



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 436 OF 2016

MORRIS KITHEKA WILSON.....1ST CLAIMANT

HENRY RAMA JAMES.....2ND CLAIMANT

JAMES MUNYOKI MBUVI.....3RD CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th November, 2021)

JUDGMENT

The claimants filed the memorandum of claim on 08.06.2016 through Tindika & Company Advocates. The claimants' case is as follows. Each was employed by the respondent and they worked faithfully and diligently and were unfairly and wrongfully dismissed from employment on 14.12.2015. They allege constructive dismissal. Further, as at the time of termination all the claimants were employed by the respondent on casual basis despite the 1st claimant working for 11 years, the 2nd claimant 19 years and the 3rd claimant for 7 years. As at dismissal each earned Kshs.527.00 gross wage per day and for 6 days per week and paid at the end of the week. Each had a monthly gross income of Kshs.12, 648.00. they were subjected to statutory deductions. Further on 14.12.2015 each reported on duty and found a team from Insight Management Consultants Limited at the respondent's premises. The team informed the claimants that the respondent had decided to transfer some of its casual employees to serve the said company, Insight Management Consultants Limited. Each was offered a six months' contract with the said company and failing to sign, the employment with the respondent would lapse. The gross salary offered was Kshs. 12, 598.33 per month and which was lower than the one paid to them by the respondent. The claimants met the respondent's manager one Wycliffe Sunda who informed them that they would no longer be employees of the respondent if they failed to sign the contract with Insight Management Consultants Limited. They were not issued with a certificate of service and the respondent had failed to faithfully remit NSSF deductions.

The 1st claimant claimed for:

- a) One month pay in lieu of termination notice Kshs.12, 648.00.
- b) Compensation for unfair termination 12 x 12, 648.00 Kshs.151, 776.00.
- c) Service pay or severance pay at half monthly pay Kshs. 86, 955.00.
- d) Leave pay for 11 years Kshs. 139, 128.00.
- e) NSSF refund for 2013 Kshs.2, 400.00, 2014 for Kshs.2, 400.00, and for 2015 at Kshs.600.00.
- f) Total claim Kshs.395, 907.00.

The 2nd claimant claimed for:

- a) One month pay in lieu of termination notice Kshs.12, 648.00.

- b) Compensation for unfair termination 12 x 12, 648.00 Kshs.151, 195.00.
- c) Service pay or severance pay at half monthly pay Kshs. 150, 955.00.
- d) Leave pay for 19 years Kshs. 240, 312.00.
- e) NSSF refund for 2014 Kshs. 1, 600.00, and 2015 for Kshs. 400.00.
- f) Total claim Kshs.556, 931.00.

The 3rd claimant claimed for:

- a) One month pay in lieu of termination notice Kshs.12, 648.00.
- b) Compensation for unfair termination 12 x 12, 648.00 Kshs.151, 776.00.
- c) Service pay or severance pay at half monthly pay Kshs. 55, 335.00.
- d) Leave pay for 8 years Kshs. 101, 184.00.
- e) NSSF refund for 2012 Kshs, 1, 200.00, 2013 Kshs.2, 400.00, 2014 for Kshs.2, 400.00, and for 2015 at Kshs.400.00.
- f) Total claim Kshs.327, 343.00.

The claimants cumulatively claimed for Kshs. 1, 280, 181.00. They prayed for judgment against the respondent for:

- a) Liquidated sum of Kshs. 1, 280, 181.00.
- b) Respondent to issue each claimant a certificate of service.
- c) Costs of and incidental to the suit.
- d) Interest at court rates on (a) above.

The respondent filed the memorandum of defence on 21.07.2016 through Obura J & Company Advocates. The respondent's case was that the claimants worked as casual employees for a limited time and the respondent decided to outsource the casuals from Insight Management Consultants Limited. The respondent denied transferring the claimant's services to the outsourced company. Further, the casual service meant that once the agreed wage had been paid, the relationship thereby lapsed. The respondent stated that it did not issue certificates of service to casual employees. The respondent further case was that NSSF and NHIF deducted from the claimants for the period served was remitted. The respondent alleged that the claimant's case was time barred and based on falsehoods. The claimants being casuals, they were not entitled to the claims and prayers made. The respondent prayed that the memorandum claims be dismissed with costs.

The claimants testified to support their respective cases and final submissions were filed for both parties. The respondent's witness (RW) was Simon Mwadime. The Court has considered the pleadings, evidence, and final submissions. The Court makes pertinent findings as follows:

1) To answer the 1st issue, the evidence is that parties were in a contract of employment. The respondent admits employing the claimants but as casuals. The claimants allege and testified that they worked continuously without a break - the 1st claimant from April 2004, the 2nd claimant from 01.05.1996, and the 3rd claimant from July 2008. The evidence was that the claimants served in the different sections of the respondent's establishment as deployed such as at Grain Bulk and at the port when ships docked. The 2nd claimant testified that he had been sick in 1996 and 8 months in 2006 but otherwise he worked without a break. The 1st claimant testified he worked continuously for 11 years. The 3rd claimant testified he worked continuously without a break. RW testified that he worked in the respondent's Agricultural Services Department for 25 years and he knew the claimants. He had prepared and filed the casual summary lists for his department and filed for the respondent showing the days the claimants attended at work. RW further testified thus, **"I do not know aggregate period worked. I do not know their aggregate years worked. We have record of casuals' job attendance. We have counter books. The books are kept by Secretary Supervisor. The claimants worked in different departments. They worked at inspection, port, etc. Respondent keeps counter books used for check in and check out of claimants.... My casual summary sheets run from January 2012 to 13th December 2015.... My casual summary sheets I have filed is secondary evidence but vouchers not filed as primary evidence. I say my record may erroneously show gaps of days not worked. I say I have not manipulated my casual summary sheets to suggest they had a break in their service.... I compiled summary only for my department.... Summary on their full service not filed."** The Court has considered the evidence. RW testified that all record of claimant's attendance had not been filed. After the outsourcing ended, RW testified that he had been instructed by the respondent to contact the claimants to compromise the suit and to get reinstated. The Court finds that there is no reason to doubt that the claimants had served without a break as per their pleadings and testimony. Accordingly, as submitted for the claimants, the work was continuous over the long period served and their casual employment converted to one subject to the minimum terms and conditions of service under the Employment Act, 2007 per section 37 of the Act – the work was available and could not be completed in 3 months, and the claimants had served continuously for more than one month, and in fact, for several years as per their testimony. Under section 74 of the Act, it was for the respondent to maintain the full record of claimants' service.

Further, under section 10 (7) of the Act the burden of proving the terms and conditions of service rested with the respondent but was not discharged when the respondent withheld crucial documents on the claimants' attendance at work and payments made to them.

2) To answer the **2nd issue** for determination, the Court finds that the termination was procedurally unfair. The evidence is that the claimants' employment ended 14.12.2015 when the respondent decided to outsource the casuals. The Court finds that the claimants were entitled to consider themselves constructively dismissed effective 14.12.2015 because their service having converted to one subject to minimum statutory terms and conditions of service per section 37 of the Act, the respondent's action amounted to a fundamental breach of section 40 of the Act on the due procedure for redundancy. As between the respondent and the claimants, the Court returns that the contracts of service were ending on account of redundancy as defined in the Act. The Court has considered section 49 of the Act. The claimants had long and clean records of service. They desired to continue in the respondent's employment. The claimants had raised grievances with the respondent about statutory deductions and their terms of service. The Court has considered the mitigating factors in favour of the respondent. First, in view of the redundancy, the respondent had arranged that the outsourced company offers the claimants employment on priority basis. Second, after the outsourcing contract lapsed, the respondent invited the claimants for a reinstatement. Thirdly, the reason for the redundancy namely outsourcing casuals appears to have been genuine in terms of section 43 of the Act as at the time of termination. To balance justice for the parties, each claimant is awarded 6 months' compensation under section 49 of the Act at last monthly pay of Kshs.12, 648.00 making **Kshs.75, 888.00**. Each is awarded the contractual one month pay in lieu of the termination notice and also due under section 40 of the Act, **Kshs.12, 648.00**. Each is awarded severance pay per section 40 of the Act and as prayed for the 1st claimant **Kshs. 86, 955.00**, the 2nd claimant **Kshs.150, 195.00**, and the 3rd claimant **Kshs. 55, 335.00**.

3) The third issue is whether the claimants are entitled to the other remedies as prayed for. The Court finds that the claimants were entitled to annual leave under section 28 of the Act. However, the amount payable must be strictly pleaded and proved. The claimants pleaded and proved that as at termination each earned Kshs.12, 648.00 per month. There was no pleading and evidence on monthly pay for the earlier periods in the service and therefore the base for computing pay in lieu of annual leave for those earlier years remains unknown. The Court returns that the claimants have established that each is entitled to annual leave in the last year served and each is awarded **Kshs.12, 648.00**. The Court further considers that the claims for refund of NSSF will be declined as the matter should be handled in accordance with the relevant statutory provisions as the primary and priority remedy in the circumstances of the case. Per section 51 of the Act, each is entitled to a certificate of service.

4) As the claimants have substantially succeeded, the respondent will pay their costs of the suit.

In conclusion judgment is hereby entered for the claimants against the respondent for:

1) The respondent to pay the 1st claimant **Kshs. 188, 139.00**, the 2nd claimant **Kshs. 251, 379.00**, and the 3rd claimant **Kshs.156, 519.00** by 01.12.2021 and failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

2) The respondent to deliver by 01.12.2021 the certificate of service for each claimant for the period served as per the claimant's case and per section 51 of the Act.

3) The respondent to pay the claimants' costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE