



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 27 OF 2017 (as consolidated with No. 28, 29, and 30)

(Before Hon. Justice Mathews N. Nduma)

MICHAEL OSINO NG'ONGA.....1ST CLAIMANT

MOSES SIGUNA ODERO.....2ND CLAIMANT

CARREN AUMA GUNGA.....3RD CLAIMANT

ELIAS OKELO ONDIASA.....4TH CLAIMANT

VERSUS

SIAYA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

1. The claimants in the consolidated suit were employed as casuals by the respondent on diverse dates and they worked continuously for the respondent until when they were collectively dismissed on 7th August 2014.
2. CW1 Stella Ndede testified on behalf of the rest of the Claimants. CW1 was employed on 2/8/2005, Moses Odero was employed on 11/7/2009, Karen Auma was employed on 26/7/2002 and Elias Okelo Ondiasa was employed on 18/5/2010.
3. The claimants did not have written contracts of employment. The claimants worked as garbage collectors for the respondent. CW1 was in 2012 transferred to the slaughter house.
4. CW1 testified that the claimants were not given any notice of termination. That they did not get notice to show cause nor were they charged with any misconduct. The claimants were not given any reason for termination of employment. They were dismissed simply because they were regarded as casuals.
5. CW1, stated that he was paid Kshs. 3,600 per month and was paid in cash. That from the year 2007 the respondent started paying them through the bank. The dismissal was vide an SMS and they were not paid any terminal benefits which they now claim. They also claim compensation for the unlawful and unfair dismissal.
6. The claimants seek payment in respect of underpayments, accrued leave days, unpaid house allowance and service pay. The claimants were registered with NSSF but no contributions were remitted by the respondent. The Claimants produced documents attached to the respective statements of claim in support of their case and pray to be awarded accordingly.

RESPONSE

7. RW1 William Oyayo Luballo testified for the respondent. RW1 testified that he worked for Siaya Public Service Board as secretary for the past four (4) years. RW1 said he was aware of the claim before Court but has not met the Claimants personally.
8. RW1 adopted a written statement dated 2/5/2018 as his evidence in chief. He also produced list of documents filed on 2/5/2019 as exhibit (i).
9. RW1 concluded that the Claimants were employed as casuals on fixed term contracts which they signed and accepted the terms and

conditions of employment. RW1 stated that the Claimants were released upon expiry of their respective contracts of service and were paid all terminal benefits. That the Claimants are only entitled to earned salary and nothing else.

10. RW1 stated under cross examination that he was not sure when the Claimants were employed. He conceded that the employment of the Claimants was terminated by the respondent. That no disciplinary action was taken against the Claimants.

11. RW1 indicated that the claimants were on fixed term contracts that were renewed from time to time.

12. That the suit be dismissed with costs.

Determination

13. The issues for determination are;-

(i) Whether the termination of employment of the Claimants was lawful and fair.

(ii) Whether the Claimants are entitled to the reliefs sought.

14. In answer to issue (i) above the Court Refers to the provision of Section 37 of the Employment Act no. 11 of 2007 which provide as follows:-

“ 37(1) Notwithstanding any provisions of this Act, where a casual employee:-

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month.

b) Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more.

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (I) (c) shall apply to that contract of service”.

15. The Claimants had worked from 2002, 2005, 2009 and 2010 respectively and had worked continuously until they were unceremoniously dismissed from employment by an SMS on the 7th August 2014. The claimants have demonstrated that they were not given notice to show cause, any hearing nor were they given reasons for termination. They were dismissed because they were casuals in the eyes of the respondent.

16. In terms of the provisions of section 37 cited above the claimants had converted to the employment protected vide the provisions of parts II, III, IV, V, and VI of the Employment Act, 2007.

See Chemelil Sugar Co. – VS- Ebrahim Ochieng Ofuon & 2 others (2015) eKLR, and Nanyuki water and sewerage Co. Ltd – VS- Benson Mwiti Ntiriti (2018) eKLR . They were entitled to all the minimum terms and conditions of service provided under those parts in the Employment Act. They could not be dismissed without notice, notice to show cause or without an opportunity to explain why their employment ought not to be terminated.

17. The termination of the employment of the Claimants violated section 36, 41, 43 and 45 of the Employment Act. The terminations were therefore unlawful and unfair and the Claimants are entitled to compensation in terms of Section 49 (1) (c) and 4 of the Act.

18. In this regard Michael Osino Ng’onga had served from 2/10/2005 up to 7th August 2014 a period of about 7 years. Moses Siguda Odera had served from 1/7/2009 up to 7th August 2014 a period of over 5 years, Carren Auma Gunga had worked from 26/7/2002 up to 7th August 2014 a period of over 12 years, whereas Elias Okelo Ondiaso had served the respondent from May 2010 to 4th August 2014 a period of over 4 years.

19. The Claimants served under similar conditions, were denied all the minimum benefits they were entitled to as protected employees, they did not contribute to the termination, were dismissed without notice and hence suffered shock and anguish of sudden financial loss and support. The Claimants were not paid any terminal benefits and were not compensated for the sudden loss of job.

20. The claimants suffered loss and damage and are awarded compensation for the unlawful and unfair termination of employment as follows:-

(i) Michael Osiano Ng’onga: The Claimant is awarded the equivalent of eight (8) month’s salary in compensation. The Claimant earned Kshs. 3,600 per month. The award translates to Kshs. 28,800.

(ii) Moses Siguda Odera: The claimant earned 6,237 per month. The Claimant is awarded the equivalent of five (5) month salary in compensation in the sum of Kshs. 31,635.

(iii) Carren Auma Gunga: The claimant earned Kshs. 5,141 per month and is awarded 12 months' salary in compensation for the unlawful termination in the sum of Ksh. 61,652.

(iv) Elias Okelo Ondiasa: The claimant earned Kshs. 6,000 per month and is awarded equivalent of four (4) months' salary in compensation for the unlawful dismissal in the sum of Kshs. 24,000.

Terminal benefits:-

Notice pay.

Each of the claimants is awarded one month salary in lieu of notice in the sum of Ksh, 3, 600, 6, 237, 5,141 and 6,000 respectively.

Gratuity

The claimants were regarded as casuals and so the respondent failed to pay NSSF and NHIF on their behalf and no other pension scheme was in place for their benefit. The claimants are granted 15 days salary for each completed year as service gratuity.

Payment in lieu of leave days not taken.

The claimants are granted three months' salary in lieu of leave days not taken during their three years of service. The rest of the claim is time barred.

21. In the final analysis judgment is entered in respect of each Claimant as follows:-

MICHAEL OSINO NG'ONGA

- i. Kshs. 28,000 in compensation
- ii. Kshs. 3,600 in lieu of notice
- iii. Kshs. 10,800 in lieu of leave days not taken
- iv. Kshs. 14,400 terminal gratuity

Total award kshs. 57,600

MOSES SIGUDA ODERO

- i. Kshs. 61,692 in compensation
- ii. Kshs. 6,237 in lieu of one month notice
- iii. Kshs. 18,711 in lieu of leave days not taken
- iv. Kshs. 24,949 being terminal gratuity

Total award Ksh. 111,589

CARREN AUMA GUNGA

- i. Kshs. 31,635 in compensation
- ii. Kshs. 5,141 in lieu of one month notice
- iii. Kshs. 15,423 in lieu of leave days not taken
- iv. Kshs. 30,846 being terminal gratuity

Total award Ksh. 83,045

ELIAS OKELO ONDIASA

- i. Kshs. 24,000 in compensation

ii. Kshs. 6,000 in lieu of one month notice

iii. Kshs. 24,000 in lieu of leave days not taken

iv. Kshs. 12,000 being terminal gratuity

Total award Ksh. 66,000

i. Interest at Courts rates from date of filing suit in respect of terminal benefits in items (ii) to (iv) above and from date of Judgment in respect of compensation in (i) above.

ii. Costs of the suit.

For the evidence of doubt the Claims for underpayments were not sufficiently proved and are dismissed.

Judgment Dated, Signed and delivered at Nairobi this 28th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

M. M. Omondi for Claimants

Counsel for Respondent

Chrispo – Court Clerk