



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 207 OF 2017

JULIUS IKAPES WASIKECLAIMANT

VERSUS

CAPACITY OUTSOURCING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein was a leaf grader/line blender earning Kshs. 23,022/- when he joined the Respondent on 1st August 2007. His salary as later enhanced to Kshs. 36,533/- a month. He averred that on 1st November 2016 the salary was reduced to Kshs. 22,696/- a month and that the Respondent did not make regular contributions to NSSF and NHIF. He was dismissed on 11th March 2017 without notice and was issued with a certificate of service. His shift allowances from 1st January 2013 till 11th March 2017. He averred that his terminal benefits were unpaid being salary arrears for one month Kshs. 36,533/-, house allowance at 15% of basic pay for 116 months Kshs. 635,674/-; service pay at rate of 15% of basic pay for 116 months Kshs. 635,674/-; compensation for unlawful loss of employment Kshs. 438,396/-; shift allowance at 16% on the basic pay for 51 months Kshs. 298,109/-. He averred that the action by the Respondent offended provisions of the Employment Act and also ILO Convention No. 158 and the Constitution of Kenya's Articles 41 as read with Section 12 of the Employment Act. He thus sought payment of the sums as well as interest at court rates and costs of the suit.

2. The Respondent filed a defence and in which it averred that it complied with the law and the claim for non-compliance is farfetched and misplaced. The Respondent asserts that there was no demand received for payment of the alleged terminal dues and salary arrears. The Respondent averred that the Claimant was paid as per the contract and the law and that the Claimant was under several term contracts the last of which expired on 11th March 2017. The Respondent averred that upon expiry of the contract the Claimant did not apply for renewal of the contract hence the lapsing of the employment relationship. The Respondent denied discriminating against the Claimant and that he did not work in any shift or work overtime to be entitled to shift allowance. The Respondent asserts that the Claimant is not entitled to any of the claims he has sought and that the suit should be dismissed with costs and interest.

3. The Claimant testified that his contributions to NSSF and NHIF show gaps in remittances and that he was summoned on 13th March by Herbert the administrator who informed him that the CEO had said the wage bill was too high and there was no option but to terminate his services. He was referred to the statement of claim and corrected the date to 11th March. He referred to the gate passes and indicated that these showed he was employed for the period in question and that the termination came abruptly without notice at a time he had outgoings and loans. He thus sought the reliefs set out in his claim.

4. In cross-examination he testified that he was initially employed on 1st August 2007 and the first contract was for 6 months. He signed other contracts and that the salary was the same from then till 2009. He stated that his role to NTRM coordinator was on 1st November 2016 and that there was no documented reason. What was said was that BAT had changed capacity rendering leaf grading redundant. He was paid Kshs. 1,000/- on clocking days and that the administration manager told him to await communication. He noticed lower pay at the end of the month and was patiently waiting for the issue to be resolved. He stated that he had misplaced the 2010 gate pass and that is why he did not produce it. He testified that the finance and administration manager said the wage bill could not be sustained. He stated some of the payslips showed payment of house allowance and others indicated shift allowance. He admitted that he was a member of NSSF, that deductions were made from his salary and there were variations on his NSSF statements. He was referred to the list of remittances and he confirmed that there were remittances made to NSSF. He stated that there were still gaps in the statement. He was cross-examined and he testified that the contracts had same terms and salary was Kshs. 23,130/- and there was no notification of the change.

5. The Respondent called Herbert Charo Mwikamba the finance and administration manager from 2016. He confirmed that the Claimant was an employee of the Respondent on contract alongside other employees and that the contracts would be renewed or even terminated. He stated the Respondent was an outsourcing company and that the employees worked for BAT. He said the Claimant was a leaf grader and that changed in November 2016 to non-tobacco related machine supervisor. The salary changed because of the change in responsibility. He stated that gate passes are not contracts and that the gate passes were given to all contractors working at the BAT premises. He testified that there

were no arrears and the Claimant had been paid in full. He stated that there can be no remittances if there are no jobs and that the gaps were subject to confirmation as he would have to check records. He stated that the Claimant's contract was not terminated and that the contract ended and the Respondent even gave him a recommendation letter.

6. In cross-examination he testified that the Claimant was not a permanent employee and that the Respondent had no other contract other than the one with BAT and if BAT went under they would be jobless. He stated that the Respondent was paid dependent on the business and that when the job was declared redundant in 2016 he spoke to the Claimant around August. He testified that the gate passes were issued annually and that the job as leaf grader ended in 2016 and that the Claimant was on the job as NTRM operator. In re-examination he stated that the contract with the Claimant depended on the jobs assigned and these could end.

7. The parties were to file written submission but only the Claimant filed written submissions on 18th September 2018. The Claimant submitted that there was no notice written or otherwise contrary to Section 35(1)(c) and 35(3) of the Employment Act. The Claimant submitted that the Respondent was required to maintain records in terms of Section 74 of the Employment Act and that the allegation of a consolidated salary was not backed by records. The Claimant submitted that under Section 43 of the Employment Act, the Respondent had not proved the reasons for the termination and therefore the termination was unfair and unlawful. The Claimant thus sought the relief set out in his claim as well as certificate of service.

8. The Claimant was an employee of the Respondent and in terms of Section 74 of the Employment Act, the Respondent was required to keep records. The Claimant asserts he was dismissed without cause. The Respondent produced 3 contracts dated 1st June 2016 which covered the period ending 31st October 2016. The Claimant produced gate passes for 1st January to 31st December 2017. Quite rightly, as the Respondent's witness pointed out, a gate pass is not a contract. The Claimant was out of a job sometime in March 2017. The date he fixes this is 11th March 2017. From the contract produced, it is clear the contracts would end at the end of a month. In his case the service came to an abrupt end. No notice is shown to have been given and only the verbal testimony of Herbert Mwikamba suggests that the Claimant was notified of the intention to terminate services on account of the variation in the contract with BAT. If indeed that was the case, the Claimant ought to have been declared redundant. There was nothing illegal about such a move had that been effected as the contract with the Claimant could terminate for just cause. Since the Respondent failed to adhere to the provisions of the law in the dismissal I would hold that the Claimant is entitled to recover the sum of Kshs. 26,100.40 being the basic pay plus house allowance as notice, compensation for 3 months Kshs. 78,301.20 and costs of the suit. He was unable to prove entitlement to any other sum and despite the indication that there were gaps in remittances to NSSF he was unable to prove that was the mistake of the Respondent. The Claimant was issued with a certificate of service and it would be superfluous to order the reissue.

9. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Notice pay of Kshs. 26,100.40
- b. Compensation for 3 months Kshs. 78,301.20
- c. Costs of the suit.
- d. Interest on the sum above at Court rates from date of Judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 31st day of October, 2018

Nzioki wa Makau

JUDGE