



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 393 OF 2017
[PREVIOUSLY MOMBASA HIGH COURT CIVIL CASE NUMBER 156 OF 2004]

BETWEEN

- 1. MIRAJ BAKARI**
- 2. ALI NZEMBE**
- 3. MWINYIHAJI MWINYIFAKI**
- 4. BENSON CHAI**
- 5. SUDI KEAH**
- 6. SAID KALUME**
- 7. SULEIMAN NJAMA**
- 8. BORA HEMED**
- 9. SAID SALIM**
- 10. HASSAN SWALEH**
- 11. NGANDU RAJABU**
- 12. MZUNGU BEJA**
- 13. MWINYI SALIM**
- 14. CHITSALA BAYA**
- 15. RAMA JITWA**
- 16. JUMA RUWA**
- 17. KHAMISI MUGANDI**
- 18. ALI RAJABU**
- 19. SALIM BAKARI**
- 20. MUNAGO MUNGA**
- 21. WALE GEORGE**

22. MWADZUPHY CHIRANZE

23. PATRICK CHARO

24. HAMIZI KOMBO

25. KENNEDY KILETA

VERSUS

DOSHI ENTERPRISES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company Advocates for the Claimants

C.B. Gor & Gor, Advocates for the Respondent

JUDGMENT

1. This is another old matter, filed at the High Court Mombasa 15 years ago, in the year 2004.
2. It was transferred to the Employment and Labour Relations Court only in year 2017. It is not clear why the Claim had been pending at the High Court, for such a long time, between 2004 and 2017. It is also not clear why the decision to transfer was made after considerable delay, from the date the High Court took cognizance of the Claim.
3. Claimant Numbers 18 [Ali Rajabu], 10 [Hassan Swaleh] and 1 [Miraj Bakari] gave evidence in this order, on 22nd October 2018.
4. The Respondent indicated at the end of the Claimants' case, that it would be calling 2 Witnesses, who were scheduled to be heard on 10th December 2018. On this date the Court was informed by Counsel holding brief for the Respondent's Counsel, that Respondent's Witness was unwell. Adjournment was sought. It was not disclosed to the Court which of the 2 Witnesses, lined up by the Respondent, was unwell. No evidence of ailment was placed before the Court. Adjournment was declined and proceedings closed.
5. In their Further Amended Complaint, dated 20th October 2005, the Claimants state that they were employed by the Respondent as Labourers, on diverse dates, between 14th March 1981 and 13th April 1999 or soon thereabouts. They last earned a daily wage of Kshs. 201.
6. They assert that the Respondent, without giving them reason or notice, wrongfully and in breach of agreement, rendered the Claimants redundant, and refused to allow the Claimants to remain in employment. They plead 13th April 1999, and 24th April 2004 as the dates wrongful termination took place.
7. They were denied terminal and/ or redundancy dues. They were not heard before the drastic action was taken. They were not given notice. They were denied annual leave, severance pay and/or gratuity. They were denied off-duty days and worked on public holidays without compensation. They worked continuously for 7 days a week.
8. Their prayers against the Respondent are as shown below:-

Miraji Bakari

- Annual leave at Kshs. 14,954.
- Severance pay at Kshs. 74,772.
- Off-days and public holidays worked at Kshs. 303,912.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 534,459.

Ali Nzembe

- Annual leave at Kshs. 87,374.
- Severance pay at Kshs. 43,617.

- Off days and public holidays at Kshs. 177,282.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 314,504

Mwinyihaji Mwinyifaki

- Annual leave at Kshs. 93,465.
- Severance pay at Kshs. 46,732.
- Off days and public holidays at Kshs. 189,945.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 336,373.

Benson Chai

- Annual leave at Kshs. 81,003
- Severance pay at Kshs. 40,501.
- Off days and public holidays at Kshs. 164,619.
- 1 month salary in lieu of notice at Kshs. 6,321.

Total...Kshs. 292,354

Sudi Keah

- Annual leave at Kshs. 81, 003.
- Severance pay at Kshs. 40,501.
- Off days and public holidays at Kshs. 164,619.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 292,354.

Said Kalume

- Annual leave at Kshs. 81,003.
- Severance pay at Kshs. 40,501.
- Off days and public holidays at Kshs. 164,619.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 292,354.

Suleiman Njama

- Annual leave at Kshs. 72,772.
- Severance pay at Kshs. 37,386.
- Off days and public holidays at Kshs. 151,956.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs 268,345

Bora Hemed

- Annual leave at Kshs. 72,772.
- Severance pay at Kshs. 37,386.
- Off days and public holidays at Kshs. 151,956.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 268,345.

Said Salim

- Annual leave at Kshs. 72,772.
- Severance pay at Kshs. 37,386.
- Off days and public holidays at Kshs. 151,956.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 268,345.

Hassan Swaleh

- Annual leave at Kshs. 81,003.
- Severance pay at Kshs. 40,501.
- Off days and public holidays at Kshs. 164,619.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 292,354.

Ngandu Rajabu

- Annual Leave at Kshs. 68,541.
- Severance pay at Kshs. 34,270.
- Off days and public holidays at Kshs. 139,293.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 248,335.

Mzungu Beja

- Annual leave at Kshs. 62,310.
- Severance pay at Kshs. 31,115.
- Off days and public holidays at Kshs. 126,360.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 226,396.

Mwinyi Salim

- Annual leave at Kshs. 68,541.
- Severance pay at Kshs. 34,270.
- Off days and public holidays at Kshs. 139,293.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 248,335.

Chitsala Baya

- Annual leave at Kshs. 62,310.
- Severance pay at Kshs. 31,115.
- Off days and public holidays at Kshs. 126,360.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 226,396

Rama Jitwa

- Annual leave at Kshs. 56,079.
- Severance pay at Kshs. 28,039.
- Off days and public holidays at Kshs. 113,967
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 204,316

Juma Ruwa

- Annual leave at Kshs. 56,079.
- Severance pay at Kshs. 28,039.
- Off days and public holidays at Kshs. 113,967.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 204,316

Khamisi Mugandi

- Annual leave at Kshs. 49,848.
- Severance pay at Kshs. 24,924.
- Off days and public holidays at Kshs. 101,304.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 182,307

Ali Rajabu

- Annual leave at Kshs. 56,079.
- Severance pay at Kshs. 28,039.
- Off days and public holidays at Kshs. 113,967.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 204,316

Salim Bakari

- Annual leave at Kshs. 49,848.
- Severance pay at Kshs. 24,924.
- Off days and public holidays at Kshs. 101,304.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total ...Kshs. 182,307

Munago Munga

- Annual leave at Kshs. 68,541.
- Severance pay at Kshs. 34,270.
- Off days and public holidays at Kshs. 139,293.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 248,335

Wale George

- Annual leave at Kshs. 43,617.

- Severance pay at Kshs. 21,808.
- Off days and public holidays at Kshs. 88,641.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 160,297

Mwadzuphy Chiranze

- Annual leave at Kshs. Kshs. 43,617.
- Severance pay at Kshs. 21,808.
- Off days and public holidays at Kshs. 88,861.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 160,297

Patrick Charo

- Annual leave at Kshs. 37,386.
- Severance pay at Kshs. 18,693.
- Off days and public holidays at Kshs. 75,978.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 138,288

Hamisi Kombo

- Annual leave at Kshs. 49,848.
- Severance pay at Kshs. 24,924.
- Off days and public holidays at Kshs. 101,304.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 182,307

Kennedy Kileta

- Annual leave at Kshs. 56,079.
- Severance pay at Kshs. 28,039.
- Off days and public holidays at Kshs. 113,967.
- 1 month salary in lieu of notice at Kshs. 6,231.

Total...Kshs. 204, 316

9. In total the Claimants pray for a sum of Kshs. 6,180,658 as detailed above, costs and interest. They pray the Court to declare that termination was wrongful.

10. Claimant Number 18, Ali Rajab told the Court that the Claimants were employed as Casuals. He did electrical wiring. They were locked out in the year 2004. Security Guards denied them entry. They worked in continuity. Rajab worked for 11 years. They worked even on Saturdays. This was the position with respect to all the Claimants. They did not desert as alleged by the Respondent; they were locked out.

11. Cross-examined, Rajab told the Court he used to clear off paints. The work was continuous. The Personnel Manager Aziz, asked the Security Guards to keep away the Claimants. The Claimants worked over the weekends. They never took time off to attend to social events.

12. Claimant Number 10. Hassan Swaleh used to scrap paint from pipes. He did not have a written contract. The Claimants were not issued letters of termination. There was a notice on the Board, informing the Claimants they were no longer needed. Swaleh worked for 11 years without rest. He worked on public holidays. He told the Court on cross-examination that he used galvanizing machine. It was always in operation. It was maintained. The Claimants did not work during maintenance of the machine. Maintenance took place after 6 months. The Claimants could be assigned work elsewhere during maintenance. There was no document to show such assignment. His work did not depend on availability of materials. He worked in continuity. Redirected Swaleh told the Court that lockout had never happened before the

material day.

13. Claimant Number 1, Miraji Bakari, also used to remove paints from the pipes. He worked for 23 years. A notice was placed on the notice board by the Respondent, informing the Claimants that their services were no longer needed. Cross-examined he told the Court that he was not given a written contract for 23 years. The Claimants worked in continuity. The machines were serviced occasionally. The Claimants would be assigned duty elsewhere, when servicing was underway. Bakari had illness on certain days, during his 23 year stint, and did not work on such days.

14. The Respondent filed Re-Amended Statement of Defence, dated 20th September 2005.

15. Its position is that the Claim is time-barred. Without prejudice to this line of defence, the Respondent states that the Claim is scandalous and frivolous.

16. The Claimants were employed by the Respondent as Casuals, and paid a daily wage. Employment was terminable at the end of each day. It was not indeterminate. No notice of termination was necessary. They are not entitled to the prayers sought. The Court is urged to dismiss the Claim with costs.

The Court Finds:-

17. Termination of the Claimants' contracts took place under the old Employment Act, preceding the Act of 2007.

18. The Claimants have not cited the law which obligated their Employer, to hear them, or accord them an opportunity to be heard before termination.

19. It is widely acknowledged that the Employment Act in place at the time, allowed the Employer to terminate the contract of employment for just cause, bad cause or no cause. Employment was at the will of the Employer.

20. The Claimants did not approach the Court under the Trade Disputes Act Cap 234 the Laws of Kenya, which at the time of termination, applied with regard to Unionisable Employees, and had provisions for substantive and procedural fairness in the process of termination.

21. The notice, which informed the Claimants that they were not needed at the workplace, is dated 24th April 2004. This is the date termination took place. There is confusion in the Claimants' Pleadings, which mention another date in 1999, as the date of termination.

22. This notice does not mention redundancy. It simply informs the Claimants and 3 other Employees [28 in all], that they " will not be allowed in the factory with effect from 24th April 2004." It does not refer to a redundancy situation. The Claimants have therefore not established their prayer for severance pay. The prayer is declined.

23. The prayer for off-duty days and public holidays is not supported by the evidence given by the 3 Claimants. There are no employment records exhibited by the Claimants showing they worked throughout. They acknowledged there were days when the galvanizing machine was under maintenance and days when they were not at work, for various reasons including illness. They were not at work all the time, and if they worked on public holidays, which they have not established, they were adequately compensated through other forms of off-duty days.

24. They base their prayer of annual leave, on a months' salary. There is no material on record showing that for the long years served by respective Claimants, they were entitled to 30 days of annual leave. The finding that the Claimants were in any event resting, while the galvanizing machine was under maintenance, would militate against the claims for annual leave. Maintenance was done after every 6 months, which would suggest there was not much work at the galvanizing department, affording the Claimants regular periods of break.

25. Having worked for 11 to 23 years, albeit with regular breaks in service, the Claimants cannot have been Casual Employees by the time of termination. They had worked for aggregate number of years, to be converted into, or considered as, regular Employees. They told the Court they used to clear off paints from pipes sold by the Respondent. Their roles were integral to the business, to be discharged by temporary labour.

26. In the Court's view they merited notice or notice pay. The notice of 24th April 2004 was abrupt and placed on the notice board. It had the effect of locking the Claimants out, and eventually terminated their respective contracts of employment.

27. *The Respondent shall pay to each Claimant, notice at Kshs. 6,231.*

28. *Costs to the Claimants.*

29. *Interest allowed on notice pay, at 14% per annum, from the date of termination, 24th April 2004, till payment is made in full.*

IN SUM IT IS ORDERED: -

a. *The Respondent shall pay to each Claimant notice at Kshs. 6,231- total Kshs. 155,775.*

b. *Costs to the Claimants.*

c. Interest allowed on notice pay at 14% per annum, from the date of termination - 24th April 2004 - till payment is made in full.

Dated and delivered at Mombasa this 13th day of June 2019.

James Rika

Judge