



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO. 286 OF 2013

*(Consolidated with cause no. 281, 282, 283, 284, 285, 287 & 288
of 2013)*

JOSEPH MUMO.....CLAIMANT

VERSUS

KYANZAVI FARMERS COMPANY LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought the suits separately on 1.3.2013 alleging that they were employed by the respondent on diverse dates between 1991 and 2002 but they were unfairly terminated by the respondent's new management on 3.3.2011. They all sought the following reliefs:

- a) Salary in lieu of notice
- b) Service pay
- c) Accrued leave
- d) Compensation for unfair termination
- e) Costs and interest
- f) Any other relief the Court may deem just.

2. The respondent filed a similar defence in all the said suits contending that she employed the claimants on casual basis and denied that she dismissed the claimants unfairly. On the contrary she averred that the claimants illegally absconded duty and as such she acted within the law in dismissing them. In addition she averred that the claimants being casual employees, they were incapable of accruing the reliefs sought by their respective suits and prayed for the same to be dismissed with costs.

3. In answer to the defence, the claimants denied that they were casuals and contended that they worked continuously from their respective date employment till 3.3.2011 when they were unfairly terminated by the respondent. They further denied the allegation by the respondent that they absconded or absented themselves from work without permission and maintained that it is the respondent who dismissed them without notice or chance to defend themselves and evicted them from her premises.

4. The suits were consolidated on 25.5.2015 under ELRCC No. 287 of 2013 but when the suits came up for hearing the counsel agreed to proceed under this suit. They further agreed to dispense with calling of witnesses instead opted to adopt the pleadings and documents and dispose of the suit by written submissions.

Claimants' case

ELRC 281, 282, 283, 284, 286, and 288 of 2013

5. The claimants in the above 5 cases allege that they were all employed by the Respondent in March 2002 as a security guard at an alleged daily salary of Kshs. 237.00 which converts to a monthly salary of Kshs. 7,110. They further contended that they continuously worked as such, diligently and with loyalty until 03/03/2011 when they were terminated by the respondent. They described their termination as wrongful and unfair because it was done in without prior notice, or in accordance with the procedure provided under the Employment Act 2007 and they were denied their terminal benefits.

6. They therefore each prayed for the following reliefs against the

Respondent:

- a) One month's salary in lieu of notice Kshs. 7,110
- b) Service pay @ 15 day pay x 9 years Kshs.31,995
- c) Accrued leave @ 26 day x 9 years Kshs. 55,458
- d) Compensation for wrongful dismissal being 12 months wages Kshs. 85,320

Total kshs. 179,883

- e) Costs of the suit plus Interest

ELRC 285 of 2013 – Wathome Ndavi

7. The claimant in this case alleges that he was employed by the Respondent in February 1991 as a driver at an alleged daily salary of Kshs. 250.00 which converts to a monthly salary of Kshs. 7,500. He contended that he continuously worked as such, diligently and with loyalty until his services were terminated by the Respondent on 03/03/2011. He further contended the termination as wrongful and unfair because it was done without prior notice, or in accordance with the procedure provided under the Employment Act 2007 and his terminal benefits were withheld.

8. He therefore each prayed for the following reliefs against the Respondent:

- a) One month's salary in lieu of notice kshs. 7500
- b) Service pay @ 15 day pay x 20 years kshs.75000
- c) Accrued leave @ 26 day x 20 years kshs. 130000
- d) Compensation for wrongful dismissal being 12 months wages kshs. 90000

Total kshs. 302500

- e) Costs of the suit plus Interest

ELRC 287 of 2013 – Michael Ndunda

9. The claimant in this case alleges that he was verbally employed by the Respondent in April 1992 as a Security guard for daily salary of Kshs. 450.00 which converts to a monthly salary of Kshs. 13,500. He contended that he continuously worked as such, diligently and with loyalty until his services were terminated by the Respondent on 03/03/2011. He further contended the termination as wrongful and unfair because it was done without prior notice, or in accordance with the procedure provided under the Employment Act 2007 by being heard and his terminal benefits were withheld.

10. He therefore each prayed for the following reliefs against the Respondent:

- a) One month's salary in lieu of notice Kshs.13500
- b) Service pay @ 15 day pay x 19 years Kshs.128250
- c) Compensation for wrongful dismissal being 12 months wages Kshs. 162000

Total Kshs. 303750

- d) Costs of the suit plus Interest

Defence case

10 In response to the allegations by the claimants, the respondent, through her Managing Director Mr. Juvenalis Kavita stated that she engages labour on temporary basis because her farming operations are seasonal. She contended that the claimants were casual employees earning a daily wage and she remitted NHIF and NSSF contributions for them during the months when they worked. She further contended that the claimants habitually reported to work late absented themselves from work without permission or lawful excuse and maintained that she acted lawfully in dismissing the claimants.

Claimants' submissions

11 The claimant submitted that they worked continuously from the dates pleaded as the starting time till 3.3.2011 when they were dismissed and evicted from the staff quarters. They therefore contended that they had converted from casual employees to regular employees under a term contract. They relied on my decision in *Sikuku nzuki Ngii vs Gacal Merchants ltd [2015] eKLR* to fortify the alleged conversion.

12 They further urged that the respondent has not produced any employment records to disprove their allegations of continuous employment and entitlement to the reliefs sought and relied on *Jonathan Zacharia & 24 others vs Bulk Warehouse Management & 2 others* to urge that the burden of disproving verbally alleged terms of contract by the employee in any suit lies with the employer.

13 The claimants submitted that their continuous employment was abruptly terminated by the respondent on 3.3.2011 when the new management evicted them from their staff quarters with their families at night. They further submitted that the termination was unfair

because it was without any just cause or reason and without being heard as required under section 41 of the Employment Act. They therefore prayed for compensation under section 49 of the Act.

14 The claimants further submitted that they are entitled to the reliefs sought including service pay because the employer never registered them to any social security welfare or protection scheme as required by section 35 of the Act. They concluded by urging that the respondent has not denied their employment relationship but only described them as mere casuals without evidence of employment records. In their view, casual employment is not a licence to abuse employment and human Rights.

Respondent's submissions

15 The respondent submitted that she lawfully and fairly summarily dismissed the claimants for gross misconduct, namely, absenteeism from work without permission or lawful cause by all the claimants in Cause No. 281,282,283,284,285,286 and 288 of 2013 while the claimant in cause No.287 of 2013 was caught selling bananas from the respondent's farm illegally. She further submitted that the said misconduct justified the summary dismissal of the claimant under section 44(4) of the Employment Act. She therefore urged for a finding that she had discharged her burden of proving the reason for terminating the claimants' employment as required by section 43 of the Employment Act. She relied on *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014]eKLR* to support the foregoing submission.

16 On the reliefs sought, the respondent submitted that the claimants were not entitled to the same because they were all casual employees as pleaded in their respective Claims. She urged that service pay is only payable under section 35(5) of the Employment Act to employees who are paid on monthly basis and not daily like the claimants. Likewise she submitted that the claimants were not entitled to any annual leave or pay in lieu because they were casual employees. She urged that casual employees are only entitled to leave where their employment converts to permanent employment.

17 She relied on the Court of Appeal decision in *Krystalline Salt limited v Kwekwe Makele & 67 others [2017] eKLR* where an award of salary in lieu of notice and leave was set aside on grounds that, although the claimants worked daily, they were not entitled to termination notice because their work depended on availability of raw materials, and that they were not entitled to leave because they were given one unpaid rest day after every 10 days. She concluded by contending that the claimants in this case took all their rest and leave days and prayed for the suit to be dismissed with costs.

Analysis and determination

18 After careful consideration of the pleadings, evidence and submissions filed, there is no dispute that the claimants were employed by the respondent as casual employees on diverse dates between 1991 and 3.3.2011 when they were summarily dismissed by the respondent. The issues in dispute and therefore due for determination are:

- a) Whether the claimants' casual employment converted to a term contract under Employment Act.
- b) Whether the summary dismissal of the claimants was unfair.
- c) Whether the claimants are entitled to reliefs sought.

Conversion from casual employment

19 The claimants cited *Sikuku Nzuki Ngii vs Gacal Merchants ltd [2015]eKLR* where this court relied on section 37(4) of the Employment Act to declare that casual employment of the claimant had converted to term contract under the Act through prolonged continuous service like in this case. All the claimants have contended that they worked for the respondent continuously as security guards save for one who was a driver. The engagement was verbal and the respondent has not produced their employment records to disprove the alleged continuous service.

20 Under section 9, 10 and 74 of the Act the employer has a legal obligation to prepare the contract of service and to keep record of employment for his employees, and to produce the same in court to disprove any verbally alleged term of the contract by the employee in any legal proceedings. In default by the employer to produce employment records as required by section 10(5) of the Act, like in this case, the court is entitled to make a presumption that the allegation by the employee are true. That is the basis upon which the court decided in favour of the claimants who served as casual employees for a long time in **Jonathan Zacharia & 24 others vs Bulk Warehouse Management & 2 others**.

21 Likewise in this case, I return that the claimants converted to term employees by virtue of their continuous service under section 37 of the Act. The said section provides

“37(1) Notwithstanding any provision of this Act, where a casual employee-

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

(b) Performs work which cannot reasonably be expected to be completed within a period, or 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 the section 35(1) (c) shall apply to that contract of service”

Unfair termination

22 Under Section 45(2) of the Employment Act, termination of employee’s employment contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reasons is one that relates to the employees conduct, capacity and compatibility or based on the employer’s operational requirements. Fair procedure on the other hand refers to the process of according the employee a hearing before termination of his contract of service and post termination process including right to appeal, payment of terminal dues and issuance of certificate of service.

Reason for the summary dismissal

23 In this case, the respondent admitted in her pleadings and submissions that she summarily dismissed the claimants for gross misconduct. The claimants contended that the dismissal was unfair because there was no valid reason and the procedure followed was unfair because they were not accorded any opportunity to defend themselves. Under the said section 45 of the Act, read with section 43 (1) and 47 (5) of the Act, the burden of proving the reason for terminating the employee’s contract of service rests with the employer.

24 In this case the employer adduced no evidence to prove the alleged misconduct by the claimants including habitual late reporting and absenteeism from work by the 7 claimants and illegal selling of her bananas by one claimant. Consequently I return that the respondent has failed to prove the reason for the summary dismissal of the claimants on a balance of probability as required by the said provisions of the Act.

Procedure followed

25 Section 41 of the Employment Act provides in mandatory terms that, before terminating an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

26 In this case the respondent adduced no evidence to prove that before dismissing the claimants for the alleged misconduct, she complied with the said mandatory procedure laid down by section 41 of the Act by explaining to them the reason for the intended dismissal and thereafter accorded them a chance to defend themselves, and considered their defence before finally dismissing them. She further never gave them certificate of service required by section 45(5)(c) and 51 of the Act. Consequently I return that the respondent has also failed to prove that she followed a fair procedure before dismissing the claimants as required by sections 45 (2) read with section 41 and 51 of the Act.

Reliefs

27 In view of foregoing finding that the summary dismissal of the claimants was unfair both procedurally and substantively, I award each one them one month salary in lieu of notice plus 12 months salary compensation for the unfair dismissal under section 49 (1) of the Employment Act. In awarding the said damages, I have considered that the fact that the claimants had served for long periods of 9 years and above. I have also considered the fact that they did not contribute to the dismissal through misconduct and the reasonable expectation to continue working. The award is assessed using the daily wages pleaded.

28 I further award all the claimants accrued leave except Michael Ndunda (ELRCC No. 287 of 2013) who did not seek that relief. Although the respondent pleaded that, the claimants took all their leave and rest days, no leave records were produced to prove the same. They pleaded 26 leave days per year but under section 28 of the Employment Act, they were entitled to 21 leave days after every 12 consecutive months of service. The accrued leave days will be paid using the daily wage pleaded.

29 Finally I award each claimant service pay because the respondent did not prove that she registered them to any social protection scheme like NSSF. The award is assessed at the conventional rate of 15 days wages per completed year of service. The applicable wages herein are

daily wages pleaded by each claimant.

30 In awarding the reliefs hereinabove, I have found that the facts of this case are distinguishable from the facts in *Krystalline Salt limited v Kwekwe Mwaakele & 67 others [2017] eKLR* where the claimants were involved in piece work as opposed to continuous casual employment in the present case.

Conclusion and disposition

31 I have found that the casual employment of the claimants converted to a term contract whose wages are paid on monthly basis and termination of which was protected by the Employment Act. I have further found that the summary dismissal of the claimants on 3.3.2011 was unfair because the respondent did not prove that there existed a valid and fair reasons warranting the dismissal, and that a fair procedure was followed. Finally I have found that the claimants are entitled to the reliefs sought by their respective statements Claims. Consequently, I enter judgment for each claimant against the respondent as set out herein below.

32 Each of the 6 claimants in ELRC 281, 282, 283, 284, 286, and 288 of 2013 is awarded based on kshs.237 daily wage for 9 years:

- (a) One month's salary in lieu of notice kshs. 7110
- (b) Service pay @ 15 day pay x 9 years kshs.31,995
- (c) Accrued leave @ 21 day x 9 years kshs. 44793
- (d) Compensation (12 months wages) kshs. 85,320

Total kshs. 169,218

33 The claimant in ELRCC No.285 of 2013 pleaded a daily wage of kshs.250 for 20 years and is awarded the following:

- a) One month's salary in lieu of notice kshs. 7500
- b) Service pay @ 15 day pay x 20 years kshs.75000
- c) Accrued leave @ 26 day x 20 years kshs. 105000
- d) Compensation for wrongful dismissal being 12 months wages kshs. 90000

Total kshs. 277500

34 The claimant in ELRCC No. 287 of 2013 worked for 19 years and pleaded a daily wage of kshs450.n the said wage was not disproved by employment contract of records and therefore I award him the following:

- a) One month's salary in lieu of notice kshs.13500
- b) Service pay @ 15 day pay x 19 years kshs.128250
- c) Compensation (12 months wages) kshs. 162000

Total kshs. 303750

35 The claimants are also awarded costs the suit plus interest at court rates from the date hereof. The award will however be paid subject statutory deductions.

Signed, dated and delivered at Nairobi this 8th day of March, 2019

ONESMUS N. MAKAU

JUDGE