



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1644 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

SAMMY CHEGE NGARI.....1ST CLAIMANT

JOHN KAIRU KIMAMU.....2ND CLAIMANT

BONIFACE MUNYAO NGEWA.....3RD CLAIMANT

VERSUS

J. M. MURITU CONSTRUCTION.....RESPONDENT

JUDGMENT

On 14th September 2012, the Claimants filed their Memorandum of Claim dated 15th September 2014 in which they sued the Respondent for unlawful summary dismissal. The 1st, 2nd and 3rd Claimant respectively, seek the following reliefs:

- a. Public Holiday pay for 10 years, 21 years and 20 years respectively,
- b. Annual leave for a period of 10 years, 21 years and 20 years respectively,
- c. Service pay,
- d. House allowance,
- e. Notice pay,
- f. Balance of their respective salaries taking into account the minimum wage of a painter.
- g. Damages for unlawful loss of employment.
- h. Costs of the claim.
- i. Any other or further relief as this Court may deem fit or appropriate to grant.

The Claimants aver that they were employed by the Respondent in 2001, 1990 and 1991 respectively, in the capacity of painters during which period they participated in various construction projects that the respondent was undertaking, until 24th September 2011 when they were dismissed from employment. They further aver that they were not provided with written contracts of employment as required by section 9 of the Employment Act 2007.

During trial, CW1, the 2nd Claimant in this case, testified that he was employed to do carpentry and joinery but was made to do other jobs. It was his evidence that he worked on various government projects on diverse dates from 1990 to 2007, which jobs would take a period of up to 2 years. It was also his testimony that they would work at RW1's establishments in Githurai and Embakasi and also his home.

It is the 2nd Claimant's testimony that he worked for 6 days in a week at the rate of Kshs.300.00 per day, which payment was made on

Saturdays. He admitted that the only evidence he had of employment was a letter issued to him when he was giving evidence in court.

During cross-examination, he admitted that he was not issued with an employment letter but contended that he was allocated work by the general foreman and paid by RW1. It was his testimony that the Respondent issued him with gate passes but admitted to not having them in court. He also conceded that his worker's ID did not have a rubber stamp.

CW2, the 1st Claimant herein, reiterated CW1's evidence concerning their termination, the nature of their work, the work they did and their working hours but testified that his payment rate was Kshs.250.00 per day. It was also his testimony that the Claimants were known to the Respondent.

During cross examination, CW2 conceded that the dates of commencement of his employment was contradicting. It was his testimony that although he had been employed to work as a painter, he did any available work when he was not required to paint. He testified that he was paid in cash but did not have evidence of receipt of the money. It was also his testimony that they did not receive their terminal benefits.

Upon re-examination, it was his testimony that he was employed in 2003 and not 2001 as indicated in the Memorandum of Claim.

CW3, the 3rd Claimant, reiterated CW2's evidence concerning their termination, the nature of their work, the work they did, their working hours and payment rate. However, it was his testimony that they worked on holidays and did not take leave. He confirmed that the Claimants were known to the Respondents and that they had worked together.

During cross examination, the CW3 testified that it was the Respondent's foreman and not the Respondent, who sought their employment services. He conceded to not having any employment documents but testified that he had a gate pass. It was his testimony that they made futile attempts to be issued with letters of appointment. He denied working for another person other than RW1.

In its Response dated 16th October 2012 and filed on 17th October 2012, the Respondent denies the averments in the Claimants' Memorandum of Claim and ever employing the Claimants. The Respondent avers that the claims are malicious, ill-intentioned and calculated to embarrass it. It is the Respondent's case that the Claimants are not entitled to prayers sought and that their claims should therefore be dismissed.

RW1 and the owner of the Respondent Company, testified that the Respondent is a business name and not a company. He confirmed that he had seen the Claimants but did not know them. He denied ever employing them but admitted that they were hired by his foreman. He reiterated the Claimants' testimonies concerning the nature of their work, the work they did and their working hours.

However, it was his testimony that the last project he undertook was in 2007 as a result of the 2007/2008 skirmishes. He admitted that he had weekly engagements with the Claimants for the period he had work. It was his testimony that the projects they undertook were for durations of up to three months but that there were no jobs in between tenders.

He denied having issued the Claimants with their employment documents. It was his testimony that the signatures on the vouchers were not his.

During cross examination, it was his testimony that the Respondent's offices were in Kirinyaga Road. He denied carrying out works at Langata Barracks, the Ministry of Lands and the Ministry of Water. However, he admitted to having rental houses in Githurai.

Submissions by the Parties

The Claimants submissions dated 4th December 2018 are based on the following issues: whether the Respondent was rightly sued, whether the Claimants were casual employees, whether they were unfairly terminated from employment and whether the Claimants are entitled to the orders sought in the Memorandum of Claim.

The Claimants submit that the Respondent was rightly sued since it admitted to being a limited liability company, and that the claim that it is a registered business name is an afterthought.

It is the Claimants' submissions that they were not casual employees as they worked on a continuous basis over the course of several months. They further submit that even if they were indeed casual workers, their employment should be converted under section 37(1) of the Employment Act as they have discharged the burden of proof as required under the section. The Claimants rely on the case of *Nelson Ogeto Mogaka & 15 Others vs. Geothermal Development Company Limited [2014] eKLR*.

The Claimants submit that section 35(1)(c) of the Employment Act is applicable in their employment relationship and that their employment was unfair and unlawful (sic) contrary to the provisions of section 45 (4) (b).

The Claimants submit that they are entitled to the orders sought because the Respondent has not proved its case on a balance of convenience.

There is no record of the Respondent's submissions in the court file.

Determination

From the evidence on record, the following are the issues for determination:

1. Whether the Claimants were casual employees of the Respondent and if so, whether their employment should be converted to permanent employment.
2. Whether the Claimants employment was unlawfully and unfairly terminated.
3. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants were casual employees of the Respondent and if so, whether their employment should be converted to permanent employment

There is no evidence that the claimants were ever employed by the respondent either continuously or intermittently. The petty cash vouchers submitted by the claimants do not show that they were issued by the respondent. The receipts for rent also do not show the connection with the respondent.

Under the Labour Institutions (Building and Construction Industry) (Wage) Order the law provides for payment of daily wages for General Tradesman (artisans) which include carpenters, joiners, masons, stone dressers, bricklayers etc. It is in recognition of the nature of work in building industry which only last for as long as the construction work is in progress. There can therefore be no presumption of conversion of employment as provided under Section 37(1) of the Employment Act.

From the foregoing I find that the claimants have not proved their case with the result that the same is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE