



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 51 OF 2016
CONSOLIDATED WITH CAUSE NO 136 OF 2016

DANIEL OPAR AND 15 OTHERS [51 of 2016]

STEPHEN NDOLO & 21 OTHERS [136 OF 2016].....CLAIMANTS

VS

TOYO CONSTRUCTION COMPANY LIMITED.....1ST RESPONDENT

GIEFCON LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimants filed two separate claims on 4th February 2016 and 18th February 2016. In a ruling delivered by my brother, **Makau J** on 13th January 2017, the suit against the 1st Respondent was struck out.
2. On 23rd January 2017, a consent order was recorded by which the two matters were consolidated.
3. At the trial, Stephen Odhiambo Ndolo testified for the Claimants while the 2nd Respondent called its Human Resource Manager, Cavine Kebaso. The parties also filed written submissions.

The Claimants' Case

4. In their Memorandum of Claim dated 18th February 2016, the Claimants state that they were employed by the 1st Respondent, through its agent the 2nd Respondent, under an unwritten contract of service.
5. The Claimants add that they were employed in diverse positions, ranging from skilled to unskilled labourers.
6. The Claimants further state that they were employed on contract basis on diverse dates beginning 6th August 2012 until 31st October 2015, when their employment was terminated.
7. The Claimants accuse the Respondents of failure to pay their terminal dues.
8. The Claimant further claim that they were underpaid, that the Respondents did not remit their statutory dues and they were not allowed to go on leave.
9. The Claimants aver that they sought their terminal dues from the Respondents, through their union officials, but the issue was not resolved.
10. The Claimants further aver that on 8th June 2015, they downed their tools following a strike notice issued by the Union due to unfair and poor working conditions, harassment, unfair terminations and underpayment. The Union engaged the Ministry of Labour to conciliate the dispute.

11. The Claimants state that the County Labour Officer presided over the conciliation and a return to work formula was agreed upon in the following terms:

- a) A recognition agreement to be signed;
- b) NSSF deductions and remittances to be effected;
- c) Service pay to be looked into positively;
- d) Accrued annual leave to be granted and/or paid;
- e) Employment records to be furnished to the Labour Officer for scrutiny of wages;
- f) Payment of housing allowance to be based on scrutiny of employment records of the Respondents;
- g) Travelling allowance to be paid in accordance with the Building and Construction Industry Order;
- h) Certificates of service to be issued in accordance with Section 51 of the Employment Act, 2007.

12. The Claimants state that the Respondents failed, ignored and/or refused to comply with the return to work formula, especially with respect to the issues of underpayment, house allowance, annual leave and travelling allowance, which were abandoned without any discussions.

13. The Claimants claim compensation for unlawful and unfair termination, notice pay, unlawful NSSF deductions, house allowance and underpayment. They also ask for service pay and certificates of service.

14. The Claimants further ask for costs of the case plus interest.

The 2nd Respondent's Case

15. In its Memorandum of Response filed in court, the 2nd Respondent states that pursuant to a Memorandum of Agreement between it and the 1st Respondent, the 2nd Respondent undertook to provide manpower to work in the 1st Respondent's project.

16. The 2nd Respondent avers that, the nature of the 1st Respondent, being project based, the contract entered into between them, was for a fixed term from 30th July 2012 until 29th July 2016.

17. The 2nd Respondent further avers that following the agreement, it engaged the services of the Claimants on diverse dates and for diverse tasks, as per the requirements of the 1st Respondent, ranging from skilled to unskilled labourers.

18. The 2nd Respondent adds that being a project based engagement, each and every one of the Claimant's engagement concluded on diverse dates as such, they were issued with one month's notice to that effect.

19. The 2nd Respondent goes on to state that the Claimants were duly paid their wages in accordance with the Minimum Wages Order applicable at the time.

Findings and Determination

20. There are two (2) issues for determination in this case:

- a) Whether the Claimants have made out a case of unlawful termination of employment;
- b) Whether the Claimants are entitled to the remedies sought.

Unlawful Termination?

21. The Claimants' action arises from letters issued by the 2nd Respondent on diverse dates stating:

"RE: TERMINATION OF CONTRACT

Giefcon's nature of business is project-based and terms of engagement are tied to the project. Though the company thrives in combining the power of its specialty and passion for robust human resource practices, the dictates of the business puts a lot of premium on productivity and performance.

In the month of, several projects are coming to a closure.

In view of the above and given that your section is completed, you will work up to and including thereafter further engagement will be on available opportunities.

In case you are not willing to work up to the said dates kindly give us a one week notice in writing.

Thank you for working with us.

Yours Sincerely,

(signed)

Cavine Kebaso

Human Resource Manager

For Giefcon ltd

22. In denying the Claimants' claim that their employment was unlawfully terminated, the 2nd Respondent states that the Claimants were employed for a specific project, upon whose completion their employment lapsed.

23. In his testimony before the Court, the Claimants' witness, Stephen Odhiambo Ndolo stated that he and his co-claimants were employed on different dates to perform specific tasks in the construction of a berth at the Port of Mombasa. Ndolo further told the Court that the tasks came to an end on different dates.

24. It was therefore common cause that the Claimants were engaged in specific project work and their employment period was tied to this project.

25. In his decision in ***Benson Omuyonga v Laxmanbhai Construction Limited [2014] eKLR Rika J*** stated the following:

“The construction industry is based on projects with specific beginning and specific ending. Employees are contracted to work for the duration of the Project.”

26. This position was adopted by ***Nduma J*** in ***Daniel Mungai v Kabuito Contractors [2016] eKLR***.

27. The Claimants in the case now before me did not prove that they were chased away from the Project in which they had been employed. Their claim for compensation for unfair termination of employment is therefore unsustainable.

Other Remedies

28. Because the Claimants had not been issued with contracts of employment, they could not tell for sure when their employment would terminate. Their employer was therefore under a duty to issue termination notices of not less than one month as provided under Section 35 of the Employment Act.

29. In the course of the trial, it emerged that some of the Claimants were issued with notices of less than one month. The Court finds and holds that these Claimants are entitled to pay for the notice period shortfall.

30. The Claimants claim unlawful NSSF deductions and service pay. In response, the 2nd Respondent claims to have made good all unremitted NSSF dues. However, no conclusive documentary evidence was availed to the Court in support of this position.

31. The Claimants further claim house allowance and underpayment. From the evidence on record, the Claimants were paid on the basis of a daily wage which would ordinarily be inclusive of house allowance. The Claimants did not adduce evidence to prove their claim for underpayment. In the result, both the claim for house allowance and underpayment fail and are dismissed.

32. In the end, I make the following orders:

a) The 2nd Respondent shall, within the next thirty (30) days, from the date of this judgment, tabulate and pay in lieu of notice period shortfall to all the Claimants whose notice period fell below the one-month threshold;

b) The 2nd Respondent shall, within the next thirty (30) days from the date of this judgment, present to the Claimants' Advocate conclusive documentary proof of remittance of all NSSF dues on account of the Claimants;

c) The 2nd Respondent shall, within the next thirty (30) days from the date of this judgment, issue the Claimants with certificates of service;

33. Matter will be mentioned on 23rd November 2020 to confirm compliance.

34. Each party will bear their own costs.

35. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyange h/b for Dr. Mbogoh for the Claimants

Miss Opolo for the 2nd Respondent