



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO. 694 OF 2015

JUMA SALIM MRONDA.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Juma Salim Mronda and his former employer, Kwale International Sugar Company Limited. Mronda states his claim in a Memorandum of Claim dated 5th September 2015 and filed in court on 8th September 2015. The Respondent filed a Memorandum of Response on 7th September 2016, to which the Claimant responded on 7th March 2017.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Agriculture Department Zone Manager, Paul Mulinge and Senior Human Resource Information Systems Officer, Kevin Mapesa Wamaya. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was engaged by the Respondent as a General Worker from 5th March 2008 until 14th July 2015, when his employment was terminated. He gave his monthly salary as Kshs.9,400.

4. The Claimant further states that he used to report to work at 6.00 am and leave at 6.00 pm, translating to 3 hours over the normal working hours after deduction of a 1-hour lunch break. He claims to have worked as such every day, without an off day, from Monday to Sunday, including public holidays. He adds that he was not allowed to go on leave.

5. The Claimant goes on to state that he was not compensated for working overtime.

6. Regarding the termination of his employment, the Claimant states that there was an allegation of over-application of fertilizer at the Respondent's sugar plantation. The Claimant avers that he was not given an opportunity to defend himself against the said allegation and adds that the termination of his employment was without justifiable cause.

7. The Claimant now seeks the following remedies:

- a).... 1 month's salary in lieu of notice..... Kshs.9,400.00
- b).... Normal overtime pay..... Kshs.447,729.23
- c).... Off duties..... Kshs.364,618.41
- d).... Public holidays..... Kshs.81,659.49
- e).... Leave pay for 7 years..... Kshs.46,060.00
- f).... 12 months' salary in compensation..... Kshs.112,800.00

The Respondent's Case

8. In its Memorandum of Response dated 6th September 2016 and filed in court on 7th September 2016, the Respondent states that the Claimant was employed as a casual labourer with his wages being paid on a weekly basis, for the hours worked.
9. The Respondent adds that by virtue of being a casual employee, the Claimant was not entitled to leave, overtime or any of the other reliefs claimed.
10. The Respondent accuses the Claimant of engaging in malpractices and/or misconduct to the detriment of the interests of the Respondent and its resources, contrary to the Claimant's terms of employment.
11. The Respondent states that on 10th June 2015, the Company Manager, while on field check, noticed that the fields assigned to the Claimant were in a very bad state as there were weeds in some of them and fertilizer had been applied haphazardly. The Respondent alleges that some bags of fertilizer were missing and were later recovered by the police.
12. The Respondent avers that after investigations, the Claimant was called before a disciplinary committee on 24th June 2015, and was given an opportunity to explain the circumstances under which the incident had happened. The Respondent states that minutes of the said meeting were taken.
13. The Respondent further avers that during the meeting, the Claimant on his own volition admitted to:
- a) Collecting the fertilizer late and reporting to the field late;
 - b) Failing to ensure his team applied fertilizer in several fields;
 - c) Absconding work and instead opting to go rest under a tree;
 - d) Directing the application of fertilizer on a field with weeds;
 - e) Wilfully neglecting to ensure the fertilizer was applied;
 - f) Not applying any fertilizer at all in several fields;
 - g) Neglecting his duties.
14. The Respondent admits that the Claimant's services were terminated but denies that the termination was unlawful and/or unfair.
15. The Respondent goes on to state that the Claimant admitted to wrongdoing and the General Manager directed that the case be heard before the disciplinary committee on 24th June 2015.
16. The Respondent avers that during the disciplinary hearing, the Claimant was found to have failed to perform his duties as required and was therefore summarily dismissed.

Findings and Determination

17. There are three (3) issues for determination in this case:
- a) The nature and status of the Claimant's employment with the Respondent;
 - b) Whether the termination of the Claimant's employment was lawful and fair;
 - c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Employment

18. The Respondent states that the Claimant was a casual employee and is therefore not entitled to the remedies sought.
19. Section 2 of the Employment Act, defines a casual employee as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

20. According to this provision, casual employment is defined by the duration of employment and not by the frequency of pay, which is often an arrangement made by the employer.
21. In its final submissions, the Respondent spent a lot of time trying to convince the Court that the Claimant was a casual employee, and in doing so the Respondent stressed the point that the Claimant did not produce any employment records.

22. With much respect to the Respondent and its Counsel, this submission is misplaced. I say so because unlike in ordinary civil litigation, the burden of proof in employment claims is not always on the alleging party. This conclusion is based on Sections 10 and 74 of the Employment Act, which place the obligation of keeping and availing employment records on the employer.

23. In this regard, Section 10(7) of the Act states the following:

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

24. It follows therefore that for the Respondent to succeed in its line of defence that the Claimant was a casual employee, it needed to produce employment records, such as attendance or payment sheets to show that the Claimant was indeed a casual employee. Having failed to do so, its assertion remains unsupported and is rejected.

The Termination

25. That settled, I now turn to the question whether the termination of the Claimant's employment was lawful and fair. The Respondent's witnesses, Paul Mulinge and Kevin Mapesa Wamaya admitted that the Claimant was not issued with a termination letter. They further admitted that the Claimant was not issued with a show cause letter and he was not formally invited to a disciplinary meeting.

26. The Claimant himself denied attending any disciplinary meeting. The Court looked at minutes of a disciplinary meeting alleged to have been held on 24th June 2015. Page 1 of these minutes shows the Claimant and Gabriel Philip Rumba as accused persons.

27. There are however many things wrong with this record; first, it appears that the Claimant and Rumba were subjected to a joint disciplinary forum, second, the Claimant did not sign the minutes and his assertion that he did not attend the meeting is therefore believable and third, there were no specific charges put to the Claimant for his response.

28. In light of the foregoing, the only conclusion to make is that the Respondent failed to prove a valid reason for terminating the Claimant's employment as required by Section 43 of the Employment Act. The Respondent also failed the procedural fairness test set by Section 41 of the Act.

Remedies

29. As a result, I award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

30. I further award the Claimant one (1) month's salary in lieu of notice as provided in Section 35 of the Employment Act.

31. The Respondent's response to the claim for leave pay is that the Claimant was not entitled to leave because he was a casual employee. In view of my finding on the nature and status of the Claimant's employment, the claim for leave pay succeeds and is allowed.

32. The Claimant told the Court that he did not work on Sundays. The claim for off days is therefore misplaced.

33. The claims for overtime and public holiday pay, being in the nature of special damages, were not proved to the required standard and therefore fail.

34. Finally, I enter judgment in favour of the Claimant as follows:

a).... 8 months' salary in compensation..... Kshs.75,200

b).... 1 month's salary in lieu of notice..... Kshs.9,400

c).... Leave pay for 7 years

x 21 x 7)..... Kshs.46,060

Total..... Kshs.130,660

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant will have the costs of the case.

37. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Maragia for the Claimant

Ms. Abdi for the Respondent