



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 791 OF 2015 CONSOLIDATED WITH CAUSE 634 OF 2015

JAIRUS NYANDIKA MOMANYI.....1ST CLAIMANT

GEOFFREY OMARI MOKUA.....2ND CLAIMANT

-VERSUS-

LANEEB PLASTICS INDUSTRIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimants filed their respective memoranda of claims against the respondent on 12.05.2015 and on 20.04.2015 respectively and through Namada and Company Advocates. They prayed for judgment against the respondent for:

- a. The declaration that summary dismissal was unfair and unlawful.
- b. The declaration that the claimants are entitled to payment of their terminal dues and compensatory damages.
- c. The respondent to pay the 1st claimant Kshs. 203, 130.00 being one month notice pay Kshs.13, 320.00; pay in lieu of annual leave for the period served Kshs.26, 640.00; service pay Kshs.3,330.00 when NSSF was not remitted; and 12 months' pay in compensation Kshs.159, 840.00.
- d. The respondent to pay the 2nd claimant Kshs. 203, 130.00 being one month notice pay Kshs.13, 320.00; pay in lieu of annual leave for the period served Kshs.26, 640.00; service pay Kshs.3,330.00 when NSSF was not remitted; and 12 months' pay in compensation Kshs.159, 840.00.
- e. Interest from the date of filing the suits.
- f. Costs of the suits.

The respondent filed a statement of response in each suit through Wekesa & Simiyu Advocates. The respondent prayed that the suit be dismissed with costs.

To answer the 1st **issue** for determination the Court returns that there is no dispute that parties were in contracts of service. The respondent employed the claimants as Machine Operators sometimes on 01.01.2013. The claimants worked in the respondent's Extrusion Department. The claimants pleaded that the daily wage was Kshs. 444.00 and the respondent pleaded that it was Kshs.331.88. The written contract which each claimant signed indicated the pay as Kshs.331.88 and the Court returns that was the agreed daily wage.

The 2nd **issue** for determination is whether the termination of the contracts of service was unfair or unlawful. The claimants' case is that on 23.12.2014 the respondent closed business for Christmas holiday and advised the claimants to report back on duty on 05.01.2015. Further that on 05.01.2015 the claimants reported on duty but the respondent's supervisor one Nlesh denied the claimants access to the work place alleging that there was no work and that the claimants would be recalled when work became available. The claimants' further case is that the claimants were never recalled and instead other persons were employed in their positions. Their case was that the respondent was not genuine in alleging that there was no work for the claimants to perform.

The respondent's case is that the claimants did not have a clean record of service for the 2 years they served the respondent and there were warning letters about their poor performance. In such circumstances, the respondent's case was that for the year ending 2014 the claimants were paid their full contractual dues and the ending annual contract was not renewed. The ending annual contract was not in writing but the annual contract that had ended in December 2012 had been renewed orally. Accordingly the respondent's case was that the separation was not unlawful or unfair because the claimants did not have a clean record of service and the respondent was entitled not to renew the annual contract which had ended in December 2014.

The claimants testified and confirmed that they worked on a signed annual contract in 2013 for 12 months and in January 2014 the parties renewed the contract on annual basis upon the same terms of service and lapsing in December 2014. The renewal clause stated as follows:

- a. Your contract may be renewed for a further term after expiry of the term on such terms and conditions as may be agreed upon with the directors of the company.
- b. Unless your contract is renewed it shall be deemed to have terminated. The company shall not be obliged to renew your contract after expiry.
- c. Intention to renew the contract shall be communicated to you at least one month before expiry.

The 1st claimant testified thus, "...2014 I worked for one year. Same terms applied. 2014 I signed no other contract. Period notice to terminate was one month....I was not given notice for renewal." On the other hand, the respondent's witness (RW) testified, "I see clause 8 period of notice. Before employment came to an end in 2014 or 05.01.2015 there was no communication on no renewal intention."

The Court has considered the evidence, pleadings and submissions. It is that the claimants served on an annual contract that was lapsing on 31.12.2014. The ending contract though implemented upon the terms and conditions of service as per the written contract that lapsed on 31.12.2013, had been so renewed orally. The Court returns that renewal required a renewal notification but which was not given in writing on the part of the respondent for the contract lapsing on 31.12.2014. Instead the claimants were told to report on 05.05.2015 when they were locked out. The Court returns that the claimants were entitled to a termination notice but which was not given in terms of section 35 of the Employment Act, 2007. In absence of any other material, the Court returns that after the contract lapsed on 31.12.2014, it stood renewed (albeit orally like the one which had lapsed on 31.12.2014 and upon the same terms) when they were told to report on 05.05.2015. There was no dispute (taking into account the evidence) that the lapsing contracts had ended on 31.12.2014. Thus the clause on the term stated, "**In the event that at the expiry of your contract there shall be ongoing works which need be completed and the company retains your services for the purposes of completion of such work, this contract shall be deemed to have been extended on the same terms and conditions from month to month until the completion of such work or until otherwise terminated.**" The claimants' evidence was that termination was on account of no work as informed on 05.01.2015. The Court finds that the reason for termination was within the contractual clause on term of contract. While the claimants purported to dispute that reason, the Court finds that there was no material before the Court to doubt that the reason was genuine in terms of section 43 of the Employment Act, 2007. The respondent wrote to the labour officer on 06.01.2015 about the claimants having been released and that was after the claimants had reported and been locked out on 05.01.2015. The respondent offered no evidence to rebut the claimants' evidence that on 05.01.2015 they reported and they were told there was no work and thereafter they were locked out. In the circumstances, the Court returns that as at 05.01.2015 the parties had renewed the contract and it was month to month and the claimants are entitled to pay in lieu of the termination notice under section 35 of the Employment Act, 2007 making Kshs.331.88 x 28 = **Kshs.9,292.60** for each claimant. While making that finding the Court considers that for the annual contract running in 2014 the parties had renewed it orally and taking the evidence into account there is no reason to doubt the claimants' evidence that as they broke for Christmas in 2014, the respondent had told them to report on 05.01.2015 thereby reengaging them on month to month basis effective 05.01.2015 and which contract could be terminated only by due notice but which was not given at all.

To answer the 3rd issue for determination the Court returns that the 1st claimant testified that the claimants were members of NSSF and the dues were remitted and the prayer on service pay or gratuity will fail under section 35 of the Act. The 1st claimant further testified that for 2014 the contract ended and they were fully paid including a holiday gift for Christmas 2014. In view of that evidence the Court returns that the claim for leave was unfounded especially that the contract for 2013 had also been fully paid. The Court finds that the prayer for pay in lieu of annual leave will also fail.

The Court has considered the parties' margins of success and returns that the respondent will pay 50% of the claimants' costs of the suit.

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

1. The respondent to pay each claimant **Kshs.9,292.60** by 01.07.2020 failing interest to run at Court rates from the date of this judgment till full payment.
2. The respondent to pay the claimants' 50% costs of the suits.
3. In view of the COVID 19 pandemic crisis, there be stay of execution of the decree herein until 01.07.2020.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020.**

BYRAM ONGAYA

JUDGE