



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 704 OF 2016

BETWEEN

BAKARI ALI MBEGA.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANYRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Llyod & Partners, Advocates for the Respondent

JUDGMENT

1. Through his Statement of Claim filed on 26th September 2016, the Claimant prays for the following orders against his former Employer, the Respondent herein: -

- a) 1 month salary in lieu of notice at Kshs. 8,400.
 - b) Annual leave pay of 7 years, at 21 days each year, at Kshs. 51,450.
 - c) Public holidays at Kshs. 49,000.
 - d) 12 months' salary in compensation for unfair termination at Kshs. 100,800
- Total...Kshs. 209,650
- e) Declaration that termination was unfair.
 - f) Costs.
 - g) Interest.
 - h) Any other relief the Court deems fit to grant.

2. He avers he was employed by the Respondent as a Field Assistant/ Supervisor, on 1st September 2008. He was paid a weekly wage of Kshs. 2,100. Around July 2015, the Respondent started delaying Claimant's wages. Upon enquiry, the Claimant was not given an answer by

the Respondent. He was only asked to go home, and would be recalled later. He was not recalled. He was kept out of the workplace by Police Officers hired by the Respondent. It was not until 20th February 2016, that the Respondent terminated Claimant's contract formally. No reasons were availed justifying the decision. There was no notice. There was no hearing. The Claimant avers that termination did not meet the minimum standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007.

3. The Respondent filed its Statement of Response, on 22nd February 2018. The Respondent is involved in growing of sugarcane and production of sugar, and sugar byproducts. Sugarcane takes approximately 12 – 18 months to mature. Intensive labour is only needed during sowing and harvesting. Human resource needs therefore vary. Casual Workers are recruited when the season demands. The Claimant was one such Worker. He left on his own volition, in February 2016. He did not work uninterruptedly. His prayers are meritless. The Respondent prays for dismissal of the Claim with costs.

4. The Claimant, and the Respondent's Legal Officer David Kulecho, testified for the respective Parties on 18th December 2018 when hearing closed. The matter was last mentioned on 21st February 2019, when Parties confirmed filing of their Closing Submissions.

5. The Claimant, in his testimony, adopted his Pleadings, Witness Statement and Documents on record. He did not have a document showing he earned Kshs. 2,100 monthly. He was not issued a written contract. He left on 20th February 2016. He worked in continuity. He signed attendance register, but not daily. He was prevented by Police Officers from accessing his workplace. He testified he worked 6 days in a week, but did not work on Public Holidays. He withdrew the prayer for Public Holidays' pay.

6. On cross-examination he testified that he was in casual employment. There were other Employees in regular employment. He was in casual employment, receiving a daily rate of Kshs. 350. He was paid in accordance with the days worked. He chose when to go to work. Work was not constantly available. It depended on the sugarcane season. He worked in jaggery section. This section was overseen by another Company called Unifresh, which was separate from the Respondent. Police came to the workplace only when the Workers were on strike. Redirected, the Claimant told the Court he worked for many years.

7. Counsel David Kulecho testified that sugarcane matures within about 15 months. Respondents operations are governed by the seasons. These seasons include planting, harvesting and milling. Different human resource needs arise seasonally. Planting requires more Workers. Casual Workers are therefore engaged, depending on the season. The Claimant was engaged casually. He was paid Kshs. 350 daily. His contract was not terminated by the Respondent; he opted not to go to work after February 2016. The Respondent does not follow up Casual Workers who fail to show up, considering the nature of their work. The Claim is meritless, as the Claimant was in casual engagement.

8. On cross-examination, Counsel testified he joined the Respondent in the year 2017. He did not interact with the Claimant. The Claimant had the freedom to report, or not report to work. He was a Casual Worker. Attendance records were not availed to the Court. Redirected, Counsel told the Court it was impracticable to pay its big number of Casual Workers daily. The Witness sourced his evidence from the employment records held by the Respondent, and was not in any way hampered by having joined the Respondent only in 2017.

The Court Finds:-

9. Upon cross-examination, the Claimant made the following statements:-

§ I was in casual employment.

§ I was paid for days worked.

§ I received a rate of Kshs. 350 daily.

§ I was paid in accordance with the days worked.

§ I opted when to go to work.

§ There were about 600 Casual Workers.

§ The number was not constant.

§ It depended on the season.

10. These statements agree with the evidence given by Counsel David Kulecho, which includes the following:-

§ Operations vary depending on the season.

§ Different number of Workers is required for different seasons.

§ Casual Workers are engaged daily when there is sufficient work.

§ The Claimant was a Casual Worker.

11. The Parties agree in their evidence that the Claimant was a Casual Worker. The nature of the business carried out by the Respondent- sugarcane farming- and the role discharged by the Claimant, did not call for regular employment. It did not call for conversion of the Claimant's terms into regular employment under Section 37 of the Employment Act 2007. It does not call on the Court to vary the casual terms and declare the Claimant to have been employed on terms and conditions of service consistent with the Employment Act, under Section 37[4] of the Act.

12. Parties have resolved any questions surrounding the nature of their relationship, in their evidence. The Claimant served as a Casual Worker in the sugarcane plantation. He had the liberty to come to work, and leave, whenever he wished. His presence or absence, from the workplace was entirely at his discretion. He told the Court, when it rained for instance, he could stay at home, without disciplinary consequences. The Respondent did not have any obligation to look for the Claimant, if he failed to report to work, and the Claimant had no reasons to explain why he did not report for work on any given day. Mutuality of obligations rose and fell with the sun, within a span of 24 hours, and no more.

13. In light of the Parties' evidence on the nature of their relationship, the Respondent cannot therefore be asked to shoulder employment liability, arising out of statutory rights, protections, and guarantees enjoyed by regular Employees, under the Employment Act 2007. There is consensus that the Claimant was in casual employment. He concedes he did not work in continuity. Unlike the Grievant, in the decision relied on by the Claimant, ***Kenya Plantation and Agricultural Workers Union v Kenya Agricultural & Livestock Research Organization [2016] e-KLR***, the Claimant herein Bakari Ali Mbega, was not always at work. The Grievant in the decision above was a Plumber, whose role was central throughout, not seasonally, to the work of the Respondent, a State Corporation involved in agricultural research. He established that he worked in continuity. Bakari Ali Mbega on the other hand was a farmhand, a self-acknowledged Casual Worker, engaged according to the planting, harvesting and other seasons which defined Respondent's operations. The decision cited by the Claimant above seems inapplicable to the facts in this dispute, and is quite distinguishable.

IT IS ORDERED:-

a) The Claim is rejected.

b) No order on the costs.

Dated and delivered at Mombasa this 27th day of March 2019.

James Rika

Judge