



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRC 63 OF 2016**

**MUSA MZENGA MUSA.....CLAIMANT**

**VERSUS**

**JILAO COMPANY LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 8.2.2016 alleging that he had been unfairly dismissed from employment by the Respondent on 22.10.2015 and praying for Kshs.768,000 as terminal dues plus compensation for unfair termination. The Respondent filed her defence on 24.2.2016 denying the alleged unfair termination and contending that the claimant was never employed by her at any time. She further contended that the Claimant was part of gang labourers hired by Mr Eliud Maundu, an independent Contractor from whom she had outsourced labour on need basis. She therefore denied liability to pay the damages sought by the Claimant.

2. The suit was heard on 30.3.2017 when the Claimant testified as Cw1 and the Respondent called Mr. Eliud Maundu as Rw1. Thereafter the counsel for both sides filed written submissions which I have carefully considered herein. The main issues for determination herein revolve whether there was any employment relationship between the parties herein and if yes, whether the employment relationship was unfairly terminated by the respondent.

**Claimant's case**

3. Cw1 stated that he was verbally employed by the Respondent in 2003 as a casual and he was issued with Staff Identity Card. He was stationed at the Respondent's Godown at Shimanzi Mombasa and his duties included loading and off loading goods from containers. He explained that he was signing Attendance Register in the morning and Muster Roll in the evening when collecting his wages. His daily wages was fluctuating from Kshs.1,500 to Kshs.800 per day depending on the work volume and he was working every day including Sundays. His working time was from 08.00 hours to 1700 hours but sometimes he used to work up to 20.00 hours with no overtime pay.

4. On 14.6.2014, he suffered serious injuries while carrying out his duties in the Respondent's premises due to the Respondent's negligence and breach of duty of care. Thereafter he sued her through SRMCC No. 1624 of 2015 to recover damages for the injuries as a result of which he was summarily dismissed on 22.19.2015, one day after service of summons to enter appearance. He prayed for declaration that the dismissal was unfair and that he should be paid compensation. He also prayed for certificate of service. He stated that at the time of the dismissal, his daily wage was Kshs.1000 but NHIF and NSSF contributions were never remitted. He was also not given any annual leave during his entire period of service.

5. On cross-examination, he confirmed knowing Rw1 as their Gang Leader. He explained that he was a member of a 30 member gang under the command of Rw1 which did the work of loading and offloading cargo. They used to work for the respondent and other clients. He denied that he was employed by the Rw1 and maintained that he was a gang member headed by Rw1. He defined a gang as a group of labourers working for the company wherever work arose.

6. After the injury, he was taken to hospital and the bill was fully paid. When he asked for his pay while in hospital, Rw1 assured him that it will be taken care of but when he reported back to work he was denied the pay. Thereafter he filed suit against the respondent and the Rw1 told him that he was fired for suing the Respondent. He explained that after offloading cargo from Joho's lorry, he remained in the container but the driver moved the lorry before he had fully alighted from it. He reported to Joho's company but he was referred back to the respondent.

**Defence case**

7. Rw1 testified that he is a casual labourer on piecework fusing gang labour. He works for many clients including TSS, Rongai and also the

Respondent. The gang members wait at the gate while he looks for work from clients and negotiates the pay. Once he makes the deal, he picks the required number of labourers from the gang to do the job. Thereafter he goes to collect the pay and share it with the gang members who did the job. He explained that he is the only one with the client's contact. He denied that the gang was his permanent employees.

8. He confirmed that he knew Cw1 as one of the persons he used to take for piece work but contended that he used to work with intermittently while other days he worked elsewhere. He explained that one day Cw1 remained in the truck after offloading and he was injured. Thereafter he helped Cw1 with the hospital bills but he later proceeded to sue the client and ran away.

9. On cross-examination, he explained that whenever there was no work at the respondent, he looked for work elsewhere. He denied the allegation that he took away staff Card from the Cw1. He admitted that after the accident, Cw1 was taken to the hospital by the Respondent's vehicle and she also paid his medical bill plus some upkeep on humanitarian grounds. He further confirmed that other gang members also contributed money to help him because the injuries suffered prevented him from working. He clarified that the when requested, and on humanitarian grounds, Respondent used to help the gang members whenever one suffered injury while working.

### **Analysis and Determination**

10. There is no dispute that the Claimants worked at the respondent's premises between 1999 and 2015. The issues for determination are:

- (a) Whether the Claimant was employed by the respondent under a contract of service.
- (b) Whether the contract of service was unfairly terminated by the respondent on 22.10.2015.
- (c) Whether the reliefs sought should be granted.

### **Employment relationship between the parties herein**

11. The Claimant alleges that he was employed by the Respondent and that he was given a staff card which was taken back. He further alleged that he was being paid a fluctuating daily wage that stabilized at kshs.1000 until he was dismissed. The respondent's witness however denied that the Claimant was employed by the respondent. He contended that the claimant was part of his gang labour which provides outsourced labour at Go-downs in Mombasa on piece work basis. As the gang leader, he sourced for jobs from various companies, negotiated the pay, recruited the desired labour force from his gang, supervised the job and after it was done, he went for the money from the client and personally shared it to the gang members. He contended that as the gang leader, he is the only person in the gang who has the contact with the client. He further contended that like any other gang member the Claimant never worked continuously but only when picked from the gang depending on the amount of labour needed to do the agreed piece work.

12. The foregoing defence was corroborated by the Claimant's own admission that Rw1 was his gang leader. He further admitted that his daily wage was not constant but fluctuated from Kshs.1,500 to Kshs.1,000. Consequently, I find that the Claimant has not proved on a balance of probability that he was employed by the respondent under a contract of service. Section 2 of the Act defines contract of service and an employee as follows:

*"An agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."*

*"Employee means a person employed for wages or salary and includes an apprentice and indenture learner."*

13. In my considered opinion the evidence before the court leads to one inference that the Claimant was part of an organized gang of labourers on hire by any willing client in Mombasa Go-downs on piece work basis. It is also clear that the respondent is one of the clients who has occasionally hired the gang on piecework basis. "Piece work" is defined by section 2 of the Act to mean:

*"Any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance".*

14. The facts of this case are distinguishable from the facts in **Kwekwe Mwakela & Others vs Krystalline Salt Ltd** cited by the claimant because in the former case, the Claimants proved that they were in continuous service and that they were under the control of the Respondent and not a gang leader.

### **Unfair termination**

15. In view of the fact that the claimant never employed by the respondent under a contract of service but as an independent contract on piecework basis, he was not capable of being unfairly terminated within the meaning of section 45 of the Act. Consequently I find and hold that the provisions, upon which this suit is anchored are not applicable to this case.

### **Reliefs**

16. In view of the foregoing finding, that section 45 of the Act is not applicable to this case, the reliefs sought by the suit are declined.

### **Disposition**

17. For the reasons stated above the suit is dismissed with no order as to costs.

**Dated and signed at Nairobi this 5th day of March,2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 12th day of April, 2018**

**LINNET NDOLO**

**JUDGE**