



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 262 OF 2015

[Consolidated with Employment and Labour Relations Causes Nos. 260,261,263,264,265,266,267,268,269,270 all of 2016]

(Before Hon. Justice Mathews N. Nduma)

WILSON MUKUHA.....1ST CLAIMANT
SAMUEL OTIENO MBECHÉ.....2ND CLAIMANT
ROBERT OTIENO OMER.....3RD CLAIMANT
FREDRICK OWINO OYWER.....4TH CLAIMANT
PHILIP KIDULA EVELIA.....5TH CLAIMANT
MOSES OBWAO BOGE.....6TH CLAIMANT
TIMOTHY VIJEDI VOGEFU.....7TH CLAIMANT
SETH JOTHAM ANAMANDA.....8TH CLAIMANT
CHARLES OCHIENG OTIENO.....9TH CLAIMANT
LUKAS ODONGO OLIYO.....10TH CLAIMANT
WYCLIFFE NDEDA BOGE.....11TH CLAIMANT
WALTER ODONGO SHIKOYO.....12TH CLAIMANT

VERSUS

PABARI ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. This is a consolidated suit, with eleven others. Judgment in this matter is to apply to the others. The claimant on 1st October 2018 filed a schedule of particulars in respect of the twelve (12) claimants. Robert Otieno in cause no. 269 of 2015 and Wilson Mukuha in 264 of 2015 testified on behalf of other claimants. All twelve (12) claimants filed their witness statements.

2. CW1, Robert Otieno told the court that he was a driver and lived at Kibos. That he recorded a witness statement dated 2nd August 2018. CW1 relied on the contents of the statement as part of his evidence in chief. The claimant relied on the memorandum of claim and produced exhibits '1' to '8' annexed thereto.

3. CW1 testified that he was employed on 1st February 2000 as a turn boy by the respondent. That he worked continuously until the year 2013, when the respondent introduced a three (3) months contract. The twelve claimants would renew the contract every three (3) months. CW1 told the court that the twelve claimants felt oppressed by the short contracts. That at times they would be made to stay at home even for six months if the supervisor did not like one. The twelve claimants joined Kenya Union of food and Allied workers in January. Mr.

Pabari discovered that the claimants had joined the union in March 2015. Mr. Pabari summoned them and summarily dismissed them for joining the union. That the twelve were not charged with any offence. They were not given any notice or notice to show cause. That the twelve were not subjected to any disciplinary hearing. Mr. Pabari simply told them that he did not want union in his company. CW1 told the court that Mr. Pabari said he would pay any labour officer who took the case. CW1 further testified that Mr. Pabari told them that they shall walk until all their shoes were finished. CW1 told the court that they were still jobless to date. That the union leader was compromised by Mr. Pabari hence the claimants hired an advocate.

4. CW1 prayed that the summary dismissal of the twelve claimants be declared unlawful and they be compensated as per the schedule of particulars filed on 1st October 2018 dated the even date.

5. CW1 was cross examined by Mr. Omondi for the respondent. CW1 told the court that the claimants were employed on three months and six months contracts. That when Pabari got information that the twelve employees had joined the union, he summarily dismissed them. CW1 stated that they had a daily wage. That they all worked for the respondent in a hardware shop that sells building materials. That some of the claimants had served for up to 10 years. That they worked six days a week and were paid daily. That they earned Kshs. 470 per day. That they were not given leave. CW1 had served the respondent for about 11 years. The period of service is reflected in the filed schedule.

6. RW1 Jaden Pabari testified for the respondent. RW1 Relied on a witness statement dated 15th May 2018. RW1 admitted that the twelve claimants were his employees. That they worked as casuals. That they were paid a daily wage. That they had signed fixed term contracts which were renewed from time to time. That the claimants wanted indefinite employment. That it was against the company policy to employ people on permanent terms. That the union wrote to the company to that effect but the respondent did not respond to the letter. That Kenya Building, Construction, Timber and Allied Industries Union was the legitimate union. Respondent did not recognize the union the claimants had joined, which was Kenya Union of Commercial Food and Allied workers. RW1 stated that respondent did not deal with food but dealt with building material and timber products. RW1 stated that the respondent was a member of FKE. RW1 stated that initially 20 employees sued the respondent.

7. That 14 employees were still working for the respondent. That Respondent has a Recognition Agreement with the right union. RW1 stated that the claimants' employment was not terminated but the claimants refused to sign new contracts. RW1 stated that the claimants worked as casuals and were given leave. That they were paid daily. RW1 said issue of notice or notice pay does not arise since respondent did not terminate employment of the claimants. That the contracts provided for 7 days termination notice.

8. That the claimants walked out of employment. That the 12 claimants loaded and off loaded building material. That they were all paid Kshs. 470 per day. Records of payments were produced. The contracts did not provide for leave. That all the claimants worked for the respondent for several years. That the claimants were not registered with NSSF and NHIF. RW1 denied under cross examination that he made the claimants sign short term contracts after many years of service to avoid legal obligations. RW1 stated that the claimants were ill advised and they walked away from their employment. RW1 said the respondent had operated for 34 years and it was a good employer. RW1 did not deny that the schedule filed by the claimants on 1st October 2018 reflected the correct number of years each of the claimants had worked. RW1 said they employed 50 workers on average. RW1 stated that the claimants were not paid in lieu of leave not taken. RW1 stated that he had received demand letters from the advocate for the claimants.

Determination

9. The issues for determination are:

(i) Whether the employment of the twelve claimants listed in the schedule filed on 1st October 2018 was unlawfully and unfairly terminated or the claimants refused to sign new contracts and walked away?

(ii) Whether the claimants are entitled to the reliefs sought.

Issue (i)

10. The evidence by CW1 was that they had worked for the respondent as loaders in the hardware shop for various periods reflected in the statements of claim filed by each of the twelve claimants and summarized in the schedule filed on 1st October 2018. That the claimants worked continuously until March 2015, when RW1 learnt that the claimants had joined Kenya Union of Commercial food and Allied workers and he summoned all of them and summarily dismissed them without any charge laid against them, without any notice or notice to show cause given to them and without any disciplinary hearing. RW1 simply told them he did not want the new union in his company and chased them away without payment of any terminal benefits. That demand letter was sent to the respondent but it was not heeded. That it was not until the year 2013 when RW1 started to make the claimants sign short term contracts. That the claimants felt oppressed and they joined the union. CW1 named all the 12 claimants in his witness statement and gave their month and year of employment in the statement. CW1 also stated that all were dismissed on the same date and had remained unemployed to date.

11. RW1 was unable to explain why all the 12 claimants stopped working on the same date if indeed the reason for separation was expiry of their contracts of employment. RW1 did not produce before court contracts that had expired in the month of March 2015 when the claimants stopped working. RW1 admitted that all the claimants had worked for several years but the company regarded them as casuals. RW1 admitted that it was company policy not to employ workers on permanent basis despite running a hardware shop for about 34 years. RW1 Also stated that the respondent employed about 50 employees at any given time. RW1 stated that the respondent sold building materials and the claimants were employed to load the materials on a daily basis. The respondent admitted that the contracts of employment of the claimants did not provide for leave days. RW1 also admitted that the claimants were not registered with NSSF and NHIF. RW1 stated that the claimants were not paid in lieu of notice since they were casuals and were not entitled to notice.

12. Section 37 of the Employment Act, No. 11 of 2007 provides:

“37(1) notwithstanding any provisions of this Act, where a casual employee:

(a) Works for a period of 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.

13. Section 35(1) (c) provides for the termination of employment by giving not less than 28 days’ notice. The wages of such employees are deemed to be monthly wages in terms of the same section 35(1) (c).

14. The implication of the provisions of Section 37 is to deem employees who hitherto had been employed as casuals to be permanent and pensionable employees.

15. The employees are entitled to all the rights provided under part v of the Employment Act, which rights are deemed *“Basic Minimum Conditions of Employment”*

16. Accordingly, such workers are entitled to working hours and rest days provided under Section 27 of the Employment Act and annual leave provided under section 28, which ought not to be less than 21 working days. The employees are entitled to at least one rest days in seven days. The employees are entitled to social security and medical cover under NSSF and NHIF. The employees are entitled to provision of housing at the expense of the employer.

17. More importantly, termination of employment of the employees must follow the provisions of *part VI of the Employment Act* and in particular the employer must comply with the provisions of *Section 35, 36, 41, 43, 45 and 46 of the Act.*

18. Section 46 in particular provides grounds which do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. 46 (c) provides one such reason to be:

“An employee’s membership or proposed membership of a trade union”

19. The court is satisfied that the claimants have proved on a balance of probabilities that they were summarily dismissed from employment by the respondent for joining a union of their choice. It is not the business of any employer to choose a union for its employees. The employer recognizes a union which its employees have chosen to join as members and not vice versa.

20. The employees have a right under Sections 4 of the Labour Relations Act, 2007 which provides:

“4(1) every employee has the right to

(a) Join a trade union; or

(b) Leave a trade union”

Whereas Section 5(1) prohibits discrimination as follows:

“No person shall discriminate against an employee or any person seeking employment for exercising any right contained in this Act”

21. The respondent has failed to rebut the evidence by CW1 that the only reason the twelve (12) claimants were summarily dismissed on the same day is because RW1 had discovered that the claimants had joined a union of choice. The court is satisfied that the respondent had no valid reason to dismiss the claimants. The court is also satisfied that the respondent did not follow a fair procedure in dismissing the claimants. The respondent violated Sections 35, 41, 43, 45 and 46 of the Employment Act.

22. The testimony by RW1 that it was not the policy of the respondent which employs over 50 people to provide permanent and pensionable terms and/or reasonably longer contracts to employees but instead treats employees of up to 11 years as casuals is in itself unfair labour practice. This practice by the respondent’s company constitutes unfair labour practice within the meaning of Article 41(1) of the constitution which makes it a constitutional, human right to be treated fairly at work as follows:

“41(1) every person has the right to fair labour practice”

It is this court’s finding that dismissing an employee for any of the grounds prohibited under Section 46 (a) to (e) amounts to unfair labour practice within the meaning provided under Article 41(1) of the constitution of Kenya 2010.

23. It is the court's finding that the respondent violated Article 41(1) of the constitution of Kenya 2010 by summarily dismissing the claimants for joining a union of choice.

24. In the final analysis the court finds that the suits by the 12 claimants have merit since the claimants were dismissed by the respondent for no valid reason. The respondent did not follow a fair procedure in dismissing the claimants and the respondent engaged in unfair labour practice in violation of *Article 41(1) of the constitution*.

Issue (ii) Remedies.

25. From the totality of evidence in this matter, the court is satisfied that the 12 claimants had long converted to protected employees from casuals in terms of Section 37 of the employment Act. The claimants were entitled to all the minimum essentials of an employee including at least 28 days' notice; at least 21 days paid leave; medical provision; housing allowance to name but a few. The claimants were also entitled not to be dismissed for reasons prohibited under *Section 46 of the Employment Act* and to be dismissed only for a valid reason and following a fair procedure as provided under *Sections 36, 41, 43 and 45 of the Act*.

26. The respondent violated *Sections 36, 41, 43, 45 and 46*. The respondent further violated *sections 4 and 5 of the Labour Relations Act 2007 as read with Article 41 of the Constitution of Kenya 2010* as earlier narrated in its judgment.

27. The court has found that the summary dismissal of all the claimants was unlawful and unfair and that the claimants are entitled to compensation under *Section 49(1) (c) and (4) of the Act*. Therefore in answer to issue (ii) above, the court awards the claimants remedies as follows:

Compensation

1. Samuel Otieno Mbeche

28. This claimant had served the respondent from the year March 2005 to March 2015 a period of 15 years. The respondent treated him as a casual unlawfully since the 2007 Act was enacted. The claimant was unlawfully denied leave pay; house allowance; NHIF and NSSF. The claimant was victimized for joining a union of choice. This is an aggravating factor. The claimant did not contribute to the summary dismissal. The claimant was not compensated for the wrongful termination nor was he paid terminal benefits. The court awards the claimant the equivalent of 10 months' salary in compensation in the sum of Kshs. 112,800.

2. Robert Otieno Omer

29. This claimant served the respondent from February 2000 to March 2015 a period of 15 years. All the considerations above apply to him *mutatis mutatis*. The court awards him the maximum 12 months compensation for unlawful dismissal in the sum of Kshs. 169,200.

3. Fredrick Owino Oywer

30. This claimant served the respondent from January 2006 to March 2015 a period of 9 years. All factors in (1) above apply *mutatis mutadis* to him. The court awards him nine (9) months salary in compensation for unlawful dismissal in the sum of Kshs. 101,520.

4. Wilson Mukuha

31. The claimant served the respondent from January 2005 to March 2015. All the factors in (1) above apply to him *mutatis mutadis*. The court awards him ten months salary in compensation in the sum of Kshs. 112,800.

5. Philip Kidula Evelia

32. The claimant served the respondent from January 2000 to March 2015. All factors in (1) above apply to him *mutatis mutadis*. The court awards him 12 months salary in compensation in the sum of Kshs. 135,360.

6. Moses Obwao Boge

33. The claimant served the respondent from January 2005 to March 2015. All factors in (1) above apply to him *mutatis mutadis*. The court awards him equivalent of 10 months salary in the sum of Kshs. 112,800.

7. Timothy Vijedi

34. The claimant served the respondent from February 2003 to March 2015 a period of 12 years. The court awards the claimant the equivalent of 11 months salary in compensation in the sum of Kshs. 124,080. All factors in (1) above apply to him.

8. Seth Jotham Anamanda

35. The claimant had served the respondent for a period of about 12 years. All factors in (1) above apply to him. The court awards him 11 months salary in the sum of Kshs. 124,080.

9. Charles Ochieng Otieno

36. The claimant served the respondent from July 2007 to March 2015 a period of about 8 years. All factors in (1) above apply to him. The court awards him 8 months salary in compensation in the sum of Kshs. 90,240.

10. Lukas Odongo Oliyo

37. The claimant served the respondent from October 2004 to March 2015 a period of 11 years. All factors in (1) above apply to him. The court awards the claimant equivalent of 11 months in compensation in the sum of Kshs. 124,080.

11. Wycliffe Ndeda Boge

38. The claimant served the respondent from January 2005 to March 2015, a period of 10 years. The court awards the claimant 10 months salary in the sum of Kshs. 112, 800. All factors in (1) above apply to him.

12. Walter Odongo Shikoyo

39. The claimant served the respondent from May 2011 to March 2015, a period of four years. All factors in (1) above apply to him. The court awards him the equivalent of four (4) months salary in compensation in the sum of Kshs. 45,120.

Terminal benefits

Notice Pay

40. All the 12 claimants are entitled to one month salary in lieu of notice and are awarded Kshs. 11,280 each in lieu of notice.

Payments in lieu of leave days

41. All claimants were not granted leave for the entire period they worked. The claimants were also not paid in lieu of leave. The court awards all the claimants equivalent of three (3) months' salary for three years annual leave not taken by each in the sum of Kshs. 33,840 each. The rest of leave days not taken beyond the three year period is barred by limitation of time and is disallowed for that reason.

42. In the final analysis, judgment is entered in favour of all the named twelve claimants as set out above. In addition, the claimants are entitled to interest at court rates from date of judgment till payment in full. The claimants are also entitled to costs of the suit and are awarded accordingly.

43. For clarity and avoidance of doubt, all the twelve (12) suits filed by the 12 claimants have been heard and determined by this judgment. All the files are to be placed together and all claimants summoned to attend the delivery of the judgment. In any event all of them attended the hearing of the suit.

Judgment Dated, Signed and delivered this 7th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Kimanga for claimants

Mr. Sagwe for Respondent

Chrispo – Court Clerk