



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 34 OF 2017

JUMAA MANGARO.....CLAIMANT

VS

CHINA JIANGXI INTERNATIONAL KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim was heard as a test case whose outcome would apply to ELRC Malindi Causes No 30 of 2017, 31 of 2017, 32 of 2017, 35 of 2017, 36 of 2017, 37 of 2017, 38 of 2017, 39 of 2017, 40 of 2017, 79 of 2017, 80 of 2017, 81 of 2017, 82 of 2017, 83 of 2017 and 84 of 2017.

2. The claim is documented by a Memorandum of Claim dated 31st July 2017 and filed in court on 3rd August 2017. The Respondent filed a Memorandum of Response on 5th April 2018, to which the Claimant responded on 26th September 2018.

3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Michael Musembi.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Carpenter from 2nd January 2015 until 6th January 2017. He adds that he worked from Monday to Saturday and most times on Sundays.

5. The Claimant states that he was initially employed on casual basis and later on term contract. He was paid a daily wage of Kshs. 750.

6. The Claimant claims that the work conditions were not entirely good because:

- a) He was not allowed one rest day in a period of seven days as is required by law and was not compensated;
- b) He was not allowed to take annual leave as stipulated by law and was not compensated;
- c) He was not issued with a written contract of employment;
- d) He was not issued with an itemised pay statement;
- e) The Respondent did not remit all his National Social Security Fund (NSSF) dues.

7. The Claimant avers that on 6th January 2017, he reported to work as usual but was refused entry into the Respondent's premises. A supervisor informed him that his employment had been terminated.

8. The Claimant's case is that the termination of his employment was unlawful and unfair in that there was no valid reason for it and he was not afforded an opportunity to be heard.

9. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 19,500
- b) Accumulated leave days for 2 years & 6 months.....31,752
- c) 12 months' salary in compensation.....234,000
- d) An order directing the Respondent to remit the Claimant's NSSF contributions for 16 months
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

- 10. In its Memorandum of Response dated 29th March 2018 and filed in court on 5th April 2018, the Respondent states that the Claimant was engaged as a casual labourer, undertaking various duties on project employment terms.
- 11. The Respondent adds that the Claimant was assigned duties as they arose at the construction site.
- 12. The Respondent avers that the Claimant deserted duty from 28th December 2016.
- 13. The Respondent denies the Claimant's entire claim and states that:
 - a) All employees were allowed rest days and those who opted to work on Sundays were paid double their daily rate;
 - b) The Claimant's employment was seasonal and was renewed every month; he was paid salary in accordance with the days worked as indicated in the job card;
 - c) At all material times relevant to this suit, the Claimant was well aware that his employment was subject to availability of work at the site;
 - d) The Respondent has complied with all provisions of the law with regard to statutory deductions;
 - e) The Claimant was paid all his dues.

Findings and Determination

- 14. There are three (3) issues for determination in this case:
 - a) The nature and status of the Claimant's employment;
 - b) Whether the Claimant deserted duty or was unlawfully terminated;
 - c) Whether the Claimant is entitled to the remedies sought;

Nature and Status of the Claimant's Employment

- 15. The Respondent's line of defence in this claim is that the Claimant was a casual employee.
- 16. 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.”

- 17. The Claimant testified that although he was initially employed as a casual employee, his employment status subsequently changed to term contract.
- 18. The Claimant further testified that he was paid salary twice monthly; at mid-month and at the end of the month. He produced copies of his bank statement to support his case.
- 19. The Respondent's witness, Michael Musembi told the Court that the Claimant was engaged in a specific project in Kikambala known as Sultan Palace. Musembi added that the project commenced in 2014 and was handed over in 2018.
- 20. Musembi was in agreement with the Claimant's testimony that the Claimant was paid twice monthly; at mid-month and at the end of the

month. He however pointed out that the pay was calculated on the basis of the days worked.

21. The law requires the employer to reduce the terms of employment of its employees into writing. The Respondent's Human Resource Officer admitted that the Claimant was not issued with a written contract of employment. He further testified that the project in which the Claimant was engaged took more than two (2) years to completion.

22. Musembi further admitted in cross examination that according to the Claimant's job card for November 2016, the Claimant worked throughout the month save for 5 days which were consistent with his off days per month.

23. As held by my sister **Mbaru J** in *Robai Musinzi v Safdar Mohamed Khan [2012] eKLR* where an employer fails to document the employment relationship as required under Section 10 of the Employment Act, it is left to the Court to interpret the terms and conditions of employment.

24. In this regard and in consideration of the evidence on record, I find and hold that the Claimant was not a casual but a regular employee of the Respondent engaged on term contract.

Desertion of Duty or Unlawful Termination of Employment

25. In denying the Claimant's claim that his employment was unlawfully terminated, the Respondent asserts that the Claimant himself deserted duty from 28th December 2016.

26. An employer seeking to rely on the ground of desertion of duty must lay before the Court the basis upon which such an assertion is made. This is mainly because not every absence from duty amounts to desertion.

27. In the South African case of *Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the following distinction was made:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

28. It is therefore not enough for an employer to simply state that an employee has deserted duty. The rule of thumb is that an employer who alleges that an employee has deserted duty must show steps taken to trace the whereabouts of the employee.

29. Further, an employer who contemplates dismissal on this ground must issue notice to the employee to that effect (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*)

30. The Respondent did not bother to explain its plea that the Claimant deserted duty from 28th December 2016. The plea therefore remained a mere statement and as restated by **Odunga J** in *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR* pleadings that are not supported by evidence have no probative value.

31. A detail in the testimony of Michael Musembi to the effect that the Claimant was the leader of a group of employees who had engaged in a go-slow caught the attention of the Court. If indeed the Claimant was a leader in industrial action, the Respondent would have had a reason not to want to keep him in its employment.

32. Additionally, Musembi told the Court that after 28th December 2016 being the date the Claimant was said to have deserted duty, he signed a return to work formula on behalf of the employees who had engaged in the go-slow.

33. If the Claimant had already left the Respondent's employment, he would have had no capacity to enter into a return to work formula with the Respondent.

34. Overall, the Court rejects the Respondent's defence and agrees with the Claimant that his employment was unlawfully and unfairly terminated. The Claimant is therefore entitled to compensation.

Remedies

35. In therefore award the Claimant five (5) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

36. In the absence of any leave records to show that the Claimant took his annual leave, the claim for leave pay succeeds and is allowed.

37. From the NSSF statement filed by the Claimant, which the Respondent did not contest, it is evident that the Respondent did not make all remittances due to the Claimant's account. The claim thereon therefore also succeeds and is allowed.

38. In the final analysis, I enter judgment in favour of the Claimant as follows:

- a) 5 months' salary in compensation.....Kshs. . .112,500
- b) 1 month's salary in lieu of notice.....22,500
- c) Leave pay for 2 years (750x21x2).....31,500
- Total.....166,500**

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

40. I further direct the Respondent to pay all outstanding NSSF dues on the Claimant's account up to December 2016 and to issue the Claimant with a certificate of service.

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

42. Pursuant to consent recorded in court on 17th October 2019 that this matter be heard and determined as a test case, this judgment will apply in the following causes:

- a) Cause No 30 of 2017: Kalama Jefa Chai v China Jiangxi International (K) Ltd;
- b) Cause No 31 of 2017: Anthony Wambua David v China Jiangxi International (K) Ltd;
- c) Cause No 32 of 2017:Janji Nyale Mbaru v China Jiangxi International (K) Ltd;
- d) Cause No 35 of 2017:Mwahenzi Bakari Mwahenzi v China Jiangxi International (K) Ltd
- e) Cause No 36 of 2017:Gabriel Mbura Washe v China Jiangxi International (K) Ltd;
- f) Cause No 37 of 2017: Danson Karisa Mwamuye v China Jiangxi International (K) Ltd;
- g) Cause No 38 of 2017:Swaleh Kombe Karisa v China Jiangxi International (K) Ltd;
- h) Cause No, 39 of 2017:Danson Kiti Mwatsuma v China Jiangxi International (K) Ltd;
- i) Cause No 40 of 2017:Kaingu Deche Washe v China Jiangxi International (K) Ltd;
- j) Cause No 79 of 2017:Wilfred Kombora Deche v China Jiangxi International (K) Ltd;
- k) Cause No 80 of 2017:Mwero Swalehe v China Jiangxi International (K) Ltd;
- l) Cause No 81 of 2017:Solomon Mwarema Chai v China Jiangxi International (K) Ltd;
- m) Cause No 82 of 2017:Naftali Hamisi v China Jiangxi International (K) Ltd;
- n) Cause No 83 of 2017:Kenga Charo Shungu v China Jiangxi International (K) Ltd;
- o) Cause No 84 of 2017: Juma Salim Nzagu v China Jiangxi International (K) Ltd

43. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF FEBRUARY 2020

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JUDGE

Appearance:

Mr. Mbuya h/b Mrs. Kariuki for the Claimant

Mr. Adala for the Respondent