



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2109 OF 2014

DANIEL OPONDO OBIMBO 1ST CLAIMANT
NICHOLAS MUTUA 2ND CLAIMANT
BISHOP HAYOYO 3RD CLAIMANT
FESTUS KITALE 4TH CLAIMANT
HAMED MAJUTO 5TH CLAIMANT
ERICK OKOTH 6TH CLAIMANT

- VERSUS -

ABERCROMBIE & KENT KENYA LTD 1ST RESPONDENT
ABERCROMBIE & KENT MOBILE
CAMPING LIMITED 2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 24.11.2014 through Maari, Nyaberi & Associates Advocates. The amended memorandum of claim was filed on 21.07.2016. The claimants prayed for a finding that the respondents unfairly and unlawfully terminated their services and they be compensated and paid on the headings of 12 months compensation, service pay, prorated leave, house allowance, one month salary in lieu of notice, and for a certificate of service.

The respondent's memorandum of response was filed on 05.06.2015 through Obura Mbeche & Company Advocates. The amended response was filed on 20.07.2018 and the respondents prayed that the suit herein be struck out or dismissed with costs to the respondents.

The evidence is that the respondents are one and the same company in the sense that the 2nd respondent is a subsidiary company wholly owned by the 1st respondent. Further, the respondents share staff. At the hearing it was ordered that by consent no dispute that respondents are properly sued as the joint employers of the claimants.

The 2nd respondent was registered on 16.02.2000 and prior to that, mobile camping was part of the 1st respondent's undertaking.

The claimants' case is that they were employed on diverse dates by the 1st respondent: the 1st claimant on 24.03.1999 as a room steward; the 2nd claimant on 15.04.1999 as a waiter; the 3rd claimant on 26.08.2000 as a room steward; 4th claimant on 02.06.1988 as a room steward; the 5th claimant on 12.06.1989 as a room steward; and the 6th claimant on 26.08.2000 as waiter. Their further case is that from the date of employment they worked without a break or continuously until 02.07.2014 when their services were terminated verbally on account of redundancy and the respondent purported to issue them with short periodic contracts during their duration of service.

The respondents' case is that they never employed the claimants and no monthly wage was paid. Further claimants were seasonal employees and paid wages for the short periods they rendered services to the 2nd respondent. Further, due to the nature of the work the respondents were engaged as seasonal workers and there would be long periods when there were no tourists hence no camping and as such there was no work

to be done by the claimants. Further, whenever work was available the 2nd respondent communicated to its casuals and also communicated whenever there was no work.

The 1st issue for determination is whether the claimants worked continuously throughout their service without a break as they allege or they were seasonal workers as urged for the respondents. The 1st claimant (CW1) testified that on 02.07.2014 the safari they had been engaged on ended. His evidence was that at the end of the journey selection had to be done. Thereafter 2 months lapsed and his name was not selected and placed on the notice board for the next safari. He asked why he had not been selected for the next safari and he was told by his supervisor that the employer had a right to deny him employment or to give him employment. The supervisor told him that he had authority from the human resource manager to stop the claimant's employment. It was his testimony that since his employment on 24.03.1999 to July 2014 there was no break in his service. In cross-examination CW1 stated that the claimants used to sign for contract for start and end of safari. Such letters were exhibited and they showed that during a safari, the claimant was paid a consolidated daily wage and while on moving camp was paid overnight or move allowance on the headings of accommodation, dinner, lunch, and breakfast. In between the journeys, the claimants' evidence was that they cleaned the tents and prepared for the next safari and for that service the contract of service was not written. The claimants' evidence was that they therefore had two contracts of service that alternated, one written during the safari and one not written between the safaris. CW testified that on 02.07.2014 the job for cleaning tents and preparing for a safari was not available for him and other claimants. Further that their supervisor told them to go away until he'd recall them but they were not recalled.

CW3 Bishop Olang' testified that he worked at the workshop and at field camping. He was paid on daily basis for the days he worked. His work entailed preparation for safaris and each safari took about a month. He stated that he was paid only when on safari. He did not recall the daily rate of payment when he worked at the workshop but it was lower than when he was on safari. CW4 Festus Kitale Nzomo confirmed that he had been issued with Safari Casual Staff Card and they worked during safaris depending on the number of visitors who had booked. They were paid at the end of safari and for work at the workshop they were paid every Saturday.

CW5 testified that they worked on safari and at the end of safari they were paid. As a waiter he never washed tents.

The respondents' evidence was that the claimants were part of the 126 pool of seasonal staff hired on seasonal basis based on the availability of visitors. That none of the claimants worked at the workshop because the workshop was for repairing motor vehicles. The written contracts covered the entire safari being first 2 days for loading and upon return 2 days for off loading. It was the respondents' evidence that the claimants were selected for July, August, and October 2014 safaris but they failed to turn up. The respondents had permanent and pensionable staff, staff on fixed term contracts, and seasonal employees like the claimants.

RW 3 testified that the claimants were not terminated on 02.07.2014 because they had attended the meeting of 08.07.2014 at which agreements about future work were discussed including increase in wages.

The Court has considered the evidence. The Court returns that the evidence shows that the claimants were employed on seasonal basis and were drawn from the pool of seasonal workers maintained by the respondent. The seasonal employment was for a few days of the camping safari upon a written contract of service setting out the detailed payments in consolidated wage and allowances. There is no evidence that after a safari, the claimants would remain in employment and in any event the terms of such service outside the safari are not established. There is no reason to doubt the respondents' evidence that the only contracts were written and covered the period the camping safari took place. Thus the Court returns that the claimants were seasonal employees and they never served continuously without a break as they alleged.

To answer the 2nd issue for determination, the Court returns that the claimants are not entitled to any of the remedies as prayed for because the same are not justified, except the statutory certificate of service. The written contract of seasonal employment and the Safari Casual Staff Cards confirm the seasonal service and the contracts provided for the comprehensive terms and conditions of service so that the parties are bound accordingly. The Court considers that each party will bear own costs of the suit because the claimants are entitled to a certificate of service as per section 51 of the Employment Act, 2007.

In conclusion judgment is hereby entered for the parties for the respondent to deliver to each claimant a certificate of service by 15.11.2018 and each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE