



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.409 OF 2017

JOSHUA ONDERE ALIBI..... 1ST CLAIMANT

PHILEMON CHEPKWONY2ND CLAIMANT

DENNIS KOSGEL..... 3RD CLAIMANT

ELIUD KOSGEL.....4TH CLAIMANT

EDWIN KOECH.....5TH CLAIMANT

GILBERT RONO.....6TH CLAIMANT

PATRICK KIPKOECH CHEPKWONY.....7TH CLAIMANT

COSMAS KIPNGETICH KORIR 8TH CLAIMANT

VERSUS

ROSOGA INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed the memorandum of claim on 22nd September, 2017 on the grounds that they were all verbally employed by the respondent.
2. The 1st claimant was employed as a machine operator in January, 2016 with hours of work being 7am to 6pm for the day or night shift. The wage paid differed every month. He worked until May, 2017 when employment was terminated without due process or payment of the owing terminal dues.
3. The 2nd claimant was employed for 1 year and 9 months as a machine operator from August, 2015 and did not take annual leave. He was earning ksh.300.00 per day and differed each month.
4. The 3rd claimant was employed as a general worker from February, 2016 to April, 2016 and paid ksh.6,000.00 and from May to July, 2016 he was paid ksh.4,000.00 per month and from August, 2016 to April, 2017 he as paid ksh.3,00.00 per month.
5. The 4th claimant was employed as a general worker in May, 2016 and paid different wages each month.
6. The 5th claimant was employed in November, 2016 as a general worker until April, 2017.
7. The 6th claimant was employed as a general worker at ksh.300.00 per day from December, 2016 to April, 2017. He was promoted to a logger line cutter in January, 2017.
8. The 7th claimant was employed as a general worker in August, 2016 earning ksh.8, 000.00 per month for 9 months when employment terminated in April, 2017. He was not paid the due leave days.

9. The 8th claimant was employed as a machine operator in March, 2016 and paid different wages each month with gross underpayments until April 2017 when all the claimants were terminated without notice or being given reasons or payment in lieu thereof.

10. All the claimants worked overtime which as not compensated. No house allowance was paid. Work during public holidays and due leave days were not paid. There was underpayment. The wage due to May, 2017 was not paid while the 4th claimant was not paid for 5 months and the 7th claimant was not paid for 8 months. There was no notice issued before employment terminated.

11. The claimants were registered with ROCOM Sacco (ROSOGA COMMUNIT SACCO) without their consent and each was deducted ksh.1, 100.00 per month. Upon termination of employment, the due shares were not refunded.

12. The claimants were registered into another Sacco, ROWA WELFARE and the respondent was deducting ksh.100.00 per month.

13. Upon termination of employment, the 2nd claimant was paid Ksh.8, 570.00;

3rd claimant paid ksh.5, 190.00;

4th claimant paid ksh.4, 000.00;

5th claimant paid ksh.6, 000.00;

6th claimant paid ksh.6, 000.00; and

7th claimant paid ksh.6, 000.00.

14. The claims are for the payments of One month notice pay, underpayments, leave days due, overtime pay, public holidays, refund of Sacco shares, unpaid salaries, compensation and costs.

1st claimant is seeking;

- a. Notice pay Ksh.12,971.35;
- b. Underpayments ksh.42,165.60;
- c. Overtime Ksh.62,471.10;
- d. Leave Ksh.12,638.15;
- e. Wage for May, 2017 Ksh.12,971.35;
- f. Public holidays ksh.15,964.70;
- g. Compensation Ksh.155,656.20;
- h. Sacco refunds Ksh.18, 000.00.

The 2nd claimant is seeking the following

- a. Notice pay Ksh.12,971.35;
- b. Underpayments ksh.84,051.40;
- c. Overtime Ksh.87,459.50;
- d. Leave Ksh.14,750.10;
- e. Wage for May, 2017 Ksh.12,971.35;
- f. Public holidays ksh.16,432.15;
- g. Compensation Ksh.155,656.20;
- h. Sacco refunds Ksh.25, 200.00.

3rd claimant is claiming the following;

- a. Notice pay Ksh.6,720.80;
- b. Underpayments ksh.43,091.20;
- c. Overtime Ksh.32,367.90;
- d. Leave Ksh.5,645.95;
- e. Wage for May, 2017 Ksh.6,720.80;
- f. Public holidays ksh.7,192.95;
- g. Compensation Ksh.80,649.60;
- h. Sacco refunds Ksh.18, 000.00.

4th claimant;

- a. Notice pay Ksh.6,720.80;
- b. Underpayments ksh.5,160.80;
- c. Overtime Ksh.25,894.30;
- d. Leave Ksh.4,090.90;
- e. Wage for May, 2017 Ksh.33,604.00;
- f. Public holidays ksh.5,394.65;
- g. Compensation Ksh.80,649.00;
- h. Sacco refunds Ksh.14, 400.00.

5th claimant;

- a. Notice pay Ksh.6,720.80;
- b. Overtime Ksh.12,947.15;
- c. Leave Ksh.3,110.00;
- d. Unpaid wage Ksh.26,883.00;
- e. Public holidays ksh.4,195.00;
- f. Compensation Ksh.80,649.00;
- g. Sacco refunds Ksh.7, 200.00.

6th claimant,

- a. Notice pay Ksh.6,720.80;
- b. Underpayments ksh.4,148.80;
- c. Overtime Ksh.21, 578.
- d. Leave Ksh.4,090.90;
- e. Unpaid wage Ksh.6,720.80;

- f. Public holidays ksh.4,615.65;
- g. Compensation Ksh.80,649.00;
- h. Sacco refunds Ksh.12, 000.00.

7th claimant;

- a. Notice pay Ksh.6,720.80;
- b. Underpayments ksh.5,160.80;
- c. Overtime Ksh.19,420.70;
- d. Leave Ksh.5,183.00;
- e. Unpaid wages Ksh.53,766.40;
- f. Public holidays ksh.4,796.20;
- g. Compensation Ksh.80,649.00;
- h. Sacco refunds Ksh.10, 800.00.

The 8th claimant;

- a. Notice pay Ksh.12,791.40;
- b. Underpayments ksh.83,665.60;
- c. Overtime Ksh.25,894.30;
- d. Leave Ksh.4,090.90;
- e. Wage for May, 2017 Ksh.12,971.40;
- f. Public holidays ksh.15,039.30;
- g. Compensation Ksh.155,656.60;
- h. Sacco refunds Ksh.16, 800.00.

15. The 1st claimant testified on behalf of the claimants that they were all employed by the respondent who was running day and night shifts.

16. In May, 2017 the respondent dismissed all the claimants without giving reasons. Nothing had happened. It was sudden and nothing was paid. For 20 days worked in May, 2017 the wages due were not paid. Some dues were paid but these did not cover the owing terminal dues.

17. Over the months the claimants were paid inconsistently, different wages without any explanation. For every wage paid there was a deduction to the Sacco and there was no refund at the end of employment.

18. Each shift was running from 7am to 6pm or vice versa. For the overtime work there was no compensation. Work days were Monday to Saturday including public holidays. No leave days were awarded.

19. Upon cross-examination, the claimant testified that he is not aware that the 7th claimant is working with the respondent. His duties were of log cutting but had no contract as a machine operator. No letter of promotion. There were payments to a Sacco without consent. No clearance was done as casual employees.

Defence

20. The defence is made of mere denials save that on without prejudice assert that sometime in the year 2017 the sawmill where the claimants were working as casuals went without logs due to delay in allocation of a plantation. Without work materials, operations were suspended and the casual workers, including the claimants were duly notified and informed that they would be recalled when the respondent had logs. The allegations made with regard to owing dues does not arise, the claimants remained casual employees and paid for work done and are not entitled to the claims made.

21. Moses Serem the operations manager for the respondent testified that the claimants were causal employees and paid on weekly or monthly basis and paid based on work done. Employment was offered when available. The respondent had no logs and forced to suspend operations and lay off the claimants together with other employees. They were notified of the situation and informed that once the plantations were allocated they would be notified and recalled back.

22. Mr Serem also testified that some time in October, 2017 work was available and the respondent communicated that it needed causal employees. The 7th claimant returned to work as a causal.

23. There was no termination of employment as the claimants remained causal employees of the respondent and when there was no work they were notified.

24. Mr Serem also testified that some claims were paid daily or weekly or monthly and due to the due statutory deduction were issued with pay slips. The respondent also paid NSSF and NHIF and the Sacco dues. The Sacco payments were based on individual savings. The claimants as causal employees were not entitled to notice pay.

25. The nature of the respondent's work has highs and lows and based on availability of logs allocation in the tree plantations. The claimants were to be recalled back once work was available.

26. The Sacco is registered under the Co-operative Society Act for respondent's employees.

27. At the close of the hearing, both parties filed written submissions.

28. The claimants in submissions filed some of their payment statements;

1. Ondere Joshwa Alibi;
2. Chepkwony Philemon;
3. ...
4. Eliud Kiprono Koskei
5. Edwin Koech
6. Gilbert Rono;
7. Patrick Kipkoech Chepkwony
8. Cosmas Korir;

29. These statements were not made available to the respondent during the hearing to help them make any defences therefrom. To file them at this stage is to deny the respondent due process. However, these records are crucial to any employment and labour relations claims filed with the court and the duty is vested upon an employer such as the respondent to submit the same under the provisions of section 10(6) and (7) of the Employment Act, 2007. This duty was not discharged and the court shall apply these records as filed accordingly.

30. The payment statements however only relate to a few months for each claimant. They do not speak to the entire duration of their alleged employment with the respondent.

31. Without the respondent filing any form of work records, the alleged payment of terminal dues as pleaded, huge gaps are apparent. The court cannot make a finding with regard to the duration of employment, the nature of employment for the alleged term of employment for any claimant so as to arrive at a conclusion.

32. The defence is that the claimants were employed as causals and some paid daily or weekly or monthly. The records to support such defence is necessary for the court to review the terms for the daily wage, the terms for the weekly wage payments and the terms and conditions with regard to monthly wage payments.

33. The County Labour Officer shall access the respondent's work records as assist the court in this regard.

34. This shall take into account not all the claimants attended court at the hearing and the 1st claimant testified on their behalf and the defence that the 7th claimant has since returned to work. The 3rd claimant also did not file any payment statement.

35. The alleged payment by the respondent of Ksh.6, 720.00 to the 3rd to the 7th claimants and the payment of ksh.12, 971.40 to the 1st, 2nd and 8th claimants shall be put into account and a confirmation of the records in evidence accessed and assessed.

36. The County Labour Officer shall tabulate the dues owing, if any, and based to the availed records as follows;

- a. Period of service;
- b. Nature of employment;
- c. Reason(s) for end of employment;
- d. Any terminal dues, if any; and
- e. Putting into account the paid terminal dues.

37. A report shall be filed with the court within 45 days from the date hereof.

As the duty to file work records is vested upon the employer, the respondent in this case, the costs due to the County Labour Officer in the exercise of the functions above shall be met by the respondent. The respondent shall allow the CLO reasonable access to their premises and shop floor for this purpose.

38. On the claims for Sacco payment refunds, the claimants assert that these dues owe from the respondent. A Sacco is an entity registered under a separate legal regime and under the provisions of the Co-operative Societies Act with its members setting the rules of operation and regulations with officers/officials to manage the same. Each member must apply and be allowed to join. An employer is only allowed to effect a deduction to the Sacco upon the application and approval by the employee. Such is regulated under the provisions of section 19 of the Employment Act, 2007 which allow the employer to effect all lawful deductions from a wage.

39. With end of employment, the duty is upon the employee to apply to exit and be paid the due benefit, share contribution or as the rules of operation provide for. Such an entity such as a Sacco must be operated separately from the employer and be run by its officials who may be drawn from differ cadres of employees in the same entity.

40. In this regard, where the claimants wish to withdraw from the Sacco, an application therefrom or as required under the Sacco regulations is imperative. However such should not be applied to victimise them for filing the claims herein as such will be contrary to fair labour relations and against the spirit of co-operators under the Sacco.

41. A complete set of work records from the respondent shall facilitate assessment of the Sacco dues noting the deductions which have been effected for the duration of employment for each claimant. This shall suffice in this regard.

Accordingly, the matter is hereby referred to the County labour Officer to report to the court as paragraph 36 above. Parties shall attend, work with the appointed officer and upon compliance, take a mention date for the court to confirm the findings and direct as appropriate. Where the respondent fails to comply as required, the County Labour Officer shall report to the court for the necessary facilitation.

Delivered in open court at Nakuru this 11th July, 2019.

M. MBARU

JUDGE

In the presence of:

Court Assistants: &

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