



REPUBLIC OF KENYA
IN THE EMPLOYEMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 99 OF 2017

[Consolidated with Causes Number 96 of 2017, 97 of 2017, 98 of 2017, and 100 of 2017]

BETWEEN

- 1. RONALD KAI TSUMA [99 OF 2017]**
- 2. JAMES BISHI MWANDONGA [96 OF 2017]**
- 3. GAMBO NYAMAWI [97 OF 2017]**
- 4. JUSTINE KAHANGA [98 OF 2017]**
- 5. GEORGE LEWA MWIYA [100 OF 2017].....CLAIMANTS**

VERSUS

CHINA JIANGXI KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nguyo Kariuki & Company Advocates for the Claimants

Gikera & Vadgama Advocates for the Respondent

JUDGMENT

1. The Claimants filed separate Statements of Claim against the Respondent, on 18th December 2017.
2. The Respondent filed a Statement of Response in every file, on 1st February 2018
3. It was ordered that the Claims are consolidated, with evidence recorded in Cause Number 99 of 2017.
4. Hearing took place and closed on 1st March 2019. The Claimants gave evidence, as did Respondent's Human Resource Officer, Michael Musembi Kioko.
5. The Claimants state, they were employed by the Respondent to work in a housing project the Respondent had been contracted to undertake for a Client at Kikambala in Kilifi, between 2015 and 2017. The Respondent was to construct residential houses, known as Sultan Palace.
6. Ronald worked as a Labourer, assisting Masons, between 9th June 2015 and 18th January 2017, earning Kshs. 370 daily; James was a Carpenter employed from 12th January 2015 to 6th January 2017, earning Kshs. 490 daily; Nyamawi was a Carpenter working from 10th July 2016 to 18th January 2017 at a rate of Kshs. 550 daily; Justine was a Mason, employed between 13th May 2015 and 25th January 2017,

earning Kshs. 590 daily; while George was a Labourer, employed between 8th February 2015 and 11th February 2017, earning Kshs. 411 daily.

6. The Claimants aver that their respective contracts were terminated by the Respondent without notice and without valid reason or reasons. They were not paid the correct daily rates under the Building and Construction Industry Wages Order 2012. They were denied annual leave. They pray for Judgment against the Respondent for notice, pending annual leave days, underpayment of wages, compensation for unfair termination, certificates of service, any other suitable relief, costs and interest.

7. The Respondent filed its Statement of Response in the respective files, on 1st February 2018. It is not denied that the Claimants worked for the Respondent at Sultan Palace. They were paid a rate agreed to between the Parties. They were not underpaid. They did not work continuous days. They are not owed the terminal benefits claimed. They deserted duty at the beginning of the year 2017. The Respondent did not terminate their contracts. Their Claims are presented in afterthought.

8. Ronald adopted his Witness Statement. He was not aware that he worked in a project which came to an end. He did not know of a strike which took place at the project, neither did he know about a return-to-work arrangement. Cross-examined, he told the Court the project was at Kikambala. He helped Masons. He worked intermittently. Days worked were recorded. In June 2016, he worked for 14 days, and 20 days in December 2015. He was told there was no more work, in January 2017. The project was ongoing at the time the Claimant left. He would complete a unit and be assigned another. Work is still going on and some of his former Colleagues are still working. He was aware the project would come to an end at one time. He would leave at one time. There was a notice on the Board indicating when the project would end. The Claimant could not recall the date. He was entitled to Kshs. 500 per day, as earned by other Helpers in other sites. Redirected, Ronald told the Court he was not given a written contract.

9. James likewise relies on his Witness Statement on record. He worked between 2015 and 2017. He told the Court that Sultan Palace is now occupied by residents. Work is finished. He worked up to December 2017. He was injured in June 2016 and stayed away for 2½ months. He was not denied assignment on resumption. He was wood-fitting. The Claimants were paid Kshs. 2,000 each on 15th of each month. It was deducted from the monthly earnings. Sunday was paid at double rate. He did not know that the project would come to an end. He was not given a written contract. He was injured on his leg by a nail at the site. He returned and continued working.

10. Nyamawi relies on his Witness Statement. He told the Court he would have off-duty days. He worked as a Carpenter. He did skirting. He did not know if the Respondent is a carpentry business. Once he finished skirting, he did not have any other work. There was shortage of material. Nyamawi left the site. Once he returned, he was told by the Foreman that work had diminished. Redirected he testified that there was no letter advising him that work had diminished. He was not consulted.

11. Justine relies on his Witness Statement like his Co-Claimants. He confirmed that Claimants worked on Sundays which was compensated at double the normal hourly rate. He built more than one house. He was not involved in electrical fitting or plumbing. He did masonry alone. He did not know that the project would come to an end. There was a strike in January 2017. Justine was told by his Chinese boss to stop working. He associated himself with the evidence of James on the mode of wage payment.

12. George similarly adopts his Witness Statement and Documents on record as his evidence. He was helping Masons at Sultan Palace. The Claimants built different units. There were many houses and many workers. George did not know when the project was completed. Daily wage was Kshs. 410. He was paid according to the hours worked. Sunday worked was compensated at double rate and reflected as 18 hours worked. Redirected the Claimant told the Court there were days he did not report to work. In September 2016, he rested for 6 days. 18 hours shown in the Job Card related to Sundays, when Claimants worked and were compensated at double the hourly rate.

13. Human Resource Officer Michael Musembi Kioko told the Court the Respondent was contracted by an Investor to build the Sultan Palace in Kikambala. It was a single project. There was no other work.

14. The project commenced in October 2014, and closed in December 2016. It was bush-land. The Respondent cleared the bushes using casual labour. A sample house was built, followed by other villas, which were built simultaneously.

15. The Respondent recruited Casual Employees who would gather at the gate seeking engagement. The Respondent later introduced job cards. The workers did 9 hours daily. They were paid according to the hours done. These were recorded in the job cards by the Forman. Daily wage was based on 8 hours a day. At the end of the month, the Claimants were paid in accordance with the daily rate, for the days worked.

16. There were different roles associated with the building industry. The roles diminished as the project approached the end. The project is complete. The Respondent does maintenance of the houses.

17. The Workers went on a go-slow in December 2016 and January 2017. They were agitating for pay-rise. There was return-to-work agreement. Whoever wished to return returned. Finishing work was going on. By end of 2017, most work was done. The Witness told the Court he is doing last office work at the site. There is no ongoing building work remaining.

18. Cross-examined, Kioko told the Court there are other Employees of the Respondent at the site. He keeps records of Employees. He did not issue the Claimants written contracts. They were aware of project timelines. Kioko did not explain to the Claimants details of the project.

19. General construction ended in December 2016. The Claimants were paid through the Bank. None was paid in cash. Justine was a Mason. General construction ended in December 2016. Masonry was not complete. There was a go-slow. Work was diminishing. The Respondent did not mention that there was a strike in the Statement of Response. The Respondent, not Sultan Palace, employed the Claimants. The Respondent states that the Claimants deserted. Kioko attempted recalling them. Some worked for less than a year. By desertion, Kioko explained in redirection that he meant he recalled the Claimants; they never returned. It had been agreed between the Claimant's

Representative and the Respondent that the Claimants return. They did not return.

20. The issues in dispute as understood by the Court are: whether the Claimants' contracts were unfairly terminated by the Respondent; whether they were underpaid, and denied annual leave during employment; and whether they are entitled to terminal benefits, compensation, costs; and interest.

The Court Finds: -

21. First, it is important to appreciate that the Claimants worked in the building and construction industry. They specifically worked for the Respondent, who had been contracted to build residential houses at Kikambala in Kilifi, in a project called the Sultan Palace. The Claimants were Carpenters, Masons and Helpers. The project started in 2014, and effectively was complete by 2017. The Claimants worked between 2015 and 2017.

22. They concede in their evidence that they did not work continuously. They were paid a daily rate, depending on the hours/days worked. Ronald told the Court he worked for 14 days in June 2016, and 20 days in December 2015. The job cards on record show the Claimants did not work regularly throughout the month, over the years engaged by the project. Traditionally *mjengo* industry has flexible hours of work.

23. It is also safe to conclude that the project was not indefinite. Once the main building work was complete and the houses occupied by residents, there was no more work left for the Claimants to do. By 2017, the Court is satisfied that the main building work was over and done with. Work gradually diminished, with the Respondent left with skeletal staff for maintenance of the completed houses and official winding up of the project. There was no more work for the Claimants to perform. The Court does not think it is relevant whether the Claimants left of their own volition, or were advised by the Respondent that there was no more work; both Parties were aware that the project was not an open-ended, long term undertaking. It was time-specific, like most projects carried out in the construction and building industry. The Court agrees with the submission of the Respondent that unless the Claimants' contracts were terminated in the middle of the project, it does not make sense to claim the contracts were unfairly terminated. There was no useful work shown to have taken place after the year 2017 and it would not make sense to recall the Claimants after they left in January 2017. The Court similarly does not see any significant effect to this dispute, of the purported strike or go-slow by the Claimants, which took place at the end of the project.

23. The Claimants have not shown that their contracts were unfairly terminated by the Respondent without notice and/or just cause. The contracts were tied down to a building project which came to completion, allowing the Claimants to move on to the next building site. They are not entitled to notice pay and compensation for unfair termination.

24. The Court does not agree with them also, on the prayer for accumulated annual leave days. They concede they did not work in continuity. They were not under compulsion to work in continuity. They did not work throughout the month. Ronald in particular was quite detailed in his evidence on days worked. The job cards support his evidence. The Claimants rested as and when they wished. They earned their pay when actively engaged. None of them can claim they were not aware, that they were at Sultan Palace for a season. They were not first-timers in the industry. The Employment Act avails paid annual leave of at least 21 days, to an Employee who works at least 12 consecutive months. None of the Claimants worked at Sultan Palace 12 consecutive months. They worked and kept away, when they chose to. It is not reasonable to seek accumulated annual leave days based on the assumption that the Claimants worked regularly. The prayer for annual leave pay is rejected.

25. The daily rates paid to the Claimants are not supported by the Building and Construction Industry Wages Order 2012. The Respondent does not seem to have adhered to the Order, testifying instead, that the rates paid were agreed upon by the Parties. The Labour Institutions Act does not allow Parties to contract below the minimum wage given under the various Wage Orders.

26. The Claimants were underpaid. The question arises however, whether they were underpaid for the number of days claimed. The Court has already concluded that they did not work in continuity, and they could not have worked for all the days they claim underpayment of wages. James, in addition to staying at home whenever he opted to do so, was away for 2 ½ months while injured. The Claimants had the latitude, choosing when to work, and/or whether to work. They were paid for hours worked. This must be factored in, in arriving at a fair, just, proportionate and reasonable wage compensation for work done in real time. As it has not been shown, for exactly how many days the Claimants worked, the only way the Court can reasonably compensate them under this head, is by assuming they worked for at least ¾ of the period claimed. The Court allows the prayer for underpayment of wages adopting this method, with the result that the Respondent shall pay arrears of wages as shown below:-

Ronald: Kshs. 51,945 less ¼ [Kshs. 12,986] = Kshs. 39,959.

James: Kshs. 46,975 less ¼ [Kshs. 11,743] = Kshs. 35,232.

Nyamawi: Kshs. 2,606 less ¼ [Kshs. 651] = Kshs. 1,955.

Justine: nil.

George: Kshs. 38,638 less ¼ [Kshs. 9,659] = Kshs. 28,979.

27. In sum the Court enters Judgment in favour of the Claimants for:-

a) A total sum of Kshs. 106,125 detailed above.

b) Certificates of service to issue

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Malindi, this 28th day of June 2019.

James Rika

Judge