



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 3 OF 2018

[As consolidated with Cause 242 of 2018 and Petition 5 of 2018]

(Before Hon. Justice Mathews N. Nduma)

PETER OTIENO ODERA.....1ST CLAIMANT

REGINA OWAKA OCHOLA.....2ND CLAIMANT

ANTONEY GAYA TINDI AND 66 OTHERS.....3RD CLAIMANT

VERSUS

COUNTY GOVERNMENT OF HOMA BAY.....1ST RESPONDENT

HOMA BAY COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

JUDGMENT

1. The employment of the 68 claimants was terminated by the respondent by an internal memo dated 22nd December 2017 for the reason that the claimants were casuals, and that the County government could no longer afford to keep the casual employees due to budgetary constraints as a result of the high wage bill.

2. The claimants vide memorandum of claim filed on 5th January 2018 allege that the termination of their employment was unlawful and unfair in that they had served the respondent in various sub counties continuously, and for prolonged period and were no longer casuals. That most of them had worked for longer than one year period.

3. The claimants rely on the provisions of *Section 37(1) and (3) of the Employment Act, 2007 read with Section 35(1) (c)* to aver that although they were initially employed as casuals, they had long converted to regular employees protected under the provisions of the Employment Act, 2007. The claimants pray for the reliefs set out under paragraph 3.1 of the statement of claim including:

(a) Declaration that the respondents have violated the claimants' right to fair labour practice protected under Article 41 of the constitution of Kenya 2010.

(b) Declaration that the claimants are protected under part IV and V of the Employment Act, 2007 and are entitled to the minimum conditions set out in these parts.

(c) That the claimants be reinstated to their respective jobs.

4. In the alternative the claimants be compensated for unlawful and unfair dismissal; be paid in lieu of two months' notice; be paid gratuity and payment of arrear salaries.

5. Petition number 5 of 2018 was consolidated with E&LRC Cause Number 242 of 2018 in which similar reliefs are sought by 12 claimants vide a memorandum of claim filed on 2nd July 2018 setting out similar facts and seeking same reliefs as the claimants in cause number 3 of 2018.

Statement of Response.

6. The respondents filed statement of response on 17th August 2018 in which is admitted that the claimants were employees of the respondents but denies that the termination of their employment was unlawful and unfair. The respondents aver that the employment of the claimants was casual in nature and their claims be dismissed with costs.

7. CW1 testified that the claimants were employed on three months contracts which were extended from time to time. That CW1 earned Kshs. 16,800 per month which was paid in his Equity Account. That he was termed a casual and worked as a clerical officer.

8. That on 16th August 2016, CW1 was given an open casual appointment. That he worked continuously until 22nd December 2017 when his services were terminated vide a general memo directed at all the casual workers. CW1 said all the claimants were employed on similar terms and conditions as himself on short term contracts and eventually as casuals. That they were all terminated en- mass on the same day without notice, notice to show cause and without any disciplinary hearing. CW1 stated that the claimants are entitled to the reliefs sought. The claimants' were now unemployed. They had been employed on diverse dates. They had all served for long periods and were terminated on the same day and in the same manner.

9. RW1 Charles Omondi Ouma, Director of Human Resource of the respondent testified that in November 2017, the County government wrote to the claimants requesting them to produce their documents for assessment of their qualifications. That the claimants did not produce their documents as requested.

10. RW1 stated that the casuals were inherited from the previous County Councils and others were new. RW1 stated that the claimants were appointed on one month or three months contracts. RW1 stated that all the claimants were hired before RW1 was employed two years ago. RW1 did not know the actual circumstances of their recruitment. The respondents wrote to the heads of departments asking them to notify the casuals of the eventuality of termination within 30 days. A general notice was then issued terminating the employment of the claimants. RW1 stated that about 1,000 employees were terminated. RW1 did not know how long each one of them had worked.

11. RW1 stated that the wage bill will be impossible to manage if the casuals are reinstated. That the County government looked at public interest in the matter before taking the decision to terminate.

12. RW1 under cross examination stated that he was not privy to the specific claims made for payment of arrear salaries and could therefore not dispute them. RW1 stated that only about 100 claimants are before court. RW1 opined that the exercise was successful because the 900 others may have been ghost workers. RW1 added that the wage bill went down from 45% to 40% after the termination. RW1 added further that ideal ratio was 35%. RW1 conceded that the claimants were not paid for a while before the termination took place. RW1 was not aware whether or not the claimants were granted leave.

Determination

13. The issues for determination are:

- (a) Whether the termination of the employment of the claimants was lawful and fair.
- (b) Whether the claimants are entitled to the arrear salaries claimed.
- (c) Whether the claimants are entitled to payment in lieu of leave.
- (d) Whether the claimants are entitled to reinstatement.

Issue (i)

14. The respondent embarked on an exercise to weed out 'Ghost' workers with a view to control the wage bill that according to RW1 had gotten out of hand. The exercise targeted about 1,000 casual workers mainly inherited from previous County Councils. About 1,000 employees had their employment terminated vide a general memo issued on 22nd December 2017.

15. The respondents did not address each of the employees but they were dealt with en- mass. The claimants before court are part of the 1,000 employees RW1 states were dismissed. The claimants have testified that they had worked for the respondent for varying periods but none of them had worked for less than one year. That some had worked continuously for up to 15 years. That they were doing revenue collection in various departments and were on three (3) months contracts most of the times but eventually they continued to work as casuals without a fixed term contract.

16. The claimants alleges that they are owed arrear salaries and were not given leave or paid in lieu of leave since they were treated as casuals. The claimants allege that the termination of their employment violated the Employment Act in that they were not given notice, notice to show cause nor were they given a hearing. The claimants pray for reinstatement to their jobs and in the alternative payment of the terminal benefits sought.

17. It is not in dispute that the claimants worked for the respondent for long periods and in terms of *Sections 37 and 35 of the Employment Act*, the claimants had converted to employees protected by the Employment Act and therefore entitled to the rights and protection under *part III, IV, V and VI of the Employment Act, 2007*.

18. Section 37 (1) and (2) reads:

“ (1) Notwithstanding any provisions of this Act, where a casual employee— (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service. (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days”

Sections 35 and 36 on the other hand reads:

“ (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be— (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice; (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. (2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto. (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. 36. Payment in lieu of notice: Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section”.

19. A literal interpretation of the aforesaid provisions lead to the conclusion that:

(a) The claimants had converted from casual to protected employees.

(b) The claimants are entitled in terms thereof to terminal benefits of:

(i) At least 28 days' notice or payment in lieu of notice.

(ii) Leave days calculated at 21 days for each completed year of service.

(iii) Gratuity calculated at 15 days salary for each completed year of service since they were not on any pension or social security.

(iv) Certificate of service and to

(v) A valid reason for termination of employment following a fair procedure in terms of *Sections 41, 43 and 45 of the Employment Act, 2007*.

20. Considering the evidence by the claimants, the court is satisfied that each one of them is entitled and is awarded the following terminal benefits:

(a) One month salary in lieu of notice.

(b) Payment in lieu of leave days calculated at 21 days for each completed year of service.

(c) Gratuity calculated at 15 days salary for each completed year of service.

Reinstatement/Compensation

21. The evidence before court clearly shows that the employment of the claimants was terminated not for any reason of their own making. It was an operational decision by the respondent to clear what they referred to as ghost workers. The claimants were simply asked to provide their letters of appointment to their heads of departments. This exercise was not completed, with respect to each individual. Instead the respondents issued a general memo terminating the employment of at least one thousand casuals who included the claimants. The claimants were largely involved in debt collection for the County Government. This was a continuous service undertaken by the claimants for years. It follows that each claimant required a valid reason for their employment to be terminated. The respondent did not bother to provide any such reason at all. The claimants were not issued with notice to show cause and opportunity to respond to it nor were they provided with opportunity to be heard orally as to why their employment ought not to be terminated.

22. Clearly, the respondent did not attempt to comply with *Sections 41 and 43 of the Employment Act*, under the mistaken belief that the claimants were all casuals and were not entitled to any due process.

23. The claimants have proved on a balance of probabilities that the termination of their employment was wrongful as mandated by *Section 47(5) of the Employment Act, read with Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya*.

24. The respondent failed to justify the termination of the employment of the claimants by providing a valid reason for the mass termination.
25. The court therefore finds that the termination of the employment of the claimants violated *Sections 41, 43 and 45 of the Act*, and was unlawful and unfair. The claimants are entitled to remedies provided under *Section 49(1) (2) (3) read with (4) of the Employment Act 2007*.
26. In this regard, the claimants did not contribute to their termination. The claimants were not paid terminal benefits nor compensated for the unlawful and unfair termination.
27. The claimants were treated as casuals over the years and thus suffered discrimination on this basis by being denied minimum rights provided by the Employment Act, including adequate salary, leave days, house allowance; pension and/or NSSF *interalia*.
28. The facts of this case in the court's view make it difficult for the court to order reinstatement of the claimants it being unclear what circumstances prevail at each work station the claimants were situated. It is also not clear whether other employees have taken over the positions earlier held by the claimants.
29. It is in the court's view appropriate to order compensation to the claimants instead. The claimants suffered loss and damage over the years they were treated as casuals to the date of their mass termination. These aggravating circumstances compel the court to order maximum compensation to each claimant by granting twelve (12) months salary in compensation for the unlawful and unfair termination.
30. In the final analysis judgment is entered in favour of the claimants as against the respondents as follows:
- (a) Maximum compensation equivalent to twelve (12) months salary to each of the claimants in the consolidated suit.
 - (b) One month salary in lieu of termination notice to each claimant.
 - (c) 15 days salary for each completed year of service by each claimant.
 - (d) Three (3) months salary in lieu of leave days not taken to all the claimants who had served for more than three (3) years and any lesser payment in lieu of leave days not taken with regard to those who had served for less than three years. This order recognizes the three (3) year limitation period within which claims may be filed.
 - (e) Certificate of service to each of the claimants.
 - (f) The respondent to compute the award in respect of each claimant, serve on the claimants and file same within 45 days from to date failing which the claimants to file their computation within 15 days of expiry of the 45 days above.
 - (g) The respondents to pay costs of the suit.

Judgment Dated, Signed and delivered this 24th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Obach for the claimants

Mr. Owaka for Respondent

Chrispo – Court Clerk