



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 246 OF 2015

EDWIN MOMANYI.....1ST CLAIMANT

ANTHONY ADESI.....2ND CLAIMANT

GEOFFREY KAMAU.....3RD CLAIMANT

ISAACK MAHERO.....4TH CLAIMANT

GEORGE ONYANGO OKOLA.....5TH CLAIMANT

VERSUS

WONDER FEEDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants filed a joint Memorandum of claim against the Respondent stating the issues in dispute as unfair termination and/or bad labour practices hidden as contracts under part III, section 10 C, subsection 2C and the illegal redundancy, underpayment of wages and wrong job description.
2. It is stated that the 1st claimant was employed by the Respondent on 4th July, 2006 as a clerk whose duties were to weigh the Respondent's products to the accepted weights and was paid Kshs 205 per day. The 2nd Claimant was employed in January, 2010 as a machine attendant earning Kshs. 273 per day. the 3rd Claimant was employed on 31st July, 2005 as a machine attendant earning Kshs.205 per day. The 4th Claimant was employed in June 2005 as a loader earning Kshs 173 per days and the 5th Claimant was employed as a clerk in February, 2011 earning Kshs. 270 per day.
3. That the claimants served the Respondent diligently from the date of their employment without any warning letter till 2nd January, 2015 when they were all dismissed from employment.
4. They stated that prior to their termination, in November, 2014 some of the Respondents employees including the claimants herein joined a trade Union as per Article 41 of the Constitution and filled requisition check off forms which were sent by the union to the employer for their union dues to be deducted.
5. That the Respondent declined to deduct the union dues and the union reported the trade dispute. Subsequently, their employer through the personnel manager Mr. Edwin Wacese summoned all the employees who had signed the check off forms and informed them that their contracts had terminated and they were to sign new contracts.
6. That it is the norm of the Respondent to renew contract after one year and in the year 2014 the Respondent asked its employees to sign the new contracts however the claimants noted that the contract stated that they had been paid for their dues and they had cleared with the company a fact which they denied as they had been paid only their December, 2014 salary and allowances. The claimants then rejected the said contracts and refused to append their signature on them.
7. They averred that the Respondent never paid for NSSF as required by law. Also that they have never took their annual leave.
8. The Claimants therefore prayed for judgment for the claimants as against the Respondent for; -

- i. **One-month salary in lieu of Notice.**
- ii. **Underpayment of wages which occurred as a result of moving job classification**
- iii. **Gratuity for the years worked by the claimant.**
- iv. **Annual leave which were pending**
- v. **Cooperation based on section 49(1)(c)**
- vi. **Certificate of service in the meaning of section 51 of the Employment Act.**
- vii. **The Respondent to pay cost of suit.**
- viii. **Any other compensation the court may deem necessary to give.**

9. The Respondent entered appearance on the 18th September, 2015 and filed a preliminary objection on the basis that this matter had been referred to the ministry of labour social security services for conciliation and the same was resolved pursuant to section 68(1) of the said Labour Institution Act. Further that a conciliation agreement was signed on 11th February, 2015 therefore this Court lacks jurisdiction to determine this Suit.

10. The cause herein proceeded for hearing on the 23rd March, 2021 where the claimants were represented by the 2nd Claimant, Anthony Adesi (CW-1) who sought to rely on the memorandum of claim and prayed that the claim be allowed as prayed.

11. On cross examination, he testified that he was employed in January, 2010 as a general worker and was not given any appointment letter. that they were given one off contract which were renewed without them signing new ones and that the contract was to be terminated by either party issuing 7 days' notice. He stated that they were forced to sign a contract without understanding the contents in the said contract. that they were sacked after they joined a trade union.

12. The Respondent called one witness, Edwin Wacese (RW-1) who testified that he is the Human resource manager at the respondent and testified that the claimants were given one-month notice before the termination, and that they were not underpaid. He stated that they followed the minimum wage in remunerating its employees. He stated that the claimants were paid for their annual leave every December. He testified that the contracts were for a fixed term and were renewed at will by the Respondent. Also that the Respondent and the Union had an agreement that the claimants were to apply for the jobs afresh which agreement was signed by the Union and labour officer. He therefore testified that the claim herein is not justified and prayed for the same to be dismissed.

13. On cross examination, he testified that the claimants were all employed as general workers and not clerks or machine operators as alleged. He testified that the claimants were serving on short term contracts that ran for 12 months which when expired the claimants were instructed to sign new ones and instead they took the matter to the labour officer. That the claimants were paid their dues.

Claimants' Submissions.

14. The claimants submitted that they filed this Suit in court after the labour officer together with the Respondent and their Union officials agreed among themselves to have them return to work but failed to inform them. They argued that it is on those basis that the Respondent filed the Preliminary objection claiming that the issue herein had been resolved. They submitted that none of the claimants signed the said agreement as per section 68(1) of the Labour Institutions Act.

15. The Claimants challenged the agreement signed between the Respondent and their Union, on the basis that the conciliator was not one appointed by the minister of Labour and that the document did not originate from the ministry of labour therefore the conciliation agreement is void. It was argued that when the claimant acted on the agreement and returned to work on 1st July, 2015 they were denied entry confirming that the agreement was without basis.

16. The Claimant submitted that short term contracts are provide for under part III, section 10 subsection 3(c) which provides for the duration of the contract to be precise and properly inscribed in the letter of employment. They argued that the contracts were not properly drawn as some employees who had worked from 2005 were still put on probation therefore the contract lacked consistency in the way they were drawn.

17. It was submitted that the contract were drawn in bad faith with the sole purpose of ousting the provision of section 37 of the Employment Act and prayed that the claim be allowed as prayed.

Respondent's Submissions.

18. The Respondent on the other hand submitted that the Claimants' contract lapse upon expiry and their services were not unfairly terminated as alleged. it was argued that the claimants failed to reapply for their jobs and instead filed this suit. the Respondent cited the case of **Samuel Chacha Mwita –v- Kenya Medical Research Institute [2014] eklr**. Where the court held that the parties to an employment can enter into any type of contract either, permanent, fixed term, periodic or seasonal based on the need, purpose or the interest of the parties.

19. Accordingly, that they had an agreement with the Claimant for fixed duration of time which lapsed and was to be renewed.

20. The Respondent argued that a fixed term contract has its inbuilt termination notice as the time of expiry of contract is known to the parties therefore if the claimants failed to renew the same they are at fault for failing to renew their contracts, in this he cited the case of **Margaret A. Ochieng –v National Water and Pipeline Corporation [2014] ekr.**

21. The Respondent submitted that the claimants have failed to demonstrate before this Court how they were unfairly terminated from employment as provided for under section 47(5) of the Employment Act while the respondent has demonstrated that the claimants service were not unfairly terminated but their contracts came to an end upon expiry of their contracts.

22. On whether the claimants were underpaid, the Respondent submitted that the claimants were all employed as general laborers and paid as per the general wage regulation scale.

23. The Respondent in conclusion submitted that the claimants have failed to prove their case on a balance of probability and prayed that the claim be dismissed with costs.

24. I have examined the evidence and submissions of the parties herein. The issue for this court's determination are as follows;-

1. Whether this claim was resolved by the conciliation in 2015 as submitted by the respondent.

2. Whether the claimants are entitled to the remedies sought.

ISSUE NO. 1

25. The respondents submitted that this claim was resolved by a conciliator and an agreement signed on 11th February, 2015 thereof. I note that issue No. 1 was resolved by a ruling by Hon. J. Radido on 7/3/2016 who referred the parties back to the conciliator to resolve the matter.

26. The parties were to appear before the conciliator on 7/3/2016. There is no indication as to whether this was done because the parties thereafter moved this court to proceed with the hearing on 7/10/2019 an indication that this claim was never resolved through conciliation.

ISSUE NO. 2

27. From the letter issued to the claimants terminating their employment it is indicated as follows;

“RE: END OF CONTRACT NOTIFICATION IN WRITING

We hereby notify you that your contract will lapse on 24th December, 2014. This serves as 30 days termination notice in line with our Ref. No. Letter..... issued to you on 2nd January, 2014. You will be paid your dues at the expiry of the same.

Yours faithfully,”

28. Each of the 4 claimants were issued with such a letter notifying them that their contract terms were coming to an end. Before this, the claimants had served on fixed term 1 year contracts. The contracts indicated that were subject to renewal by mutual agreement of both parties. In the case of the claimants, the respondent exercised their right as employer not to renew these contracts and they cannot be faulted for this.

29. The contracts actually expired by effluxion of time and the assertion by the claimants that they were dismissed is not true.

30. I therefore find the claims by the claimants not sustainable in terms of dismissal.

31. The claimants are however entitled to their service pay for each of the contracts served and for which I award as follows;-

1st claimant – 55,090.80/=

2nd claimant – Antony Adasi – 20,632/=

3rd claimant – Geoffrey Kamau – 41,264/=

4th claimant – Isaac Mahero – 41,264/=

5th claimant – George Okola – 23,676/=

a) The claim for underpayment is not tenable as it was based on a written contract.

b) Each of the claimants is also entitled to issuance of a certificate of service.

c) The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Cheloti for respondents – present

Ndeda & Associates for claimant – present

Court Assistant - Fred