



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 888 OF 2016

[Consolidated with Cause Numbers 889, 890 and 891 all of 2016]

BETWEEN

1. GONDA CHIBULE STEPEHEN [888]
2. EDISON MWAMBENYU NYAA [889]
3. MOSES CHIRANZI GONDA [890]
4. LUBANGA KIDIYA DANIE [891].....CLAIMANTS

VERSUS

S.S. MEHTA & SONS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno B.N. & Associates, Advocates for the Claimants

Otieno Asewe & Company Advocates for the Respondent

JUDGMENT

1. The 4 Claimant filed separate Claims against their former Employer, the Respondent herein, in November 2016. The Claims were consolidated with the consent of the Parties, on 22nd September 2017, to be heard under Cause Number 888 of 2016.
2. The **1st Claimant** avers he was employed by the Respondent as a Furnisher Man in April 2002, earning a salary of Kshs. 17,730 monthly. **The 2nd Claimant** was employed as a Carpenter in July 2014. His salary was Kshs. 21,000 monthly. **The 3rd Claimant** was employed as a Furnisher Man, in April 2002, on a monthly salary of Kshs. 17,730. The **4th Claimant** worked for the Respondent from September 2013 as a Carpenter, on a monthly salary of Kshs. 18,759. The salary was later improved to Kshs. 21,000 monthly.
3. The Claimants state, their respective contracts were terminated by the Respondent in January 2016. There was no notice, or opportunity accorded to the Claimants to be heard before termination. They were denied terminal benefits.
4. They seek Judgment against the Respondent as follows:

1st Claimant: declaration that termination was unfair; 1 month salary in lieu of notice at Kshs. 17,730; unpaid annual leave of 14 years at Kshs. 173,754; compensation for unfair termination at Kshs. 212,760 – total Kshs. 404,244.

2nd Claimant: similar declaration as above; 1 month salary in lieu of notice at Kshs. 21,000; unpaid annual leave at Kshs. 29,400; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 252,000 –total Kshs. 302,400.

3rd Claimant: similar declaration; 1 month salary in lieu of notice at Kshs. 17,730; unpaid annual leave of 14 years at Kshs. 173,754; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 212,760- total Kshs. 404,244.

4th Claimant: 1 month salary in lieu of notice at Kshs. 21,000; unpaid annual leave for 2 years at Kshs. 29,400; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 252,000- total Kshs. 302,400.

5. The Respondent filed consolidated Statement of Response, under the reference file, on 26th July 2017. Its position is that the 1st Claimant deserted. His contract was not terminated by the Respondent. He was paid his annual leave. Similarly the rest of the Claimants deserted, and are not entitled to notice and compensation. They were paid their leave days. In replying to their demand letter before instigation of the Claims, the Respondent's Advocates advised their counterparts that the Claimants contracts were not terminated by the Respondent, and required the Claimants to report back to work. They did not report back, or pay notice to the Respondent as demanded. The Respondent asks the Court to dismiss the Claims with costs.

6. The Claimants gave evidence, and rested their case on 10th July 2017. Respondent's Shop Assistant, Munir Mohammed Yakub, gave evidence for the Respondent on 10th February 2020, when the hearing closed.

7. The 1st Claimant told the Court that the Respondent is involved in construction and civil engineering. He restated his employment history and particulars, as narrated in the Statement of Claim. The Claimants took a holiday break of 2 weeks in December 2015. They were to resume on 5th January 2016. They did so and started working. At around 9 a.m. they were told by the Respondent, that there was no more work for them. There was no notice. There were no allegations of any nature against any of the Claimants. It is not true as stated by Munir Mohammed, that the Claimants deserted. Munir worked in the garage section. This section involved mechanics and welders. The Claimants were not in Munir's Section. The Respondent paid N.H.I.F and N.S.S.F contributions. The 1st Claimant told the Court he never took annual leave throughout his period of employment. His Colleagues left employment at the same time, under similar circumstances.

8. Cross-examined, the 1st Claimant told the Court it is true, that the Respondent normally gave Employees the date for resumption of duty, after the holidays. It is not true that the Claimant failed to resume, on the date advised. They did not receive the letter from the Respondent, asking them to resume duty. They were paid bonus, not leave pay. He did not have documents showing he was employed in the year 2002. Redirected, the 1st Claimant emphasized that the Claimants did not desert. Their previous Advocate did not advise them that the Respondent was willing to return them to employment.

9. The 2nd Claimant associated himself fully with the evidence of the 1st Claimant. He told the Court he does not know Munir Mohammed. Cross-examined, he confirmed that Respondent's exhibit 1 shows he was paid leave, not bonus.

10. The 3rd Respondent similarly adopted the position taken by his Colleagues in his evidence. He was paid bonus in 2014 and 2015 only. He was not paid leave. He told the Court in redirection, that his Witness Statement takes the position that he was employed in 2014, not 2002 as stated elsewhere. Redirected, he told the Court the correct date of employment is 2002, as shown in the Verifying Affidavit.

11. The 4th Claimant's narrative is not different from that of the Co-Claimants. The Workshop Manager Naran paraded Employees on 5th January 2016, when they returned from holiday. 4 out of 14 Employees, the Claimants herein, were told to leave. No reason was given to justify termination. Cross-examined, the 4th Claimant told the Court he would have no reason to decline resumption of work. He was not aware of the letter from the Respondent's Advocates, asking the Claimants to resume. He signed the document showing leave, rather than bonus, was paid. Redirected, the 4th Claimant told the Court he did not have any information calling on the Claimants to resume duty.

12. Munir Mohammed Yakub told the Court he is a Shop Assistant, but assists Management in overseeing staff issues. The Claimants were Casual Employees. They were paid all entitlements before they took leave. Every December, the Respondent allows Employees Xmas break of 2 weeks. The date of resumption is normally, and was with respect to the dispute herein, displayed on the notice board. The resumption date was 5th January 2016. They did not return. They gave no notice. The Respondent's Advocates wrote to then Advocates for the Claimants, asking that the Claimants report to work immediately. They did not return. Leave summaries are exhibited. The Claimants encashed their leave. They acknowledged payments.

13. Cross-examined, Yakub told the Court he is not a Director of the Respondent. Neither is he a Human Resource Officer. It is not in his place to determine who can, or cannot be employed. He was employed in 2012 as a Workshop Assistant. Naran worked in a different department from Yakub. The Claimants did not resume work. Their contracts were not terminated by Naran. Naran is still in employment, but was not available as a Witness for the Respondent. Yakub did not know that the Claimants, did not instruct the Law Firm of B.W. Kenzi to act for them at the outset. The Respondent had details of the Claimants and could have reached them directly. The Respondent did not avail to Court the attendance register of January 2016. It would have assisted the Court in establishing if the Claimants reported, or did not report to work.

14. Further, the Respondent did not take any disciplinary action against the Claimant for desertion. The Claimant worked in continuity. Yakub found all of them in employment when he joined the Respondent in 2012. The Respondent did not pay bonuses. Yakub stated Human Resource personnel would know the circumstances of the Claimants' exit.

15. Redirected, Yakub told the Court that the Claimants reported to Naran. Naran reported to Yakub. Yakub did not see the Claimants on 5th

January 2016. Kenzi was an Advocate engaged by the Claimants. The Respondent expected the Claimants to resume. They were not faced with any disciplinary issues.

The Court Finds: -

16. It is important to first disagree with the evidence of the Respondent – that the Claimants were in casual employment. Every piece of evidence suggests they were in regular employment. They served periods ranging from 2 to 3 years. They worked in continuity. They were enlisted to N.S.S.F and N.H.I.F by the Respondent. with contributions remitted regularly. They were issued staff transport passes, valid for 1 year. There is no reason to support the view that the Claimants were in casual employment.

17. There is agreement by the Parties that the Respondent offered its Employees 2 weeks of Xmas break. This happened in December of 2015. The Employees were to resume on 5th January 2016. They state that they resumed as instructed. They were called to a parade with 10 other Employees. Out of 14 Employees, the 4 Claimants were earmarked for abrupt and unjustified termination.

18. The Respondent denies having terminated the Claimants' contracts. According to the Respondent, the Claimants left for holiday, and did not avail themselves for duty at the end of the break.

19. The Court is not persuaded that the Claimants, deserted. There appears to have been some form of disagreement between them and the Respondent. The Respondent probably asked the Claimant to leave, as stated by the Claimants.

20. The Claimants then went and instructed B.W. Kenzi to issue demand letter dated 6th January 2016. They alleged they were unfairly dismissed. This was a day, after the disagreement with the Respondent on 5th January 2016.

21. The Respondent had a change of mind, and advised that the Claimants resume duty. There Court believes that instructions issued from the Claimants, to B.W. Kenzi Advocate on 5th January 2016, to engage the Respondent in the dispute, which arose on 5th January 2016. Similarly, the Court does not have reason to disbelieve that the Respondent did not write back on 3rd February 2016, to B.W. Kenzi, requiring the Claimants to resume work. It is totally unbelievable, that anyone would draw B.W.Kenzi Advocate, into a dispute he had nothing to do with. The Claimants' dissociation with B.W. Kenzi Advocate, did their credibility significant damage.

22. They opted not to go on working for the Respondent. They instructed their present Advocates, on 1st September 2016 - 9 months after they allege their contracts were irreversibly terminated by the Respondent, demanding redress for unfair and unlawful termination.

23. The Claims were filed in November 2016. In the view of the Court, the Claimants were aware of demand made by B.W. Kenzi on their behalf, and the response it elicited from the Respondent through its Advocates, but they opted not to make full disclosure about this, to their present Advocate. They issued a second letter of demand, way after the alleged termination, to pave way for filing of the Claim.

24. Where an Employer has made a mistake in termination of an Employee's contract, and makes amends by recalling the Employee, as soon as demand for remedy is made, the Court does not think the Employer can be held accountable in a Claim for unfair termination. A remedy of return to work, was offered within a very short period, of the Claimants being asked to leave employment. The Respondent sought to make immediate amends. Why did the Claimants decline the offer, and insist on pursuing monetary redress?

25. The prayers for compensation and notice pay have no merit, and are declined.

26. There are annual leave forms, signed by the Claimants, indicating they were not denied leave entitlement. They do not explain these forms satisfactorily, alleging that, what was paid was bonus. There is no document showing what was paid to be bonus, instead of leave. The forms, signed by the Claimants clearly state what was paid was annual leave. There are leave summaries, applicable to the 14 Employees of the Respondent, exhibited by the Respondent. And, if 2 of the Claimants were denied annual leave for a period of 14 years, why did they not at any time while in employment, make a demand for annual leave? They have not, in light of the documents exhibited by the Respondent, and the shortcomings in their oral evidence, persuaded the Court to accede to their prayers for leave pay.

IT IS ORDERED: -

a. The Consolidated Claims are rejected.

b. No order on the costs.

Dated, signed and released to the Parties, under Covid-19 Judiciary and Ministry of Health Guidelines, at Chaka, Nyeri County, this 29th day of July 2020.

James Rika

Judge