



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 225 OF 2016

KENNETH KAMAU KAIGUA.....CLAIMANT

VERSUS

GILOIL COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 16th February 2016 seeking various relief for his alleged unlawful and unfair termination. He averred that he was employed by the Respondent on May 2005 as a casual labourer but later was engaged as a Turn Boy at a gross salary of Kshs. 12,480/- as at the time of his dismissal. The Claimant avers that he had applied to the Respondent a couple of times before he was given the position of the Turn Boy. The Claimant avers that in the month of April 2015 he reported to work as usual and was asked to leave the premises and never to go back again by his superior. The Claimant avers he failed to understand why his services were terminated and that was the reason he sought legal recourse. He averred that a demand letter was drawn and sent to the Respondent who has failed to respond to it. He sought

- a) One month pay in lieu of notice – Kshs. 12,840/-;
- b) House allowance for the entire period of employment i.e. $15\%/100 \times 12,840/- = \text{Kshs. } 231,120/-$;
- c) Payment in lieu of leave not taken for the 10 years worked, $12,840/- \times 10 \text{ years} = \text{Kshs. } 128,400/-$;
- d) Damages for wrongful dismissal, $12,840/- \times 12 \text{ months} = \text{Kshs. } 154,080/-$;
- e) Severance pay at the rate of 30 (thirty days for every completed year of service) $12,840/- \times 3 \text{ years} = \text{Kshs. } 38,520/-$;
- f) Costs of this suit.
- g) Any other relief this Honourable Court may deem fit to award under the circumstances.

2. The Respondent was opposed to the suit and filed a defence which was to the effect that the Claimant had on diverse occasions and intermittently been engaged by the Respondent on piece work contracts but had never been a full time casual labourer/employee of the Respondent. The Respondent confirms that the Claimant worked intermittently on piece work contracts as a loader at the Respondent's premises with effect from December 2005. The Respondent averred that the Claimant's work as a loader involved off-loading and loading goods, mainly soap and oil on lorries and trucks at the Respondent's premises as and when there was such work on the basis of piece work contracts and payment was made to the Claimant for the work done. The payment made by the Respondent was the agreed rate for off-loading or loading a truck which payment was divided amongst all loaders involved in the assignment. The Respondent averred the Claimant's wages were dependent on piece work and the more he was able to load/off load, the higher his wages were supposed to be. The Respondent avers the Claimant never had any monthly gross salary from the it and his engagement has never been continuous as alleged. The Respondent asserts that the Claimant was informed on the material date of April 2015 that there was no off-loading or loading work on the said day and further that piece work contracts end each day and the payments due to an employee at each end of day as paid are all inclusive and cannot attract other work benefits outside the piece work contract as agreed by the parties. The Respondent averred that the claim for payment in lieu of notice, leave, damages and severance pay or such benefits due to a full time employee is a right not due to an employee issued with a piece work contract. It averred piece work contract where paid for in full do not attract the benefit of severance and service pay. The Respondent averred that Section 2 and 18 of the Employment Act 2007 recognizes piece work contracts as lawful means of employment. It thus sought the dismissal of the Claimant's claim with costs.

3. The Claimant and the Respondent's witness who was the Human Resource and Administration Manager Mr. James Kinyua testified. They adopted their statements and testified along the same lines as the pleadings above.

4. The parties were to file written submissions and the Claimant submitted that the issues for determination were:

- A. What was the nature of the Claimants employment with the Respondent?
- B. Whether the Claimant was wrongfully, unfairly and unlawfully terminated from employment;
- C. Whether the Claimant is entitled to the prayers sought in the Statement of Claim.

The Claimant submitted that he was employed by the Respondent in May 2005 as a casual labourer and started off as a loader and later as a turn boy and that at the time of the termination of his employment, was earning a salary of Kshs. 2,190/- each week. It was submitted that the Claimant's testimony that from the first day of employment, he attended work every day but for Sundays when he was granted a rest day by the Respondent. He submitted that the Kshs. 2,190/- obtained in the Respondent's Casual Workers Payment Sheet (exhibit 2) was not a daily wage but part of his monthly salary paid at the end of the week as he was paid every Saturday. The Claimant submitted as to the question as to whether the nature of his employment changed/converted during the pendency of his employment, he asserts that in the affirmative. He submits that he had worked continuously in terms of Section 37 of the Employment Act 2017. It was submitted that by operation of the law, the Claimant's employment was converted/improved to a permanent employee as he worked for continuous working days of more than a month. Reliance was placed on the court's decision in **Humphrey Owino Omondi v Vishnu Builders Limited [2016] eKLR** where the Court found that the Claimant was not a casual labourer as he was not paid on a daily basis but on a weekly basis.

5. As to whether the Claimant was wrongfully, unfairly and unlawfully terminated from employment, the Claimant submits that he reported to work as usual sometime in April 2015 and while executing his duties, the Respondent's Manager walked to the premises and asked him to leave, go home and stay with his wife as his employment was no longer needed. He submits that on part of the Respondent, it was their defence that being engaged on piece work, the Claimant was on the material day merely informed that there was no more work. The Claimant submitted that although the two versions differ, two things are clear from both versions:

- i. The Claimant was not informed any reason for the termination of his contract.
- ii. The Claimant was not subjected to any disciplinary process before he was dismissed from employment.
- iii. The Claimant was not given any notice or paid in lieu before the termination of his employment was effected.

The Claimant submits that he was entitled to be subjected to the provisions of Sections 35, 43 and 45 of the Employment Act. He cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013]**

eKLR where the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination. "

The Claimant submitted that his employment was unfairly terminated contrary to Section 45(2) of the Employment Act. The Claimant cited the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] KLR**, where Radido J. succinctly explained what constituted fair procedure thus:

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

6. The Claimant submitted that the Respondent not only failed to follow fair procedure but also didn't have any reason, valid or otherwise to warrant the termination of the Claimant's employment. The Claimant submitted that in case the Court was not convinced the Claimant's employment converted in terms of the law, then the decision of the Court of Appeal in **Krystalline Salt Limited v Kwekwe Mwakele & 67 Others [2017] eKLR** was applicable. He submitted that in line with this decision a piece rate worker is entitled to fair procedure before termination is meted out. He thus submitted he was entitled to an award in terms of the claims in the memorandum of claim.

7. The Respondent on its part submitted that the Claimant was employed as a piece rate worker on various dates the same being dependent on the availability of work with effect from December 2005 and was never a permanent or casual employee. The Respondent submits that a summary of the days worked by the Claimant does not reveal any continuity in service to allow for conversion in terms of the law to a contract. The Respondent submitted that the Claimant in his own letters had indicated that he worked as a casual labourer and that the position of turn boy was vacant. The Respondent posed the question as to how the position he allegedly served in as pleaded was vacant. The

Respondent submits that the Claimant worked as a loader and his work involved off-loading and loading goods, mainly soap and oil, on lorries and trucks at the Respondent's premises as and when there was such work and payment was made to the Claimant for the work done.

8. The Respondent cited the Court of Appeal decision in the case of **Krystalline Salt Limited v Kwekwe Mwakele & 67 Others [2017] eKLR** wherein the Court held there are 4 main types of contracts of service under the Employment Act - contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment. The Court further stated that in piece rate work, the emphasis is on the amount of work not the time expended in doing it. It submitted that by that definition the Claimant was a piece rate worker and no more. The Respondent submits that the Claimant was not unlawfully terminated from employment since his engagement with the Respondent was pegged on availability of work. The Respondent submits that the Claimant is not entitled to any of the reliefs sought. It cites the case of **BOC Kenya Limited v Amos Manoa Erastus [2017] eKLR** where the Claimant's case was dismissed on grounds that the Claimant was on piece rate work basis, that is the Claimant being paid for work done each month and therefore he could not claim for dues under any other form of employment with the Respondent.

9. The Claimant had a duty to demonstrate that his employment was of the kind that converted to more favourable terms. His own testimony worked against him as he has a letter where he specifically points out that he was a casual worker and that the position of turn boy was vacant. How could this position he allegedly occupied be vacant if he was the turn boy? When pressed as to what vehicle he was assigned to he failed to identify the vehicle he was turn boy over. In line with the decision in **Krystalline Salt Limited v Kwekwe Mwakele & 67 Others (supra)** there is room for piece rate work as was performed by the Claimant herein. The Claimant did not demonstrate he worked every single day from Monday to Saturday as the Respondent even produced evidence being the casual work registers which showed the service of the Claimant as intermittent at best. The claim was thus unproved and is accordingly dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE