimant's employment was unlawful and the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

(ii) An order for payment of the Claimant's terminal dues and damages totaling to Kshs.694,500/= for the 1st Claimant and Kshs.718,500/= plus interest for the Peter respectively from the date of filing suit until full payment.

(iii) An order for the Respondent to pay cost of this suit plus interest thereon.

3. The Respondent filed a memorandum of defence for both claims on 29th November 2013 where it denies the averments in the memorandum of claims and prays that the same be dismissed with costs.

Claimants' Case

4. The 1st Claimant claims that he was employed by the Respondent in the year 1998, initially on a two months renewable contract that was converted into an open ended contract in the year 2000. That he worked with due diligence and to the satisfaction of the Respondent. That his last salary was computed at Kshs.15,000 per month.

5. The 1st Claimant further avers that on 30th November 2012, he was called by the Respondent's officer, Edwin Njure, who asked him to remove the company uniform and leave the Company premises as he had been dismissed. That he was not afforded an opportunity to be heard as required by labour laws and the principles of Natural justice.

6. The Peter gave a similar set of facts. That he was employed by the Respondent on 26th November 1997 as a machine operator where he worked diligently to the satisfaction of the Respondent. That his last salary was Kshs.15,000 payable in two instalments.

7. Further that on 30th November 2012, he was called by the Respondent's officer, Edwin Njure who asked him to remove the company uniform and leave the premises as he had been dismissed. That he was not afforded an opportunity to be heard as required by labour laws and the principles of Natural justice.

Respondent's case

8. The Respondent vehemently denies the allegation that the Claimants were its employees at the time of dismissal. It also denies that its officer ordered the Claimants to remove the company uniform and leave the premises. It maintains that the Claimants were employees of Sheer Logic Management Consultancy Limited that had been contracted by the Respondent to provide labour on a needs basis. That the Claimants declined to sign new contracts issued to them by Sheer Logic Management Consultancy Limited on 1st September 2011. Further that the Respondent is a stranger to the process of termination, welfare, salaries and engagement of the Claimants as its role was only to confirm that the Claimants had worked to enable Sheer Logic Management Consultancy Limited pay the Claimants.

9. The Respondent maintains that it had no duty or mandate to subject the Claimants to any disciplinary process as they were not its employees. Further that the exhibits annexed to the Claimant's claim refer to the year 2003, 9 years before termination.

Facts and Evidence

10. At the hearing the parties called upon their witnesses to testify. Parties thereafter filed and exchanged written submissions.

11. **Moses N. Osoro** testified that he was employed by the Respondent and worked continuously from the year 1998 to 2011. That the Respondent wanted to transfer his services to another company but he refused as the Respondent had not cleared his dues. That at that time he was earning Kshs.15,000. He worked for the Respondent for around 13 years and wanted to be paid his terminal dues before being transferred to another company. That he reported the matter to the labour officer who recommended that he be paid his dues. That he was not given a hearing or a termination letter. That for the period he worked for the Respondent, he never went on leave.

12. In cross examination, the Moses reiterated that his employment was terminated in November 2011 and not 2012 as stated in his pleadings. Further that his employer used to deposit his salary to his account but he was never given a pay slip. He was to be transferred in 2011. He also stated that his termination was verbal and he was not given a fair hearing.

13. **Peter Mutinda Mululu** testified that he worked for the Respondent from the year 1997 to the year 2011. That by 2011, he was earning Kshs.15,000. That in November 2011, they were informed that they would be transferred to Sheer Logic Management Consultancy Limited. He however declined to sign the contracts until they were paid their dues.

14. He further testified that Jekomu Contractors was a group formed for purposes of receiving their salaries. He maintained that he was an employee of Central Glass Limited, the Respondent herein. That he neither had a relationship with Careful Industrial Packaging Services nor Sheer Logic Management Consultancy Limited. That for the period he worked for the Respondent, he never went on leave. He was also not registered under NHIF and NSSF.

15. In cross examination, the Peter testified that he was employed as a permanent employee by the Respondent. That he was paid after every two weeks. Initially employees were given cash but eventually the Respondent started depositing their salary through the bank. He insisted that Jekomu Contractors was only registered to secure pay for the employees. He maintained that he had never been paid by Sheer Logic Management Consultancy Limited. That he had no control over how money was sent to his account. He however acknowledged that on his last day in office, he received Kshs.7,000.

16. The Respondent called upon three witnesses to testify. **RW1, Edwin Ngure** testified that he works as the Finance Manager in the Respondent Company and was well seized with the facts of the matter. He testified that the Respondent used to hire casual workers on a two months renewable contract. That in the year 2000, there were money complaints and the Respondent starting outsourcing for manual labour. The first contract was awarded to Jekomu, a company formed by the former employees of the Respondent. That Jekomu, however, had management problems and eventually members decided to form another company, Careful Industrial Packaging Services.

17. On cross examination, RW1 confirmed that the Claimants were employed by the Respondent and worked for it between the year 1987 to 2000. That the workers voluntarily formed Jekomu Contractors. Further that when Sheer Logic was looking for employees, they only looked for the best employees. That the Claimants refused to sign a contract with Sheer Logic and eventually, they left employment in November 2011. That between the year 2009 and 2011, they were paid by Sheer Contractors. They had no written contract with Sheer Logic Contractors. The Respondent paid Sheer Logic who in turn paid the employees. He maintained that Sheer Logic was not a conveyor belt of salaries of the employees.

18. In re-examination, RW1 testified that assignment of giving work to casuals and suspension was the responsibility of Sheer Logic. Sheer Logic supplied the casual workers but the Respondent supervised work. NSSF and NHIF was paid by Sheer Logic. Further that the Respondents did not fire the Claimants. The Claimants simply refused to sign the contracts.

19. **RW2, Erickson Juma Waiswa** testified that he was the relationship manager at Sheer Logic Management Company. He maintained that he has never been an employee of the Respondent. He only offered the Respondent services as an outsourced worker. He testified that in the year 2007, there were a number of companies seeking to have a contract with the Respondent. That it was however agreed that they merge into one company which was eventually given a 1 year contract by the Respondent. That in the year 2008, they wrote to the Respondent enquiring whether it would renew the 1 year Contract but was informed that a company called Roma had been awarded the contract.

20. RW2 testified that Sheer Logic was formed in the year 2009 and offers casual workers to the Respondent to date. That Sheer Logic

brought about changes in the Respondent Company. It came up with contracts for staff instead of the unwritten casual arrangements that existed before. It also introduced monthly payment of salaries.

21. On cross examination RW2 testified that he has never been an employee of Central Class. That he joined a company called Roma and later signed a contract with Sheer Logic. That despite refusing to sign a contract with Sheer Logic, the Claimants continued offering casual services to the Respondent. He maintained in Re-examination that he was a casual worker just like the Claimants and that they were never employed by the Respondent.

22. **RW3, Lawi M. Avoga** testified that he was an Account manager of Sheer Logic Management Consultants Limited. That by 2010, the relationship between Sheer Logic and the Respondent was that it was an outsourcing company where it provided the Respondent with casual workers.

23. In cross-examination, RW3 stated that he started working for the Respondent on 1st December 2010. That he was informed that Sheer Logic had taken over from Roma. He had not come across any contracts between Roma and the Claimants. He maintained that he was informed that the Claimants refused to sign a contract with Sheer Logic. The Claimants were not given dismissal letters.

Claimants' Submissions

24. The Claimants through their advocates on record submitted that they were employed by the Respondents in 1998 and continued in service to 30th November 2011 when they were dismissed purely for declining to disengage themselves from employment with the Respondent and sign fresh employment terms with a contracted labour provider. That at no time did they ever sign any new terms of employment with anybody else.

25. Counsel further submitted that the Law describes an Employer as the owner of the means of production and clearly the person from whom in substance an employee works for. That Section 2 of Employment Act, 2007 defines an employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or Company.

26. Counsel submits that the Claimants have clearly proved that they worked for the Respondent for a continuous period of 13 years. That their dismissal was summary and abrupt with no basis and without due process. That they have proved and justified their claim for terminal compensation and compensatory damages as pleaded in their memorandum of claim.

Respondent's Submissions

27. Counsel for the Respondent reiterates that the Claimants were intermittently engaged as casual labourers between 1998 and 2002. That after 2002 the Respondent engaged independent employment agencies to outsource labour and in 2011 the two Claimants were indeed employees of Sheer Logic Consultancy Management Limited.

28. The Respondent vehemently denied that the Claimants were its employees at the material time to this suit and submit that the Respondent was a stranger to the process of engagement and termination, its role being limited to confirming that the Claimant's had worked, to enable Sheer Logic Management Consultancy Limited to pay the Claimants. The Respondent thus denied owing the Claimant the terminal benefits and compensatory damages as claimed in the Memorandum of Claim.

29. Counsel invites the court to take note that the documents primarily sought to be relied upon by the Claimants were payment schedules for July, August and September 2003 but all schedules capturing payments for a week. That this is consistent with the Respondent's case that the Claimants were intermittent casual employees, who were paid on a daily rate accumulated and paid on a weekly/fortnightly basis.

30. Counsel then highlighted the major events that occurred in the Respondent company as testified by the Respondent's witnesses. Counsel submitted that between 1997-2001 Claimants were engaged as casual labourers by the Respondent and were paid on a piece rate basis for work performed. However from 2001 the Respondents shifted from seeking casual labourers directly and sought to engage external entities to provide that service. That one of the entities was Jekomu Enterprises whose members were the former casuals in the Respondent's Company as confirmed by the Certificate of Registration of Jekomu Enterprises which bore the names of both Claimants and three other men as proprietors. It was registered on 23rd August 2002. At that time there were 6 such business entities providing casual labour services to the Respondent. That these six entities later merged to form Careful Industrial Packaging Services CIPS which was contracted by the Respondent vide an agreement dated 11th October 2007. They were replaced by another Company Roma Agencies Limited before Sheer Logic Management Consultants took over from 2009 to date. Counsel submits that between 2009 to 30th November 2011 the two Claimants were employees of Sheer Logic. Counsel prays that the two consolidated cases be dismissed with costs.

Determination

31. Having taken into account the above, the Court finds the issues for determination are as follows:-

- a. Whether the Claimants were employees of the Respondent at the time of termination.
- b. If so, whether their dismissal was illegal/ wrongful, unfair and inhumane
- c. Who is entitled to costs of these proceedings.

Whether the Claimants were employees of the Respondent at the time of termination.

32. The major issue in contention is whether the Claimants were employees of the Respondent at the time they allege to have been dismissed.

33. The uncontested facts of the case are that the Claimants were engaged as casual labourers for the Respondent in the year 1997 and 1998 respectively. They were on two months renewable contracts and were paid after every fortnight. The Claimants claim that eventually, the contracts were converted to open ended contracts. That in the year 2011, the Respondent wanted to transfer them to another company but they declined. That following this decline, they were summarily dismissed from employment.

34. The Respondent on the other hand avers that it ceased being the Claimants' employer in 2001 when it decided to outsource for casual labour. That a company was formed by the casual employees. The company, Jekomu contractors, provided the casual labour and was in charge of its employees. That by 2011, the Respondent was not in charge of the casual employees save for supervising the work done to enable the then contracted company, Sheer Logic Management Consultancy Limited, to pay its employees.

35. The parties did not have written contracts and as such, the court had to rely on the testimonies and documents produced by the parties. For the Claimants, they produced inter alia, an unexecuted fixed term contract dated 1st September 2011 and payment schedule dated 2003. With utmost respect, these payment's schedule do not relate to the relevant period in question.

36. The Respondent on 16th November 2017, filed a supplementary list of documents. Notably, it filed a Certificate of Registration for Jekomu Enterprises. Both Claimants are listed as proprietors of the said Company that was registered on 23rd August 2002. The Respondent also produced proof of payment by Sheer Logic to casual employees dated 17th March 2010 and 3rd August 2010. Contrary to the 1st Claimant's averment that he had never received payment from Sheer Logic Management Consultants both Claimants are included in that list.

37. A letter dated 22nd September 2009 and addressed to the National General Secretary, Kenya Chemical and Allied Workers' Union reveals that the issue as to who was the employer of the casual workers even in the year 2009. In the said letter the then Respondent's Human Resource Manager responded as follows:

"... We have noted the contents of your letter and wish to advise as follows; the employer of the employees mentioned is Sheer Logic Management Consultants Ltd. We since (sic) forwarded the letter to them to address the issues raised therein."

38. The upshot is that, on a balance of probabilities, the Claimants have failed to prove that at the time of termination, they were the Respondent's employees. The evidence by the Respondent confirm that as at November 2011, the Respondent outsourced casual labour from Sheer Logic Management Consultants Ltd.

39. Having so found, the Court needs not go into the second issue. The Claims herein fail and are accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE