



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 898 OF 2013

HENRY MUSILWA CHIBANDO.....CLAIMANT

- VERSUS -

RAFIKI MILLERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 13.06.2013 through Mulanya & Maondo Advocates. The claimant claimed that he was employed by the respondent in February 1999 to 23.08.2011 when his services were terminated. The claimant's case is that he worked as a loader for unbroken period of 13 years and as at termination he was paid Kshs.12, 000.00 per month. It was his case that throughout the service period he was not given annual leave or paid in lieu of annual leave, NSSF and NHIF were not remitted, and the termination was without notice and no reason for termination was given. The claimant filed the suit and prayed for judgment against the respondent for:

- a. One month salary in lieu of notice Kshs.12, 000.00.
- b. Compensation for leave days not taken for 13 years at the rate of 21 working days per year Kshs.12, 000.00 x 13 = Kshs. 156, 000.00.
- c. Service pay for 13 years at Kshs. 12, 000.00 per year Kshs. 78, 000.00.
- d. 12 months' salaries in compensation for unlawful termination Kshs.78, 000.00.
- e. Costs of the suit.
- f. Interest on the sums above.

The respondent filed the memorandum in reply on 29.07.2013 through Gitonga Kamiti, Kairaria & Company Advocates. The respondent pleaded that it did not employ loaders but that the claimant was part of a group of persons organised as a team or gang to provide loading services whenever necessary and were paid on a piece rate basis for services of loading and off loading. That the respondent assigned the gang a piece of work paid on piece rate basis. The respondent denied that the claimant earned Kshs.12, 000.00 per month. Further, by the letter dated 26.08.2011 the respondent replied the labour officer's letter by stating that the claimant was not its employee. The labour office investigated the complaint and found that the claimant was not the respondent's employee as per the labour officer's letter dated 14.10.2011. The respondent stated that the claimant's suit lacked factual and legal basis, it was an abuse of court process and it should be dismissed with costs.

The evidence is clear that the claimant was amongst a group of persons known to the parties as a team or gang of workers who signed a contract with the respondent. The agreement for one month from 28 July 2011 stated thus, "**We, the Loaders, whose signatures appear below, confirm that we agree to do the Loading/Offloading jobs at Rafiki Millers Ltd, for the rates mentioned below. In addition, we agree that the amount due to us, will be paid on a daily basis and there will be no further amount due to us from Rafiki Millers Ltd.**" The agreed rates of payment were as follows:

1. Wheat off – loading including containers in godwn 1 & 2, also cutting direct – 90Kgs Kshs. 5.00 per bag.
2. Bulk off-loading 90 Kgs Kshs.3.00 per bag.

3. Bran 40 Kgs Kshs. 2.00 per bag.
4. Pollard 60Kgs. Kshs.3.00 per bag.
5. Sweeping 50Kgs Kshs.2.50 per bag.
6. Return Flour 90Kgs. Kshs.5.00 per bag.
7. Bulk off-loading and re-bagging 90 Kgs 90 Kgs Kshs. 4.50 per bag.
8. Night shift work, same rates as above.

The other contract filed is made on 24.05.2010 and states as follows, **“It is agreed that the management of Rafiki Millers Ltd. will pay loaders at the following rates, on daily basis, for the job done by them. Loaders themselves will organise the team required on each day. At the end of each day, Rafiki Management will pay for the job done, and loaders will be responsible for distribution of the amount. This will be the full and final payment from Rafiki Millers Ltd. and no other claim will be entertained from Loaders, at any time later. These rates will be applicable with immediate effect and will be valid for 2 years from date of signing this agreement.”** The agreement then set out the rates applicable for each descriptive job to be performed. The agreement was signed for loaders by 10 of the loaders’ representatives and the claimant was not one of the 10 loaders who signed that agreement.

The claimant in his evidence in chief denied that he had signed the agreement of 28.07.2011 because the Kenya national identification card number against his name was 21851030 whereas his card number per the Kenya national identification (ID) card he held and exhibited in Court was 22241594. He further denied ever signing the agreement of 28.07.2011. The claimant’s evidence prompted the respondent to seek and obtained leave to verify the claimant’s testimony. The investigations revealed as follows:

- a. The report by the Director of National Registration was that the holder of ID No. 21821030 Henry Mughilwa Chibondo applied for another ID card No. 22241594 in the name of Henry Musilwa Chibondo which later ID card was invalidated. The Court finds that ID No. 21821030 is the one appearing against the claimant’s name in documents held by the respondent but which the claimant denounced at the initial trial. When recalled for cross-examination after the report had come out, the claimant testified that he had applied for a new generation ID card on 18.10.2017 hence his ID card No. 22241594 and having surrendered his earlier ID card No. 21821030. He further testified that after he surrendered the earlier ID card No. 21821030 he forgot about it and so he had initially testified in Court that the ID card No. 21821030 appearing on the agreement of 28.07.2011 did not belong to him. The Court finds that the claimant’s evidence was not truthful and further finds that the claimant indeed signed the contract of 28.07.2011.
- b. The ID card No. 21821030 appearing on the agreement of 28.07.2011 is the same one that the National Health Insurance Fund (NHIF) registered member No. 2395728 on 17.11.2008 being Chibondo Henry Mughilwa and the employer is the respondent. The Court therefore returns that the respondent remitted due NHIF contributions for the claimant per the NHIF statement on record.
- c. The report by the Forensic Document Examiner indicated that the claimant’s signature on the verifying affidavit filed with the statement of claim is similar to the claimant’s signature on the agreement of 28.07.2011. The Court therefore returns that the claimant was a member of the team or gang and he signed the contract.

To answer the **main issue** for determination, the Court returns that the parties were in a contract of service governed by the rates of payment in the contracts signed between the members of the gang or their representatives and the respondent. The **“collective agreement”** in that sense only set out the pay rates for the agreed tenure of the agreement. The gang arrangement did not thereby diminish the binding contract of service between the respondent and individual gang members. The general contract only stipulated the applicable pay rate and, where the gang received an aggregate sum of wages to share out to individual members for the individual wage, the Court returns that such arrangement only shifted some administrative obligations from the respondent (for the convenience and efficiency of running the gang arrangement) but the same did not thereby extinguish the contract of service between the claimant and the respondent.

The Court follows the judgment in **Mboo Wambua and 29 Others –Versus- Export Trading Company Ltd [2018]eKLR** where the Court held, **“It was suggested and urged for the respondent that since there was a piece rate or work arrangement, the parties were not in a contract of employment. The Court holds that piece work arrangements are not inconsistent with the contract of employment. Under section 2 of the Employment Act, 2007 “piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. Thus the Court finds that piece work or piece rate arrangements are justifiable as a pay structure in a contract of employment.”**

And the Court further held as follows, **“Thus, in piece work arrangement, parties will set targets. The employee despite being paid at the piece rate, the employer has a legitimate expectation that the employee will attain the minimum productivity targets or performance targets. Conversely, the employee has a legitimate expectation that the employer will provide sufficient work to enable the employee meet the agreed minimum targets of performance. It is the opinion of the Court that as long the work is available, within the piece work arrangement the employer would need to follow due process and show a reasonable justification where the employment is to be terminated. It is the further Court’s opinion that if indeed the work becomes genuinely unavailable, then the employer in such arrangement will be entitled to terminate the contract of service within the minimum statutory contractual terms.**

The extent to which the Employment Act, 2007 will apply in event of the termination of the contract of service in piece work arrangements will vary from case to case based on the parties agreement, practice and circumstances of the individual cases. One clear position is that time based claims may not be available.”

In the present case the claimant signed or was bound by the terms of the contract signed between the gang and the gang’s representatives.

The claimant misled the Court in his evidence about particulars of his national identification card but the Court finds that all evidence as provided for the respondent is that there was no continuous service and the claimant was bound accordingly.

The Court returns that whereas there was a contract of service, the claimant has not established continuous service and the Court returns that there was a break in service as per the respondent's testimony. The Court has no reason to doubt the respondent's testimony that the claimant stopped coming with the group of loaders after 18.08.2011. The time based claims will therefore fail and the Court further returns that there was no unfair termination of the contract of service between the parties.

The Court follows the holding by Rika J in Nyevu Sibya Maithya & 14 others –Versus- Krystalline Salt Limited [2017]eKLR thus, “**23. The prayers they seek are all time-based. They seek the equivalent of 12 months’ salary in compensation for unfair termination; 1 month salary in lieu of notice; house allowance based on a percentage of their monthly salary; overtime; severance pay; and underpayment of wages. Without establishing a rate of pay per day, week, or month, it is impossible for the Court to have a reasonable assessment of the prayers sought. How is the Court to know the hourly rate in computing overtime; daily or monthly rate in considering compensation, notice pay, severance pay and underpayment of wages? 24.It does not appear right, that a worker, who has worked on piece rate for 25 years, for the same employer, in continuity, leaves employment without recognition and reward for the years of service, and without other routine benefits due to regular Employees. This is a gap in legislation which cannot be cured by the Courts. It can be cured by Parliament through review of the current law, or mitigated through robust collective bargaining in the salt industry. Unfortunately, there does not seem to be strong Trade Union representing the industry. It will take time before this labour market imbalance in the salt industry is corrected. There is need to have legislative focus on the Salt Industry, without which some players in the industry, will continue to manipulate wage compensation mechanisms and exploit Workers, as Courts look on helplessly.**”

In any event, in the present case it is clear that there was a break in service per the signed schedules of payment and the Court returns that on a balance of probability, the claimant failed to show that he was employed by the respondent in 1999 as was alleged and without a break in service.

Accordingly the claimant's suit will fail.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 3rd May, 2019.**

BYRAM ONGAYA

JUDGE