



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 558 OF 2015

BETWEEN

1. NYAWA MALAU NYAWA
2. PANGA EDWARD MKUZI
3. NGANYAWA CHAKA NGANYAWA
4. JAPHET TAYU BETA
5. IDD KEA KANGOCLAIMANTS

VERSUS

TAPIOCA LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Onyango Onunga Advocates, for the Claimants

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimants filed their Statement of Claim on 6th August 2015. They state, they were employed by the Respondent on diverse dates, between the years 1997 and 2015. They worked in various departments. Their contracts were terminated by the Respondent on 2nd March 2015, on the ground that the Respondent did not wish to continue with old Employees. They state, termination did not follow the law under Sections 41, 43 and 45 of the Employment Act. They seek Judgment against the Respondent for:-

1st Claimant.

- a. 1 month salary in lieu of notice at Kshs. 7,950.
- b. Unpaid leave for 18 years at Kshs. 143,100.
- c. Gratuity for 18 years at Kshs. 71,550.
- d. 12 months' salary in compensation for unfair termination at Kshs. 95,400.

Total... Kshs. 318,000.

2nd Claimant.

- a. 1 month salary in lieu of notice at Kshs. 7,950.
- b. Unpaid leave for 1 year at Kshs. 7,950.
- c. Gratuity for 1 year at Kshs. 7,950.
- d. 12 months' salary in compensation for unfair termination at Kshs. 95,400.

Total...Kshs. 115,275.

3rd Claimant.

- a. 1 month salary in lieu of notice at Kshs. 9,000.
- b. Unpaid leave for 16 years at Kshs. 144,000.
- c. Gratuity for 16 years at Kshs. 72,000.
- d. 12 months' salary in compensation for unfair termination at Kshs. 108,000.

Total...Kshs. 333,000.

4th Claimant.

- a. 1 month salary in lieu of notice at Kshs. 7,950.
- b. Unpaid leave for 3 years at Kshs. 23,850.
- c. Gratuity for 3 years at Kshs. 11,925.
- d. 12 months' salary in compensation for unfair termination at Kshs. 95,400.

Total...Kshs. 139,125.

5th Claimant.

- a. 1 month salary in lieu of notice at Kshs. 7,950.
- b. Unpaid leave for 3 years at Kshs. 23,850.
- c. Gratuity for 3 years at Kshs. 11,925.
- d. 12 months' salary in compensation for unfair termination at Kshs. 95,400.

Total...Kshs. 139,125.

2. The Claimants pray also, for: declaration that termination was unlawful; declaration that the Claimants were entitled to 1 month of leave after every year of work; an order directing the Respondent to pay to the Claimants terminal dues; costs' and any other suitable relief.
3. The Respondent filed its Statement of Response on 27th April 2017. Its position is that the Claimants worked intermittently on piece rate, between the years 2011 and 2015. The 1st and 2nd Claimants were sweepers. 3rd, 4th and 5th Claimants were general labourers. They were engaged whenever there was work for them to do. They were paid daily upon completion of their tasks. They did not work in continuity. They are not entitled to the prayers sought.
4. The Claimants authorized in writing, the 1st Claimant to act on their behalf in the matter herein. The authority, filed on 6th August 2015 is undated. The 1st Claimant filed a witness statement on 6th August 2015 which is similarly undated.
5. Evidence for the Claimants was not given by the 1st Claimant, but by the 3rd Claimant alone. 3rd Claimant did not file a witness statement, neither was he authorized by Co-Claimants to act on their behalf.
6. The 3rd Claimant gave evidence on 26th November 2019, as did Respondent's witness, general labourer Edward Kiti Mwachiru.

7. The 3rd Claimant mainly testified about himself. He stated he was employed by the Respondent as a general labourer in 1997, earning Kshs. 250 daily. He became a machine operator later, on a daily rate of Kshs. 300. He worked daily, including on public holidays, from 8.30 a.m. to 4.00 p.m. There was no attendance register. He signed acknowledgement on receiving cash. Respondent business's owner Rajesh told the Claimants there was no more work. Cross-examined, the 3rd Claimant told the Court he was employed in 1997 and left in 2015. He relied on the N.S.S.F statement of account to buttress this position. He conceded the statement did not indicate that the Respondent was the Employer. The Claimants did not name Rajesh in their pleadings. They never signed attendance register. The Statement of Response, filed in 2017 in Court, exhibits attendance registers. The Co-Claimants similarly worked up to 2015. 2 of them were machine operators, others were general labourers. There is no document to support the prayer for gratuity. Redirected, the 3rd Claimant told the Court it is not necessary to have the name of the Respondent on the N.S.S.F statement.

8. Mwachiru told the Court he was employed by the Respondent as a general labourer in 1989. The Respondent manufactures oils. Their engagement of labour is dependent on levels of production. The Claimants performed various roles. They did not work from 1997. They worked from 2011 to 2015. Attendance registers show they worked intermittently. The Respondent did not terminate. It is still engaging whenever production demands. Cross-examined, Mwachiru told the Court he knew the 3rd Claimant. The 3rd Claimant was a general labourer. Machine operation required skills.

The Court Finds:-

9. The evidence adduced by the 3rd Claimant appears to the Court specific to the 3rd Claimant. This evidence, even when stretched to apply to the other Claimants, does support the Claim. There is no evidence that the Claimants worked in continuity. There are attendance registers on record, signed by the Claimants, establishing the position by the Respondent that the Claimants worked inconsistently. The assertion that some of the Claimants worked as machine operators is not supported by evidence. They pleaded that they worked in various departments, and in his evidence in chief, the 3rd Claimant told the Court he worked as a general labourer. On cross-examination, he alleged some Claimants were machine operators. His evidence was inconsistent, unpersuasive, and hardly accommodated the pleadings of his Co-Claimants. Notably, he did not have written authority to testify for the others.

10. The Claimants have not established under Section 47 [5] of the Employment Act 2007, that unfair termination occurred. The prayers for notice pay and compensation for unfair termination have no merit and are declined.

11. The 3rd Claimant said nothing and produced nothing in his evidence, to support the prayers for annual leave and gratuity. It is clear from the attendance register that, the Claimant did not work in continuity and their claims for annual leave, based on unserved periods, are misplaced. There is no contract, wage order, collective agreement, statute or other labour instrument placed before the Court, to show that the Claimants were entitled to gratuity. Declaratory orders sought are equally misplaced.

12. The Claim has no merit.

It is ordered: -

a. The Claim is rejected.

b. No order on the costs.

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

James Rika

Judge