



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS OCCUR TOF KENYA

AT NAKURU

CAUSE NO.213 OF 2016 CONSOLIDATED WITH CAUSE NO.212 OF 2016

ALI INDRAYA OBONDO.....CLAIMANT

PHILIP OWINO ODHIAMBO.....CLAIMANT

VERSUS

KAPI LIMITED.....RESPONDENT

JUDGEMENT

Both files in ELRC Cause No.213 & 212 of 2016 were consolidated for hearing and determination with the lead file being Cause No.213 of 2016. The claimant in Cause No.213 testified in support of the claims. He however lacked consistency, he was vague in most of his responses and in the written submissions, and the case for the claimant in Cause No.212 of 2016 is not given justice.

Upon retreat to write judgement, in analysing both claims, it will not achieve justice to render judgement in both claims. These are separated and **the claimant in Cause No.212 of 2016 shall be called separately to urge his case.**

The consolidated of both files is lifted.

Claim

The claimant in **Cause No.213 of 2016 Ali Idrani Obondo's** claim is that he was employed by the respondent on 31<sup>st</sup> May, 2011 as a general worker in the machine department and worked until 4<sup>th</sup> May, 2016 when his employment was unfairly terminated.

The claim is that on 23<sup>rd</sup> April, 2016 the claimant reported to work for his shift and together with other employees was informed by Rosemary and Purity the general manager and human resource manager that a grinder had been lost on 22<sup>nd</sup> April, 2016 in the workshop department and hence they were to continue in their shift but to report on Monday where investigations would be conducted on the loss and their statements would be recorded. The claimant did as directed and on 25<sup>th</sup> April, 2016 he recorded his statement with the general manager, human resource and the security company guarding the premises and then advised to proceed to his shift awaiting the conclusion of investigations.

The next day the claimant reported to work but the accountant, Yvonne told him to state who had stolen the grinder and failure to which his employment would be terminated. The claimant stated that he suspected Chege had stolen the grinder and was then sent home pending investigations.

On 29<sup>th</sup> April, 2016 the claimant was called by the respondent to collect his wages for the week and was to return on 3<sup>rd</sup> May, 2016 and the director, Ian Shaw demanded to know why the claimant and his colleagues had refused to disclose who had stolen the grinder. The claimant was not working in the department where the grinder was stolen from but all employees were informed their employment had been terminated.

On 4<sup>th</sup> May, 2016 the claimant was called to collect his terminal dues.

The claimant had been working for the respondent from 1<sup>st</sup> February, 2010 at a wage of Ksh.599 per day which was increased to Ksh.665 per day from 1st June, 2015 and paid until 2016.

Work hours were 6pm to 6am daily for 7 days each week and were not paid overtime or rest day.

That his employment was terminated contrary to the provisions of section 41, 43 and 45 of the Employment Act and claim for the following dues;

- a) Notice pay Ksh.22,942;
- b) Overtime Ksh.780,379.55;
- c) Off days ksh.520,253.04;
- d) Gratuity Ksh.11,710;
- e) Annual leave Ksh.80,297; and
- f) Compensation Ksh.275, 304.

The claimant testified in support of his claims that he was employed by the respondent on 31<sup>st</sup> May, 2010 as a general worker and paid a daily wage of ksh.665 cumulatively paid weekly on a Saturday. He was in the dyer section working in the night shift from 6pm to 6am and initially worked day shift for two week then night shift without pay for overtime hour's work.

The claimant also testified that he was paid an hourly rate of Ksh.21 but some hours were not paid for but others were paid and in total he worked for the respondent for 6 years. That he would work for 7 or 6 days per week based on availability of work and in a given year he cannot recall the weeks he worked for 7 days but mostly worked for 6 days per week.

On public holidays he would be at work but on some he would take his rest and cannot recall when and was not allowed annual leave.

On 26<sup>th</sup> April, 2016 the claimant was on night shift when he was called and told that some tools had been stolen. The shift had 5 employees who were called to explain about the stolen goods but the claimant was not in the affected section so he had not information to give and was sent home and the security company was called for investigations. He was not allowed back to work after this day. Other employees were allocated his duties.

The claimant also testified that he was not allowed back to work despite being innocent and thus make the claims set out in his Memorandum of Claim.

Upon cross-examination, the claimant testified that there was a period the respondent had no work and since he was in the drying section, production stopped and would not be required to report to work. He worked when work was available. There was the attendance sheet and would be paid ksh.665 each day when at work. When the grinder was stolen he was sent home and not allowed back to work as he was a casual employee and when there was no production he was not required to report to work. He had no fixed income for a month and only paid for the day he worked.

#### Defence

The defence is that the claimant was employed as an on and off casual worker from October, 2014 as and when there was work for production in the dryer section at the factory. There was no employment from the year 2011 as alleged.

In January, 2016 the claimant only worked when there was need and production and production in the dryer section. The muster roll filed with the defence attest to these facts and the claimant signed for the days he was at work. He was paid per day at work. This was lawful and in accordance with the law relating to casual employment.

On 23<sup>rd</sup> April, 2016 it came to the respondent's knowledge that two of its grinders had been stolen from the factory on the night of 22<sup>nd</sup> April, 2016 and the claimant had been on this shift with others. There were investigations and on 25<sup>th</sup> April, 2016 all employees on duty were questioned with a view of assisting investigations with regard to the theft. The claimant recorded his statement.

The defence is also that the claimant was not laid off work and investigations into the theft of the respondent's property are still on-going and unresolved. The claimant attended work and was paid Ksh.484 per 8 hours shift each day shift and ksh.665 for every night shift when he worked 3 hours overtime. The record of such work is filed with the defence. The claimant was fully paid for his work.

The defence is also that there was no case of unfair termination of employment. Following the loss and theft of two grinders, the respondent had to stop and undertake investigations with the assistance of the police after the matter was reported to them. Internally the human resource manager took statements from the claimant and other employees and investigations are still on-going and cannot claim there was unfair termination of employment and compensation.

On the claims made the claimant is not entitled to payment of gratuity as he was not employed under a contract and remained a casual worker as and when there was work and was paid for each day worked. Notice pay is thus not due. There was no termination of employment for the claimant to justify the claim for issuance of certificate of service.

The claims for overtime pay do not arise as the claimant worked for 8 hours day shift and was paid ksh.484 and while on night shift was paid ksh.665 taking into account the 3 hours overtime.

The defence is also that the claims made are premised on falsehood in the there was no employment from the year 2011; he was a casual employee and not working full time and the claimed benefits are without justification. The matter was not reported to the Labour Officer who would have had a chance to interrogate the claims before moving the court and should be dismissed with costs.

Ian Gerald Shaw testified that he is the director at the respondent which manufactures pesticides for agricultural and in households. The claimant was employed as a casual employee in the dryer section from the year 2014 and not as claimed in the statement of claim. The claimant would be paid a daily wage and sign each end of day and lastly earning Ksh.665 per day.

Mr Shaw also testified that on 22<sup>nd</sup> April, 2016 in the night shift he got a report the next day on 23<sup>rd</sup> that 2two grinding machines had been stolen where there were five

(5) employees on duty but upon being interviewed they all denied any knowledge of the matter. He called the human resource manager who took statements form the employees including the claimant and they denied knowledge of the matter when the respondent made a report to the police to conduct investigations as there was no internal resolution of the theft.

Mr Shaw also testified that he asked the claimant and other employees to meet with him on 3<sup>rd</sup> May, 2016 when they said Chege was the thief but there was no conclusion of the matter and he needed to investigate further.

The claimant was not dismissed form his employment since he was a casual worker and all what he needed to do was to stop allocating him work. The claimant never came back asking for work and when he called him back the claimant declined.

Mr Shaw also testified that he was shocked to see the claims made by the claimant. He did not report to the labour officer or serve any demand notice. As a casual employee the claimant would be allocated work when there was need for casual employees and would be paid each day worked. 40% of the respondent business each year there is no need for manufacturing. There was no continuous production or need to employ casual employees. The claimant was paid in accordance with the applicable Wage orders for the year 2015/2016

The claims made are no justified or with any legal foundation.

At the close of the hearing, both parties filed written submissions.

The court has analysed the pleadings, the evidence and written submissions and the issues which emerge for determination can be summarised as follows;

The nature of employment relationship between the parties;

Whether the claims made are due; and

Who should pay costs.

Date of employment – at paragraph 3 of the Memorandum of Claim the claimant stated that he was employed by the respondent on 31<sup>st</sup> May, 2011. At paragraph 14 he stated that he was employed on 1<sup>st</sup> February, 2010. In his evidence in court on 23<sup>rd</sup> January, 2020 he testified that he was employed on 31<sup>st</sup> May, 2010. In tabulating his claims, the claimant has used 1<sup>st</sup> June, 2011 as his date of employment.

These contradictions are glaring. This does not aid the claimant's case at all.

The respondent filed records of employment pursuant to section 10(7) of the Employment Act, 2007. The claimant has not challenged these records. These records relates to his employment with the respondent.

From the daily work schedules for January, 2016 the claimant was at work as follows;

6<sup>th</sup> January, 2016 from 6.30is to 6.30pm with 2.45 hours overtime and was paid ksh.665;

29<sup>th</sup> January, 2016 from 6.30is to 6.30pm with overtime of 2.45hours and paid ksh.665;

3<sup>rd</sup> February, 2016 from 6.30 to 6.30 and paid ksh.665;

27<sup>th</sup> February, 2016 from 6.30 to 6.30 and overtime 2.45hours and paid ksh.665.

These records are replicated for 2 days in March, 2016, 2 days in April, 2016, 2 days in January, 2015 and such other staggered days within the year in 2015 and 2016.

What is clear to the court is that there was no continuous employment of the claimant and for every day he was at work he was paid and acknowledged payment at each end of day.

The claimant also testified that;

... I was a general worker paid weekly at Ksh.300 initially and increased to Ksh.665 a daily rate paid weekly on Saturday.

There was clocking in at 6.30pm to 6am night shift or 6.30am to 6.30pm day shift while in the dyer section. Initially I did day shift for two weeks only.

For work hours beyond 8 hours I was paid overtime. Each hour was paid at Ksh.21 per hour and some hours were not paid but I do not have the record... I remained at work with the respondent for 6 years. Each week I

would work for 7 or 6 days based on work availability. In a given year I cannot recall the number of days I worked for 7 days per week. Save for October on a year I cannot remember all other years I worked for 6 days per week ...

On this evidence, the claimant was thus sourced for work based on availability of work; employment was daily and a daily wage paid at the end of each day; on the records, the claimant was not employed for period of more than two days each month.

Section 2 of the Employment Act, 2007 defines causal employment as follows;

**“casual employee”** means 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

Such provisions aptly define the claimant's employment with the respondent.

The Court of Appeal in the case of **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR** held that;

... The respondents admitted the appellants [the employees] were casual employees employed on job availability and they were paid a daily wage as per the petty cash analysis that was produced in evidence. ...

Our reading of **Section 37** of the **Employment Act** reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR**.

... the evidence shows the appellants were casual employees who used to work for 2 days in a week depending on the availability of materials. They used to clock their time on the said days when they reported at work. The evidence by the respondents that they used to pay daily wages as per the petty cash analysis sheets that were produced in evidence for each of the

appellant was also not challenged so was the evidence that on 2<sup>nd</sup> August, 2015 some of the appellants deserted work after they were given a term contract to convert their casual status to a term contract.

Similarly for the claimant, on the evidence before court shows that he was in continuous service of the respondent, he worked on availability of work, he was paid a daily wage and the records filed attest to these facts and assessment by the court.

Notice pay is not due to a causal employee whose employment is sourced daily and ends daily as defined under section 2 of the Employment Act, 2007.

On the claim for overtime pay, the claimant on his own evidence testified that while on day shift he earned ksh.484 and on night shift he earned ksh.665 taking into account each overtime hour worked was paid at Ksh.21. In this regard, to claim for overtime pay and base it for period of 6 years is dishonest.

A causal employee as defined above is entitled to a rest day where work is allocated for a full week continuously. The claimant testified that he would work for 7 or 6 days each week but could not recall when he last worked for 7 days per week. In this regard his claims for pay over rest/off days are without foundation.

The claim for gratuity is without foundation as the claimant was not under a written contract of employment giving him such benefit.

Annual leave is not available to a causal employee who is allocated work for 6 days each week. On the evidence that the claimant worked for 6 days each week, the provisions of section 28 or 37 of the Employment Act, 2007 do not apply to him. such benefit is not available.

On the claims made, the court finds not merit.

**Accordingly, the suit herein is dismissed in its entirety. Costs to the respondent.**

**ELRC Cause No.212 of 2016 shall be removed and addressed separately.**

**Dated and delivered electronically this 4<sup>th</sup> June, 2020 at 1200 hours.**

**M. MBARU JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 4<sup>th</sup> June, 2020.

**M. MBARU JUDGE**

**JUDGE**