



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**CAUSE NO. 247 OF 2014**

**OSCAR MURIMA TSUMA.....1<sup>ST</sup> CLAIMANT**

**JULIUS CHIRUNGA MAUNDU.....2<sup>ND</sup> CLAIMANT**

**- VERSUS -**

**MOHAMED ALI JAGANI.....1<sup>ST</sup> RESPONDENT**

**MOHAMMED JAFFA AHAMED JAGANI T/A JAGANI**

**AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> October, 2021)

**JUDGMENT**

The claimant's suit is based on the amendment to the further amended memorandum of claim filed on 23.01.2019. The claimants had initially filed the memorandum of claim on 20.04.2014 in person.

The claimants' case is that each was employed by the respondents as a general worker or helper. Their further case is pleaded as follows. The 1<sup>st</sup> claimant was employed since January 1997 and the 2<sup>nd</sup> claimant since January 1999. The employment was oral. At employment the respondents traded as Jagani Auctioneers and later changed the business name to M.A Jagani & Sons Ltd and in 2010 further changed the name to Jagani Auctioneers. The management never changed and the respondents continued to pay the claimants on monthly basis.

The claimants' case is that they worked on a daily basis from Monday to Sunday without an off day and were each paid on a daily basis. Further their daily wage rates were as follows:

- a. January 1997 to 1998 Kshs. 250.
- b. January 1999 to 2000 Kshs.350.
- c. January 2001 to 2004 Kshs. 500.
- d. January 2005 to 2006 Kshs.250.
- e. January 2007 to 2011 Kshs.300.
- f. January 2012 to 2014 Kshs. 350.

The claimants allege underpayment in view of minimum wage order and claim as set out in amendment to the further amended memorandum of claim.

The claimants allege they were entitled to their employment to be converted to one subject to the Employment Act, 2007 for the 17 and 15 years served respectively. Each claims payment for rest days as set out in the amendment to the further amended memorandum of claim.

The claimants also claimed for pay in lieu of the annual leave as particularized.

The claimants pleaded that throughout the employment the respondent failed to deduct and to remit NSSF, NHIF and PAYE.

The claimants prayed for judgment against the respondents for:

- i. A declaration that the failure by the respondent to allow the claimants to take leave for all the period the claimants were under employment with the respondent under the old employment contract was unlawful.
- ii. A declaration that the failure by the respondent to give the claimants a rest day for all the period the claimants were under employment with the respondent under the old employment contract was unlawful.
- iii. A declaration that the failure by the respondent to register the claimants with the mandatory statutory deductions for all the years they have served is unlawful.
- iv. A declaration that the failure by the respondent to convert the old contracts of employment into permanent basis was unlawful.
- v. A declaration that the respondent forcing the claimants to work seven days per week without leave was unlawful.
- vi. The declaration that the failure by the respondent to convert the old contracts to conform under the Employment Act 2007 was unlawful.
- vii. The declaration the failure by the respondent to terminate the old contracts and pay the final dues and to conform the contracts to Employment Act 2007 was illegal.
- viii. A declaration that the respondents paying the claimants wages in a fluctuating trend was illegal.
- ix. The respondents to pay the claimants the amounts claimed for rest days leave days, and any other benefit.
- x. An order that the respondent registered the claimants with NSSF, NHIF and PAYE and to pay all the arrears from the date of their employment to date.
- xi. An order that the respondent immediately convert the old contracts of employment of the claimants under the old Employment Act of the claimants to the New Contract of Employment under the Employment Act, 2007.
- xii. An order the respondent pays the claimants their wage arrears to date as claimed.
- xiii. Any other relief the Honourable Court may deem fit and just to grant to meet the ends of justice.
- xiv. Costs of and incidental of the suit.

The respondent's case is based on the amended statement of response filed on 05.12.2019 through Gikandi & Company Advocates. The respondents prayed that the claimants' suit be dismissed with costs to the respondents. The respondents pleaded as follows:

- a. It is admitted that they employed the claimants as pleaded in paragraph 3 of the amended further amended memorandum of claim. The respondents' stress that the claimants were helpers as pleaded.
- b. The suit was filed on 29.05.2014 and the claims for 1997 to 2006 are time barred since six years of limitation have lapsed per section 4 of the Limitation of Actions Act.
- c. The claims for 2007 to 2011 are time barred per section 90 of the Employment Act as the suit was filed on 29.05.2014.
- d. The claimants were involved in carrying out public auction sales which is not a permanent business but only carried out upon request by interested persons. Ordinarily the auctions take place on Saturdays and there was no need for permanent employment of the claimants.
- e. The claimants claim for under payment from 2012 to 2014 but over that period the respondent overpaid them, the minimum wage order prescribing Kshs.350 per day for 2012, 2013 and 2014 but the respondents having paid the claimants Kshs. 158, Kshs. 203 and Kshs.203 respectively over the 3 years.
- f. The claimants were casual employees on the Saturdays the auctions were carried out and the claims for PAYE, NSSF and NHIF are misguided.
- g. By reason of court orders given on 04.07.2014 the respondents have been forced to pay the claimants wages on a daily basis yet the respondents only require their services on Saturdays only. The suit should be determined forthwith.
- h. The 2<sup>nd</sup> claimant engaged in gross misconduct when on 17.11.2018 he stole the respondent's two CPUs and water pump. He has been charged in Criminal Case No. 2025 of 2018 with respect to that theft

i. The claimant's case is not merited and should be dismissed with costs.

The documents filed for parties were admitted in evidence by a consent order at the hearing. The 1<sup>st</sup> claimant and then the 2<sup>nd</sup> claimant testified as CW1 and CW2 respectively to support their claims. The respondents' witness was Mohamed Jagani (RW), the 2<sup>nd</sup> respondent. The court has considered the evidence, the pleadings and final submissions. The court makes pertinent findings as follows.

To answer the 1<sup>st</sup> issue for determination the Court returns that there is no dispute that the claimants were employed by the respondents. The dispute is whether the claimants worked continuously without a break and whether the cause of action was time barred.

CW1 testified that he was employed as a general labourer to load and off load goods during attachments. He testified that the employment was oral effective sometimes in 1997 at Kshs.250 per day as was agreed. Further the claimants worked and they were paid agreed daily wage. CW1 further testified that in 2010 the claimants noted that they were being underpaid in view of the prevailing wage order and they filed suit to claim underpayment and payment on monthly basis. He worked until May 2021 when the respondents closed the office due to the corona virus or Covid 19 situation. From 1997 to May 2021 he had been underpaid and worked 7 days per week without a break.

In cross-examination the CW1 testified that he worked as a general labourer and his work was to load and off load goods in the respondent's auctioneering business and he also served as a messenger. CW1 admitted that the auctions were in auction rooms on Saturdays and Sundays but Monday- Friday he accompanied the respondents as assigned such as in levying distress. Further, overtime the respondents were friendly and the claimants did not file suit earlier because the respondents kept on promising to purge the claimants' concerns. CW1 confirmed that the conciliator found that he had been engaged on piece rate work – and the meaning the claimant did not know.

CW2 testified that the respondents employed him orally from January 1999. He testified that he worked together with the 1<sup>st</sup> claimant as general labourers loading and offloading goods, assisting respondents as assigned during levying of distress, and arranging the goods in show or auction rooms. CW2 testified that the criminal case was different from the present suit and in any event the criminal case had been dismissed for want of evidence.

RW testified that the claimants did not work on daily basis but were engaged on need basis during auctions, assisting in levying distress and in shifting tenants on need basis. Further, when the respondents had no work to assign the claimants, the respondents could pay them on humanitarian grounds. Further where the items involved were light, the claimants had no role and shifting of tenants was on need basis. There was no rule that the claimants had to report at work on daily basis but even when there was no work, the respondents would pay them something on humanitarian grounds so that they do not leave empty handed.

The Court has considered the evidence. RW has confirmed that the claimants worked on Saturdays and whenever they reported on duty they were paid. The exhibited records for payment show that the claimants worked on a daily basis. The Court returns that the claimants worked for the respondents without a break - it was a continuous service.

The court considers that the claimants' claims for underpayment, rest days and statutory deductions are in the nature of continuing injuries. The claimants have continued in service even after the filing of the suit. As submitted for the claimants, their alleged continuing injuries have never ceased and their cause of action is not time barred as pleaded for the respondents. Under section 90 of the Employment Act, 2007 the time of limitation for a continuing injury is 12 months from the date of cessation thereof. The continuing injuries in the instant case were alive and continuing as at the time the suit was filed and they were not time barred.

To answer the 1<sup>st</sup> issue for determination the Court finds that the suit was not time barred and the claimants were in a continuous service.

The 2<sup>nd</sup> issue for determination is whether the claimants are entitled to the remedies as prayed for.

It is under section 37 of the Employment Act, 2007 that the claimants' unbroken service became convertible to one subject to minimum terms and conditions under the Act. The Court considers that the respondents cannot be bound by the provisions of the Act prior to the commencement of the Act. Now the Act was assented to on 22.10.2007 and commenced on 22.06.2008 per relevant ministerial gazette notice pursuant to section 1 of the Act. Thus prior to **22.06.2008** the claimants are not entitled to claims as based upon conversion of their otherwise casual service to one subject to minimum statutory terms and conditions – as the enabling section 37 of the Employment Act, 2007 was not in force; and not that the continuing claims were time barred as was misconceived in the respondents' pleadings and submissions.

The claimants have exhibited the relevant wage orders which establish their respective claims for underpayment as against their actual pay (the actual pay being as pleaded and established partly by the exhibited payment records, and there being no reason to doubt the payment rates as urged for the claimants). As after 22.06.2008 the claimants are awarded in underpayment as follows:

a. The 1<sup>st</sup> claimant 1<sup>st</sup> May 2010 to 1<sup>st</sup> May 2011 **Kshs. 8, 784.00** as claimed; 1<sup>st</sup> May 2011 to 1<sup>st</sup> January 2012 **Kshs. 15, 588.00** as claimed; 1<sup>st</sup> January 2012 to 1<sup>st</sup> May 2012 **Kshs. 1, 794.00** as claimed; 1<sup>st</sup> May 2012 to 1<sup>st</sup> May 2013 **Kshs. 22, 608.00**; 1<sup>st</sup> May 2013 to 1<sup>st</sup> March 2014 **Kshs. 39, 798.00** – making a total of **Kshs. 88,572.00**.

b. For the 2<sup>nd</sup> claimant the same amounts for the same periods also making **Kshs.88, 572.00**.

While making the awards for underpayment, the Court finds that the respondent invoked the inapplicable Regulation of Wages (Agricultural Industry) (Amendment) Orders for 2011, 2013 and 2015 whereas the claimants did not serve in the agricultural industry. The Court finds that the Regulation of Wages (General) (Amendment) Orders 2011, and 2013 as exhibited for the claimants applied.

The Court has considered the claims for rest days. The Court finds that there is no established ground to doubt the evidence by RW that the

claimants would be paid even when there was no assignment and they reported on duty. In view of that evidence and that auctions took place on Saturdays, the Court finds that the parties had an arrangement that the claimants had to report at work daily even when there was no work to be performed. The Court considers that they rested with pay on such days there was no work to be assigned. The Court has considered the payment records as exhibited and showing that the claimants were paid, and therefore, they worked on Monday to Fridays consistently so. The same records show Saturdays and Sundays were skipped. The mutual evidence was that the auctions were held on Saturdays. The Court infers that on a balance of probability, the claimants rested on Sundays as well. Their claim for pay on the alleged rest days throughout the period served is declined as not strictly proved in the circumstances of the case.

For leave, the Employment Act, 2007 having commenced on 22.06.2008, the claimants are awarded as follows:

a. 1<sup>st</sup> claimant half 2008 to 2009 300x1.5years x 21 days Kshs. 9, 450.00; 2010 Kshs. 6, 812.40; 2011 Kshs. 7, 663.95; 2012 Kshs. 8, 668.80; 2013 Kshs. 9, 882.60 making **Kshs. 33, 553.75**.

b. The 2<sup>nd</sup> claimant is awarded the same **Kshs. 33, 553.75** for the same periods as the 1<sup>st</sup> claimant.

The Court returns that the claims on statutory deductions including PAYE, NHIF and NSSF would otherwise be resolved in accordance with the prescribed statutory provisions. Further, the claimants did not particularize their claims by way of computation. The same are declined but in any event, the claimants were entitled to the statutory benefits in view of the conversion of the casual service to one subject to the Employment Act, 2007 per section 37 of the Act and effective 22.06.2008.

The claimants have substantially succeeded in their claims and the respondents will pay their costs of the suit.

In conclusion, judgment is hereby entered for the claimants against the respondents, jointly and severally for:

1. The declaration that the failure by the respondent to allow the claimants to take annual leave per section 28 of the Employment Act, 2007 and effective 22.06.2008 was unlawful.
2. The declaration that the failure by the respondents to register the claimants with the mandatory statutory deductions for the period they have served effective 22.06.2008 was unlawful.
3. The declaration that the failure by the respondents to convert the old contracts of employment into those subject to minimum statutory terms and conditions per section 37 of the Employment Act, 2007 and effective 22.06.2008 was unlawful.
4. A declaration that the respondents' underpaying the claimants' wages contrary to the minimum wages per the applicable Regulation of Wages (General) (Amendment) Orders was illegal.
5. The respondents to pay each claimant a sum of **Kshs.122, 155.75** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit until full payment.
6. The declaration the claimants were entitled to enjoyment of the statutory benefits and deductions of PAYE, NSSF and NHIF in view of the entitlement to conversion of their otherwise casual service to one subject to the Employment Act, 2007 and per section 37 of the Act and effective 22.06.2008.
7. The declaration that the claimants are entitled to the respondents to immediately convert the old contracts of employment of the claimants under the repealed Employment Act to contracts of employment subject to the minimum terms and conditions set out under the Employment Act, 2007.
8. The respondents to pay the claimants' costs of the suit to be taxed in the usual manner.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29<sup>TH</sup> OCTOBER, 2021**

**BYRAM ONGAYA**

**JUDGE**