



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 417 OF 2017

BETWEEN

MESAIDI MUNGA MUMBA.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omondi Waweru & Company, Advocates for the Claimant

Lloyd & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 18th May 2017. She states, she was employed by the Respondent as a General Worker, on 1st June 2009. Her first salary was Kshs. 2,800, and Kshs. 5,640 monthly as at the time of termination. Her contract was terminated on or about 2016. There was no notice, hearing or warning preceding termination. She prays for Judgment against the Respondent for: -

- a. 1 month salary in lieu of notice at Kshs. 10,954.
- b. Annual leave of 8 years at Kshs. 87,637.
- c. 12 months' salary in compensation for unfair termination at Kshs. 131,456.
- d. Underpayment of wages at Kshs. 282,210.

Total...Kshs. 512,259.

- e. Unpaid salary up to the time termination letter will be issued.
- f. Declaration that termination was unfair.

2. The Respondent filed its Statement of Response on 29th August 2017. Its position is that the Claimant was engaged by the Respondent as a Casual Worker, from June 2009. She was paid a monthly salary of Kshs. 2,800 initially. This was reviewed from time to time. The rate paid was commensurate with applicable wage orders. Her contract was not terminated by the Respondent; she simply failed to report to work. The Respondent urges the Court to dismiss the Claim with costs. The Claimant and Respondent's Assistant Human Resource Officer Rhoda Thuo, both gave evidence on 16th December 2019 when hearing closed.

3. The Claimant told the Court she was asked to report to work by a Senior Supervisor of the Respondent in 2009. She was assigned the role

of cutting and planting sugarcane. The Supervisor paid her dues monthly. She was asked by the Supervisor not to report to work. She never went on annual leave. She worked for 8 years in continuity. She was subscribed to the N.S.S.F.

4. Cross-examined, the Claimant told the Court that cutting of sugarcane was done daily. She also prepared the fields. There were many Employees, both Casual and Regular. She was involved in planting of sugarcane also. Every activity had its season. She was paid Kshs. 2600 weekly. It was paid in accordance with the days worked. She was asked to take a break and report back to work after a week. She did so, but on return was advised there was no more work. She was told she could not go on working because her hand was injured. Her wage was improved gradually. Redirected, the Claimant emphasized that her Supervisor told her there was no more work. She worked for 8 years in continuity.

5. Rhoda told the Court that the Respondent is involved in manufacture of sugar and other byproducts in Kwale County. Its labour requirements vary, depending on the seasons. During planting and harvesting, more Workers are required. The Claimant was employed as a Casual Worker, in the agriculture department. At the time of leaving, she was in housekeeping department. She left voluntarily. She was not in continuous employment. In every department, the Respondent paid in accordance with the wage orders.

6. Cross-examined, Rhoda told the Court she did not have attendance register in Court. Supervisors retained employment records of the Casuals. The Workers were paid by their Supervisors. Rhoda did not have records of payments. The Claimant deserted in June 2016. Rhoda got this information from Respondent's Finance Office. Rhoda reiterated, upon redirection, that the Claimant failed to report for duty in June 2016. If she had reported back, she would have been taken in. The Respondent did not have an obligation to follow up on Casual Employees who failed to report for work.

7. The issues as understood by the Court are whether the Claimant was employed as a Casual or Regular Employee by the Respondent; whether termination was instigated by the Respondent; whether if in the affirmative, it was a fair termination; and whether the Claimant merits the prayers sought.

The Court Finds:-

8. At paragraph 3 of the Statement of Response, the Respondent states that the Claimant was employed *at a monthly salary of Kshs. 2,800*. At paragraph 4 [a], the Respondent makes the same assertion- that the Claimant was paid a monthly salary. Section 2 of the Employment Act 2007 defines 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 24 hours at a time.*”

9. The mode of payment adopted by the Respondent in remunerating the Claimant, was not consistent with casual employment. The assertion by the Respondent that the Claimant was in casual employment, is not supported by the Pleadings filed by the Respondent. Further, the Claimant worked for 8 years. She was formally enlisted as a member of the N.S.S.F by the Respondent. She was subscribed to the N.H.I.F. These subscriptions do not support the view that the Claimant was engaged by the Respondent for a period of 24 hours at a time. There is a regular employment relationship, which spanned 8 years. Lastly, Rhoda told the Court that the Claimant worked in housekeeping department at the time of termination. She was not static in agricultural department, and would not be deemed casual only for the reason that the Respondent's business involved seasonal work. She seems to have been moved around the departments.

10. The Respondent did not avail to the Court any form of attendance register, to confirm that the Claimant worked on and off, depending on the sugarcane season.

11. It is the view of the Court that the Claimant was a Regular Employee of the Respondent.

12. Was she underpaid? She has not in her Pleadings, Evidence or Submissions, supported this prayer with copies of the relevant Regulation of Wages [Agricultural Industry] [Amendment] Orders. Her Statement of Claim contains two separate sets of underpayment claims. One is totaled Kshs. 282,210 at page 3 of the Statement of Claim, while another at page 4 and 5 gives a total of Kshs. 200,162? These figures as stated above, are not rooted in relevant Wage Orders. The Respondent availed Wage Orders for the years 2010 to 2013, which show minimum consolidated wages for unskilled Employees in agricultural industries to range from Kshs. 3,347 to Kshs. 4,854 monthly. This was within the bracket of the wages paid to the Claimant over the years. Her prayer for underpayment of wages is rejected.

13. Was she entitled to annual leave? Yes. The only reason the Respondent did not concede this prayer is that the Respondent characterized the Claimant as a Casual Employee. This has been discounted in the Pleadings and Evidence on record. ***The Claimant merits annual leave pay, based on a statutory minimum of 21 days, adopting her 26 working day- monthly salary- of Kshs. 5,640, at Kshs. 36,443.***

14. Was termination instigated by the Respondent? After 8 years of work, it is hardly believable as advanced by the Respondent that, the Claimant just left and did not return to work. A more likely scenario is that told by the Claimant: she was injured on her hand and told by the Supervisor there was no more work. The Court is satisfied that termination was at the instigation of the Respondent. There was no reason to justify termination. The manner of execution was a procedural aberration. There was no letter communicating termination to the Claimant. She was thought by the Respondent to be a Casual Employee who would just fade into the mists of antiquity, without any legal protection and guarantee.

15. Termination was unfair under Section 41, 43 and 45 of the Employment Act. The Claimant is granted the equivalent of 8 months' salary in compensation for unfair termination at Kshs. 45,120 and notice pay equivalent of 1 month salary at Kshs. 5,640.

16. The prayer for unpaid salary up to the time a letter of termination will be issued, is untenable. The Claimant is not in doubt that her contract was terminated in 2016.

IT IS ORDERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant annual leave at Kshs. 36,443; compensation for unfair termination equivalent of 8 months' salary at Kshs. 45,120; and notice at Kshs, 5,640 – total Kshs. 87,203.

c. No order on the costs.

Dated, signed and released to the Parties electronically, at Chaka, Nyeri County, under Covid-19 Judiciary Guidelines and Rule 38 of the E&LRC [Procedure] Rules, 2016, this 29th day of June 2020

James Rika

Judge