



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 819 OF 2016

CONSOLIDATED WITH CAUSE NO 820 OF 2016

MWANJIRANI MBULI MWANJIRANI.....1STCLAIMANT

EVANSON MWANDOE.....2NDCLAIMANT

VERSUS

DIAMOND INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated cause is brought by Mwanjirani Mbuli Mwanjirani as the 1st Claimant and Evanson Mwandoe as the 2nd Claimant. By consent of the parties, Cause No 819 of 2016 was used as the lead file. The 1st Claimant testified on his own behalf and on behalf of his co-claimant.

2. The 1st Claimant, Mwanjirani Mbuli Mwanjirani states that he was employed by the Respondent as a helper in February 1995. He worked until 26th April 2015 when he was dismissed without notice. He claims that at the time of dismissal, he earned a daily rate of Kshs. 470 paid weekly at the rate of Kshs. 3,290.

3. The 2nd Claimant, Evanson Mwandoe, states that he was employed by the Respondent also as a helper effective 2004. He worked until 26th April 2016 when he was dismissed without notice. He states that as the time he was dismissed he earned a daily rate of Kshs. 470 which was paid weekly at the rate of Kshs. 3,290.

4. The Claimants claim that they worked from 8.00 am to 5.00 pm during day shift and from 4.30 pm to 8.00 am during night shift. They add that they worked overtime without compensation and that they never went on leave. The Claimants plead that their dismissals were without justifiable cause and in violation of due procedure.

5. The Claimants accuse the Respondent of the following unfair labour practices:

- a) Keeping them in casual employment for many years;
- b) Failing to remit their National Social Security Fund and National Hospital Insurance Fund dues;
- c) Denying them the right to join a trade union ;
- d) Denying them annual leave for the entire periods of employment;
- e) Terminating their employment without reason and notice;
- f) Failure to pay their terminal benefits;
- g) Subjecting them to verbal abuses and mistreatment.

6. The Claimants now seek the following remedies:

1st Claimant: Mwanjirani Mbuli Mwanjirani

- a) Reinstatement
- b) One month's salary in lieu of notice.....Kshs. 14,100
- c) Unpaid leave for 20 years.....282,000
- d) House allowance for 20 years.....507,600
- e) Terminal benefits.....141,000
- f) Overtime compensation for 7 days a month for 20 years.....1,134,775
- g) 12 months' salary in compensation.....169,200
- h) Damages and aggravated damages
- i) Costs plus interest

2nd Claimant: Evanson Mwandoe

- a) Reinstatement
- b) One month's salary in lieu of notice.....Kshs. 14,100
- c) Unpaid leave for 11 years.....155,100
- d) House allowance for 11 years.....279,180
- e) Terminal benefits.....77,550
- f) Overtime compensation for 7 days a month for 11 years.....531,300
- g) 12 months' salary in compensation.....169,200
- h) Damages and aggravated damages
- i) Costs plus interest

The Respondent's Case

7. The Respondent filed separate Memoranda of Response on 18th May 2017 stating as follows:

- a) That the 1st Claimant, Mwanjirani Mbuli Mwanjirani and the 2nd Claimant, Evanson Mwandoe were engaged as casual employees performing general duties in the factory. They were paid a daily rate of Kshs. 470 each;
- b) That the Claimants deserted duty as from 30th April 2015 and never reported back. They were on duty on 27th, 28th and 29th April 2015 and cannot claim to have been terminated on 26th April 2015 which fell on a Sunday;

8. The Respondent denies terminating the Claimants' employment. They further deny having prevented them from joining a trade union and aver that both Claimants were members of Kenya Chemical and Allied Workers Union.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the Claimants have made out a case for unlawful dismissal;
- b) Whether the Claimants are entitled to the remedies sought.

Unlawful Dismissal?

10. The Claimants state that they were dismissed on 26th April 2015. In opposing this averment, the Respondent produced casual payment vouchers for 27th and 28th April 2015 showing payments made to both Claimants. In the absence of any explanation to counter this glaring documentary evidence, the Court reached the conclusion that the Claimants' pleadings in this regard consist of falsehoods. The claim for unlawful dismissal was therefore not proved and is dismissed. The same finding applies to the claim for notice pay.

Other Remedies

11. The Claimants further claim leave pay for their entire periods of service. The Respondent's defence to this claim is that the Claimants were casual employees who earned a daily rate. The Respondent's witness however admitted in cross examination that for the time he was present at the Respondent Company, the Claimants worked continuously. The claim that they were casual employees was therefore without basis in law and fact and they were entitled to annual leave. In the absence of leave records to show that they had exhausted their leave days the claim thereon succeeds.

12. Regarding the claim for house allowance, the only thing to say is that the Claimants' salary was calculated on the basis of a daily rate which is ordinarily a consolidated pay rate. The claim for house allowance therefore fails. No basis was laid for the claim for terminal benefits and damages which therefore fail and are dismissed. The claim for overtime compensation was not proved and is also dismissed.

13. Ultimately, I enter judgment in favour of the Claimants as follows:

a) 1st Claimant: Mwanjirani Mbuli Mwanjirani

Kshs. 197,400 being leave pay for 20 years.

b) 2nd Claimant: Evanson Mwandoe

Kshs. 108,570 being leave pay for 11 years.

14. These amounts will attract interest at court rates from the date of judgment until payment in full.

15. The Claimants will have the costs of the case.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngaira for the Claimant

Miss Opolo for the Respondent