



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 669 OF 2016

BETWEEN

JULIUS CHARO KAZUNGU.....CLAIMANT

VERSUS

1. MOMBASA MAIZE MILLERS

2. READY CONSULTANCY COMPANY LIMITED.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

V.N Okata & Company Advocates for the 1st Respondent

Marende, Birir, Shimaka & Company Advocates for the 2nd Respondent

JUDGMENT

1. In his Amended Statement of Claim filed on 1st December 2017, the Claimant avers, he was employed by the 1st Respondent as a Loader, in April 2005. He was earning a salary at the rate of Kshs. 600 daily. The 2nd Respondent, an outsourcing business, was engaged by the 1st Respondent to manage 1st Respondent's Labour Force. The Claimant was summarily dismissed by the 2nd Respondent on 11th April 2015. Dismissal was by word of mouth, without notice and valid reasons. He prays for Judgment against the Respondents as follows: -

- a. 1 month salary in lieu of notice at Kshs. 18,000.
- b. Service pay at the rate of 15 days' salary over a period of 10 years worked, at Kshs. 90,000.
- c. Annual leave of 22 days annually for 10 years at Kshs. 130,000.
- d. 12 months' salary in compensation for unfair termination at Kshs. 166,296.

Total...Kshs. 404,296.

- e. Certificate of Service to issue,
- f. Declaration that the Claimant was in regular employment.
- g. Costs.

2. The 1st Respondent filed its Amended Statement of Response on 19th December 2017. It denies having employed the Claimant as a Casual Loader in July 2005 or on any other date. The 1st Respondent executed an Outsourcing Agreement with the 2nd Respondent on 1st January 2012. It was agreed that the 2nd Respondent would take over management of the 1st Respondent's Labour Force. The 1st Respondent does not have any record of the Claimant showing he was employed by the 1st Respondent in 2005 or any other year. He would have been issued appointment letter if he was so employed. The 1st Respondent was not privy to termination of the Claimant's contract. The Job Identity Card exhibited by the Claimant, was not issued by the 1st Respondent.

3. The 2nd Respondent filed its Statement of Response on 3rd May 2017. It is conceded that the 1st and 2nd Respondents executed an Outsourcing Agreement mentioned in the 1st Respondent's Statement of Response. The Claimant was not a regular Employee of the 2nd Respondent, but worked as a piece-rate Employee, at 1st Respondent's premises. He was assigned work depending on its availability. He could not be dismissed by the 2nd Respondent, as he was not 2nd Respondent's Employee.

4. On 17th July 2019, the Court communicated its view to the Parties, which is that the dispute herein, raises similar legal issues, which have already been dealt with by the Court in **Nyamawi Gambo v Mombasa Maize Millers and Ready Consultancy Limited [2016] e-KLR**. The Court directed that the Claim is considered and determined under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules, 2016. Parties confirmed filing of their Submissions on 30th September 2019.

5. The Submissions are a rerun of Parties' Pleadings, whose contents are captured at the outset in this Judgment.

The Court Finds:-

6. As in **Nyamawi Gambo** case, the Claimant herein was employed initially by the 1st Respondent as a Loader. He was employed in April 2005. He was paid a daily rate of Kshs. 600. He has exhibited his job identification card.

7. The Respondents executed Outsourcing Agreements, whereof the 2nd Respondent took over management of 1st Respondent's Labour Force. The 1st Agreement was from 1st January 2009 to 31st December 2011. The 2nd Respondent undertook to take responsibility "for all the legal requirements of the Employees." The 2nd Agreement covered the period 1st January 2012 to 31st December 2012. The 3rd Agreement commenced 1st January 2013 to 31st December 2015. There are 2 more Outsourcing Agreements, exhibited by the 1st Respondent in its List of Documents filed on 11th December 2018. The 4th one commenced 1st January 2016, expiring 31st December 2017. The 5th and last Outsourcing Agreement covered the period between 1st January 2018 and 31st December 2019. All Agreements contain this clause: "the contractor [2nd Respondent] shall be made responsible for all legal requirements of the Employees."

8. It is fair to conclude therefore, that the Respondents have a continuing Outsourcing Agreement, in which the 2nd Respondent, has assumed all legal responsibility over 1st Respondent's Labour Force.

9. The Claimant's contract was terminated on 11th April 2015 by the 2nd Respondent. There was an Outsourcing Agreement between the Respondents at the time of termination. Responsibility over the decision fell upon the shoulders of the 2nd Respondent.

10. The 2nd Respondent did not justify its decision. It is pleaded and submitted that the Claimant was not a regular Employee. The 2nd Respondent describes the Claimant as a piece-rate Employee. He was not a regular Employee, entitled to the protections and guarantees of the Employment Act 2007. His contract cannot have been terminated unfairly as he was not regularly in employment in the first place.

11. The 2nd Respondent does not say what piecework the Claimant was assigned for 10 years, and how it was rated. The Court does not agree that the Claimant was a piece rate Employee. The 2nd Respondent needed to bring evidence of the piecework assigned to the Claimant, and show how it was rated.

12. As in the case of **Nyamawi Gambo**, the Court is satisfied that the Claimant was initially employed by the 1st Respondent as a Casual Loader. He was employed in the year 2005. The 1st Respondent cannot deny having employed the Claimant in 2005. There is a job identification card issued by the 1st Respondent to the Claimant. It was for the 1st Respondent, under Section 10 [7] of the Employment Act 2007, to prove the date of employment, or disprove the date given by the Claimant. The Claimant did not chance upon the job identification card issued by the 1st Respondent. The Court does not buy 1st Respondent's Submission, that the Claimant could have created a fake identification card, to enable him make a Claim against the 1st Respondent. Such a card would result in a criminal complaint against the Claimant, with serious repercussion. The 1st Respondent alleges that the Claimant manufactured a document purporting to be from the 1st Respondent. No complaint is shown to have been made to the Police. No investigation or criminal trial is recorded to have taken place against the Claimant on a serious charge of creating fake documents. The 2nd Respondent acknowledges that the Claimant was indeed an Employee, albeit a piece-rate Employee, who worked in the 1st Respondent's premises. The 2nd Respondent would be in position to know, who the Employees of the Respondents were, having taken legal responsibility over 1st Respondent's Employees, from the year 2009. The Court adopts April 2005 as the date of employment. By the time the 2nd Respondent entered the scene in 2009 and continued to manage the Labour Force in subsequent years, the Claimant had worked sufficient number of years in the aggregate, to be considered a regular Employee, under Section 37 of the Employment Act 2007.

13. There was no valid reason given by the 2nd Respondent to justify termination. There was no hearing of any nature before termination.

14. The Claimant worked for 10 years. He did not disclose to the Court how old he was at the time of termination, and how long he expected

he would have gone on working, had termination not taken place. He did not plead whether he has or has not, found another comparative job since he left the Respondents. **The Court awards him 5 months' salary in compensation for unfair termination, at Kshs. 78,000** based on daily rate of Kshs. 600, in a 26 day working week.

15. **He is allowed notice pay equivalent of 1 month salary, at Kshs. 15,600.**

16. Compensation and notice pay above shall be paid by the 2nd Respondent solely.

17. The Claimant seeks service pay based on 15 days' salary for each of the 10 complete years of service. There is no evidence that either of the Respondents placed the Claimant on any Social Security Plan contemplated under Section 35 [6] of the Employment Act. **The Court allows the prayer for service pay for 10 complete years of service, payable as follows:-**

§ 2005 to 2009 [4 years] – Kshs. 36,000 to be paid by the 1st Respondent.

§ 2009 to 2015 [6 years] – Kshs. 54,000 to be paid by the 2nd Respondent.

18. The Claimant did not provide the Court with material upon which his prayer for 22 days of annual leave for each year, rests. The Respondent gave no annual leave records, to discount the Claimant's entitlement to, and position that he did not utilize, annual leave. **He is allowed the prayer for annual leave over a period of 10 years, on the statutory minimum of 21 days a year, payable as follows:-**

§ 1st 4 years [84 days] at Kshs. 50,400- payable by the 1st Respondent.

§ Last 6 years [126 days] at Kshs. 75,600 – payable by the 2nd Respondent.

19. **Separate Certificates of Service shall issue , the 1st covering the years 2005 -2009 to be issued by the 1st Respondent, and the 2nd, for years 2009 -2015 to be issued by the 2nd Respondent.**

20. **It is declared that the Claimant was a regular Employee of the Respondents.**

21. **Costs to the Claimant, payable solely by the 2nd Respondent.**

IN SUM, IT IS ORDERED:-

a. **It is declared that the Claimant was a regular Employee of the Respondents, and termination of his contract was unfair.**

b. **The 1st Respondent shall pay to the Claimant: service at Kshs. 36,000 and annual leave at Kshs. 50,400- total Kshs. 86,400.**

c. **The 2nd Respondent shall pay to the Claimant: compensation for unfair termination at Kshs. 78,000; notice at Kshs. 15,600; service pay at Kshs. 54,000; and annual leave at Kshs. 75,600 – total Kshs. 223,200.**

d. **Certificates of Service to issue separately as detailed under paragraph 19 of this Judgment.**

e. **Costs to the Claimant to be paid by the 2nd Respondent**

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

James Rika

Judge