REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1450 OF 2012

(Consolidated with 1453, 1456, 1457, 1458, 1459, 1470, 1471, 1472,

1473, 1474, 1475, 1476, 1477, 1478, 1479 and 1527 of 2012)

CHRISTOPHER MUTUNGA MUNYWOKI.....CLAIMANT

VERSUS

KENBLEST LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by the respondent as casual employees on diverse dates, years and in various capacities at Thika Town. On 1.12.2009 the claimants among other colleagues went on strike citing their main grievance as poor terms and conditions of service including low pay and failure by the employer to appoint them on permanent basis. Other grievances included overtime pay, holidays to be paid double, leave and night allowances, extra duties like sweeping, NSSF and NHIF to be included. The dispute was conciliated before the District Labour Office Thika on 3.12.2009 but not resolved and by an agreement to disagree, the employer welcomed the production team back to work while the case for wrappers was to await a meeting with the union under the CBA. The employer further undertook to pay any lawful dues to the striking employees not willing to resume work.

2. The claimants never resumed work and the matter was escalated to the Provincial Labour Officer Nyeri and after some meetings, the respondent was directed to pay the affected employees leave due for 3 years. Any public holidays and Rest days worked at double rate, plus maternity leave not compensated. As directed the respondent complied by computing the dues payable and deposited the same at the District Labour office Thika. Thereafter the claimant received the same and acknowledged by signing.

3. The claimants were not satisfied and the matter was escalated further to the Labour Commissioner on the issue of failure to pay leave to Mr. Alfred Lumwagi Lisuza and 71 others. However, on 4.6.2010 the commissioner declined to refer the matter to the Industrial Court stating that all the claimant's lawful dues had been fully settled and the file closed.

4. The claimants never gave up and they brought the said suits before this court separately August 2012 claiming the following:

(a) Salary arrears occasioned by underpayment

(b) Unpaid House allowance

(c) Leave allowance

(d) Payment for public holidays worked

(e) Service pay

(f) Costs and interest

(g) Any other relief as the court may deem fit and just to grant.

5. The respondent filed defence against each suit but on 12.10.2012 all the files were by consent consolidated under this file and parties given leave to amend pleadings and the respondent did so on 3.12.2012. The defence contained a preliminary objection on ground that the claimants lacked *locus standi* to sue in their name since they were members of a trade union recognized by her and with which they had executed a CBA. In addition the respondent denied the reliefs sought by the claimants and averred that the claimants were causal employees who never worked continuously she further averred that they were paid all their dues through the Labour Office during conciliation process and the Labour Commissioner confirmed the same by his letter dated 4.6.2010 that all the claimant's lawful dues were fully settled and their file closed. She therefore prayed for the suit to be dismissed with costs.

6. The Preliminary Objection was heard before Ndolo J and by her ruling delivered on 22.1.2014, it was dismissed and the suit allowed to go for trial. The file was placed before me on 31.10.2018 for hearing and both sides called one witness each. Thereafter their counsel filed written submissions.

Claimant's Case

7. Mr. Christopher Mutunga Munyoki (Cw1) testified that he worked for the respondent as a Rackman in the production section on casual basis from 24.8.1999. He started with a daily wage of Kshs.127.50 but later it was increased to Kshs.327. That he worked continuously for 10 years without being appointed as permanent employee. That he was not given any rest day or public holiday. As a result, he joined the other claimants and other casual staff in staging a strike on 1.2.2009 complaining about the said grievances. He contended that for a long time they worked as casual workers whereby they used to give their identity cards to the supervisor to select whoever he wanted for each day and if one was not lucky, he went home to try the next day.

8. Cw1 further testified that he was not a member of a trade union because the employer was against the union. That when the employees had grievances they met the employer told them to take the pay or leave. They then took the money and went for good. He personally received Kshs.16,276 after termination as his service pay but he described it as little. He therefore prayed for the reliefs sought in the suit.

9. On cross examination Cw1 admitted that all the 131 casuals went on strike without prior notice. He further admitted that they met the employer at the Labour Office on 3.12.2018 where they disagreed on settlement of dues and signed a return to work agreement. He clarified that the agreement signed did not include service pay but it was on condition that no one was to be victimized.

10. Cw1 further confirmed that the striking workers never resumed work and later they were called to collect their money which did not include service pay. He concluded by stating that they failed to report back to work because they were barred by the security guards with instructions from the management.

Defence Case

11. Mr. Samson Osugo Bukuro testified for the respondent as Rw1. He is the respondents HR Assistant having access to the employees records. He stated that the claimant was employed by the respondent in the production section on casual basis. He further stated that the respondent had signed Agreements with the Bakery, Confectionary, Food Manufacturing and Allied Union.

12. He further testified that on 1.12.2009, the claimant called and participated in a strike without prior notice or demand of any kind whatsoever to the respondent and contrary to the procedure set out in the Recognition Agreement and section 76, 77 and 78 of the Labour Relations Act. That the respondent issued an order to the claimants to end the strike under section 78 and 80 of the Act but they disobeyed and threatened the majority employees who were opposed to the unprotected strike.

13. Rw1 further testified that as a result of the strike, the respondent of strike, the respondent suffered huge loss and reported the dispute to the District Labour Officer Thika. That conciliation meeting was held on 3.12.2009 presided over by the District Labour Office where the respondent agreed to receive back the striking employees if they wished to resume work and pay lawful dues to those not willing to resume work but the claimant and other casual employees refused to report back to work.

14. Rw1 further testified that, upon the District Labour Officer failing to resolve the dispute, he referred the same to the provincial Labour Officer Nyeri. That after hearing the case, the provincial Labour Officer directed the respondent to pay the claimants terminal dues including leave, maternity leave, public holidays and rest days worked. That deposited the money and was later paid to the claimants and the Labour Commissioner confirmed in writing that the claimants were paid all their lawful dues and the file closed.

15. Rw1 further testified that the claimants were casual employees receiving daily wage, which was inclusive of house allowance. He denied that the wages were underpaid and contended that it was in accordance with the statutory wage prescribed by the General Wage Order 2009. He further denied the claim for annual leave and contended that as casual employees, the claimants never worked continuously. He further denied the claim for public holidays worked and maintained that they were fully compensated through the Labour Office after the strike. Finally, he denied the claim for severance pay contending that the claimants were beneficiaries of NSSF contribution.

16. On cross examination, Rw1 stated that he was present when the claimants went on strike and that he participated in the reconciliation process. He maintained that after the conciliation meeting, the claimants resigned and thereafter collected their dues from the Labour Office. He admitted that the law allows for conversion of casuals after continuous service.

Analysis and Determination

17. After careful consideration of the pleading evidence and submissions, there is no dispute that the claimants were employed by the respondent on casual basis earning a daily wage. There is further no dispute that on 1.12.2009 131 employees including the claimants went on an unprotected strike, without serving prior notice to the employer, demanding better terms of service. There is also no dispute that the dispute was reported to the District Labour Officer Thika but after conciliation, it was not resolved and it was referred to the Provincial

Labour Officer Nyeri who resolved the dispute by directing the respondent to pay the striking workers including the claimants terminal dues including leave, rest days, public holidays and maternity leave for 3 years. It is also common knowledge that the respondent complied with the said directive by depositing the money at the District Labour Officer from where the claimants and other striking workers collected it and left for good.

18. It is further common knowledge that when the claimants sought assistance of the Labour Officer to sue the employer in the Industrial Court, the Labour Commissioner refused and wrote that the dispute had already been resolved and the file closed. The issues for determination are:-

(a) Whether the claimants' casual employment converted to term contract by dint of section 37 of the Employment Act.

(b) Whether the claimants are entitled to the reliefs sought.

Conversion from casual employment

19. Section 37(1) of the Employment Act provides for conversion of casual employment to term contract as follows:

"37(5) Not withstanding any provisions of this Act, where a casual employee;

(a) Works for a period of a number of continuous working days amounting in the aggregate to the equivalent of not less than one month, or

(b) Performs work which cannot be completed within a period of a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)

(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days."

(3) ...

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the industrial court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act."

20. The question that begs for answers is whether the claimants, who have acknowledged that they were casual employees, met the criteria for conversion to term contract. The criteria under section 37(1) of the Act is continuous service for an aggregate period or working days equaling to one month or 3 months in case of specific task. In this case, the respondent contended that the claimants never worked continuous and produced two huge volumes of documents including Attendance summaries to support that. The documents were produced by consent of the claimants. On the other hand Cw1 admitted in evidence that the reason why they went on the unprotected strike was because despite working for many years, there was no guarantee of job on every single day. That every day they were required to keep on trying their lack by dropping their Identity Cards at the designated place for the supervisor to select whoever he wanted and if one was not lucky, he went home to try the following day. Such trend in my considered view confirms that the claimants never met the threshold of continuous service required for conversion of casual employment to a term contract. Consequently

I return that the claimants' casual employment herein never converted to term contract of service by dint of section 37(1) of the Employment Act.

Reliefs sought

Underpaid salary

21. The claimants pleaded that they were entitled to salary negotiated by the trade union vide CBA of 2009. They then backdated the same to the year when they joined the company. The respondent denied the claim for underpaid salary and contended that she paid the claimants the daily wages gazette by the Government under the Wage Orders. After considering the pleading, evidence and submissions, I decline to award the backdated alleged under payments. First the claimant were not union members and they have not proved that they were charged any Agency fees in order for them to enjoy the terms of service negotiated by the union. Secondly there is no way one can backdate his wages for 2009 to let say 1999. The pay for 1999 must have been less than that of 2009.

House Allowance

22. This claim is also dismissed because the claimants were earning a daily wage, which under the Gazetted General Wage Order, is inclusive of house allowance.

Leave

23. The claim for leave is also dismissed because it was part of the grievances settled during the conciliation process and the claimants accepted the money and left their job.

Service pay

24. This claim is also dismissed because I have already found herein above that the claimants were casuals who never worked continuously and as such their terms of service never converted to what is common called permanent employment. Secondly, they never objected to the records of NSSF produced by the Employer as exhibits which showed that the employer contributed NSSF for their social security. Consequently, under section 35(6) of the Employment Act, the claimants are disqualified from getting service pay because the employer remitted their social security benefits to the NSSF.

Conclusion

25. I have found that the claimants were casual employees and therefore not entitled to the reliefs sought. I therefore dismiss their suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE