



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 833 OF 2017

BETWEEN

1. SIMEON NYANGAU MOSES
2. SULEIMAN ABDALLAH JEFWA
3. CHARLES MGHANGA MWASICHO.....CLAIMANTS

VERSUS

ONE WAY CLEANING SERVICES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odindiko & Company Advocates for the Claimants

Wanyaga & Njaramba, Advocates for the Respondent

JUDGMENT

1. The 3 Claimants filed their Statement of Claim on 2nd November 2017. They state, they were employed by the Respondent. The 1st and 2nd Claimants were employed on 10th December 2009, the 3rd Claimant on 1st November 2007. The first 2 Claimants were Cleaners, earning a monthly salary of Kshs. 7,500 while the 3rd was a Supervisor, earning a salary of Kshs. 9,500 monthly.

2. Their collective grievance is that on 30th December 2014, the Respondent terminated their contracts of employment, without notice, genuine reasons and payment of terminal dues. They seek Judgment against the Respondent as follows:-

1st Claimant

- 1 month salary in lieu of notice at Kshs. 7,500.
- Annual leave over a period of 5 years at Kshs. 30,240.
- Redundancy at Kshs. 21,635.
- Years of service at 21,600.
- Public holidays at Kshs. 14,400.
- Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 90,000.

Total...Kshs. 185,375.

2nd Claimant

- Notice pay at Kshs. 7,500.

- Annual leave at Kshs. 30,240.
- Redundancy at Kshs. 21,635.
- Years of service at Kshs. 21,600.
- Public holidays at Kshs. 14,400.
- Compensation at Kshs. 90,000.

Total...Kshs. 185,375.

3rd Claimant

- Notice pay at Kshs. 9,900.
- Annual leave at Kshs. 55,860.
- Redundancy at Kshs. 39,900.
- Years of service at Kshs. 39,900.
- Public holidays at Kshs. 26,600.
- Compensation at Kshs. 118,000.

Total...Kshs. 291,040.

The Claimants pray also for costs, interest and any other suitable relief.

3. The Respondent filed its Statement of Response on 8th December 2017. Its position is that it had been contracted by other entities to offer cleaning services. The cleaning contracts expired. The 1st Claimant was offered a fresh assignment elsewhere, which he declined. The 2nd Claimant was stationed at Electricity House Mombasa. Upon expiry of the Respondent's contract with Electricity House, the 2nd Claimant was reassigned duty at the same place, by the successor to the Respondent. The 3rd Claimant worked at Kahamas Hotel. He absconded. All efforts by the Respondent to trace him failed. The Claim is baseless and should be dismissed with costs to the Respondent.

4. The 3 Claimants testified on 12th June 2019, as did Respondent's Zonal Manager, John Mutisya Kioo, bringing the hearing to a close.

5. The 1st Claimant told the Court his contract had been renewed by word of mouth, to run from 2013 until 2015. The contract was terminated on 30th December 2014, before its due date. The Manager told the Claimants there was no more work. They were advised they would be recalled, once the situation improved. They were never recalled. The 1st Claimant did not know there was a contract for cleaning services, between the Respondent and Kenya Ports Authority. Cross-examined, the 1st Claimant confirmed that John Kioo was his Manager. The 1st Claimant was not advised that the KPA contract ended in July 2014. He was not offered alternative work. His employment contract was to lapse in 2015.

6. The 2nd Claimant associated himself fully with the evidence of the 1st Claimant. He added that he worked at a site called Stima Sacco. Cross-examined, he agreed that he was informed the contract between Stima Sacco and the Respondent had expired.

7. The 3rd Claimant confirmed he was stationed at Kahamas Hotel. He, like the Co-Claimants, was on an oral 2 year contract, which had not expired at the time of termination. He was told there was no more work. He was promised he would be recalled, which never happened. He did not abscond as alleged. He testified on cross-examination that the Respondent wrote to the Labour Office saying the 3rd Claimant was absent from work on 23rd October 2014. It is not true that the 3rd Claimant was absent. He never went back to enquire from the Respondent if there was more work afterwards.

8. Kioo told the Court that the 1st Claimant worked at KPA. The contract between the Respondent and KPA lapsed in July 2014. Some of the Employees were absorbed by the new service provider. The 1st Claimant was taken in by another Company. The 2nd Claimant worked at Stima Sacco. The contract with this Sacco ended in December 2014. The 2nd Claimant was absorbed by the new contractor. The 3rd Claimant absented himself from Kahamas. The Hotel called Kioo complaining. The Respondent wrote a letter to the Labour Office, notifying the Office about 3rd Claimant's absence. The Respondent secured a replacement for the Hotel.

9. Cross-examined, Kioo told the Court that the Claimants knew about the expiry of the commercial contracts between the Respondent and the other 2 entities. The commercial contracts were not availed to the Court. There was no document showing that the Claimants were taken in by other Employers. The 3rd Claimant was absent from 23rd October 2014 to 3rd November 2014. Kioo called the 3rd Claimant, but the 3rd Claimant did not answer his calls.

The Court Finds:-

10. It is not contested that the Claimants were employed by the Respondent, in the positions stated in their Statement of Claim. It is also clear that the Claimants held oral contracts of 2 years at the time of termination, which were to lapse in 2015. Termination took place before the employment contracts matured. The Claimants had enjoyed renewal from 2009 and 2007.

11. The Respondent has brought to the attention of the Court, decision in *Rachael Kanini Mwatu v One Way Cleaning Services Limited [2018] e-KLR*, a matter which involved the same Employer in this Cause, and its former Employee, a Cleaner. It was the finding of the Court that the Respondent had a cleaning contract with KPA. The contract expired and the Employee left, and was employed by the new contractor Norgen Enterprises. The Claim in the case of Kanini was declined.

12. The Court finds evidence relating to the 1st Claimant, and evidence in Kanini case distinguishable. There was no contract between the Respondent and KPA availed to the Court in the current proceedings. There was no evidence, unlike in Kanini case, that the 1st Claimant secured an alternative job.

13. With respect to the 2nd Claimant, the Respondent did not produce any commercial contract involving Stima Sacco or Electricity House. It has not been shown that such a contract existed and expired as stated by the Respondent, making it necessary to terminate 2nd Claimant's contract.

14. Concerning the 3rd Claimant, it was the position of the Respondent that he disappeared from Kahamas Hotel on 23rd October 2014. The letter from the Respondent to the Labour Office, dated 3rd November 2014 does not indicate if the 3rd Claimant returned at all. The evidence of Kioo was that the 3rd Claimant was absent between 23rd October 2014, to 3rd November 2014. If he was available after 3rd November 2014, why was he not taken through a disciplinary hearing for absenteeism? The Respondent told the Labour Office that the 3rd Claimant had disappeared and the Respondent would terminate the 3rd Claimant's contract in accordance with the law. Did the Respondent terminate the 3rd Claimant's contract in accordance with the law? There is no written letter of termination stating the reason, or reasons justifying termination. There was no disciplinary hearing.

15. The Respondent did not, in all the 3 cases, prove the reason or reasons for termination. It did not justify termination under Sections 43, 45 and 47[5] of the Employment Act. In the case of the 3rd Claimant, there was no justification, and procedure under Section 41 was flouted. The Claimants were contracted up to the year 2015. Did not the Respondent know its commercial contracts would expire before expiry of the Claimants' employment contracts?

16. It is declared termination was unfair.

17. The 1st Claimant's pay slip on record, for July 2012, shows his gross monthly salary was Kshs. 7,500 as pleaded. The 2nd Claimant exhibited pay slip for February 2013, showing a gross monthly salary of Kshs. 7,586. The 3rd Claimant produced 2 pay slips, the last for April 2014, showing his total monthly earnings at Kshs. 9,000. There were no pay slips supporting the figures pleaded by the 2nd and 3rd Claimants. It is also not clear if the 1st Claimant earned the same salary he earned in 2012, on the date of termination 2 years later. The Court shall adopt the salaries shown in the pay slips, in computing compensation and any other relevant awards.

18. The Claimants are granted 1 month salary in lieu of notice at Kshs. 7,500, Kshs. 7,586 and Kshs. 9,000 respectively.

19. The 1st and 2nd Claimants are granted equivalent of 5 months' salary in compensation for unfair termination at Kshs. 37,500 and Kshs. 37,930 respectively. The 3rd Claimant is awarded 7 months' salary in compensation for unfair termination at Kshs. 63,000.

20. The prayers for annual leave over a period of 5 years have no merit. The Claimants have not explained why they did not claim annual leave after their previous contracts expired. Furthermore there are Leave Application Forms exhibited by the Respondent, showing they applied for leave and went on leave at some point. They have not accounted for any days taken. The prayer is declined.

21. They pray for redundancy. Redundancy is one of the ways a contract of employment can be terminated. It is termination of employment under Section 40 of the Employment Act. It is not a benefit capable of being granted by the Court. The prayer for redundancy is declined.

22. Service pay is not awardable. The Claimants were actively subscribed to the N.S.S.F as shown in their pay slips. They are not eligible for service pay under Section 35 of the Employment Act 2007.

23. The Claimants did not give adequate evidence, supporting the prayers for holiday pay. There is no record of any work done, during public holiday. They claim a blanket 10 days every year, without specifying which these 10 days are. They did not explain why they never claimed holiday pay at the end of previous contracts. The prayers under this item are declined.

IT IS ORDERED: -

a) Termination was unfair.

b) The Respondent shall pay to the Claimants notice, and compensation for unfair termination, calculated at Kshs. 45,000, Kshs. 45,516 and Kshs. 72,000 respectively.

c) Costs to the Claimants.

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

Dated and delivered at Mombasa this 27th day of September 2019.

James Rika

Judge