



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1529 OF 2012

DANIEL OMBOGA ONSABWA.....1ST CLAIMANT
GEOFFREY OKARI ONDARA2ND CLAIMANT
MARTIN NGARE NDWIGA.....3RD CLAIMANT
KEPHA PMBASA GASAMI4TH CLAIMANT
ALICE SHARON CHAURO.....5TH CLAIMANT
GLADYS NYAMWATUGIA.....6TH CLAIMANT
TERESIA WANJA KAMOTHO.....7TH CLAIMANT
EVALYNE NYAKANG'A ONG'UBO.....8TH CLAIMANT
EDINA KERUBO NYAGICHA.....9TH CLAIMANT
RISPER MOMANYI SAMSON.....10TH CLAIMANT
SOLOMON OLE NDEMO.....11TH CLAIMANT

VERSUS

M/S POLYSACK LIMITED.....1ST RESPONDENT
MR. RALJI DIAMOND.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by the respondents at their factory situated at their factory situated at Thika Town Kiambu County. In mid 2012 the entire workforce including the claimants started agitating for better terms and condition of service by writing letters to the employer. The grievances were never sorted out and on 30.7.2012 they served a 7 days strike notice. In response, the respondents served an internal memo shutting down operations from 1.8.2012 to 5.8.2012 for stocktaking and directing all workers to report back on 6.8.2012. When the strike notice took effect on the said 6.8.2012, all the employees went on strike but through the intervention of the labour offices a Return to work agreement was signed and the employees were directed to report back to work on 9.8.2012. However, some employees were allowed back on that day but allegedly, the claimants were locked out and dismissed. They therefore brought this suit on 30.8.2012 claiming their accrued employment benefits plus compensation for unfair termination of their contracts of service.

2. The respondents denied the alleged unfair termination of the claimants employment and averred that the termination was fair and lawful because the claimants were notified of reason for the termination, that is, attending work while drunk, expiry of contract and for going on strike despite the return to work formula signed by the parties. They denied the reliefs sought by the claimants and prayed for the suit to be

dismissed with costs.

3. The suit was heard on 13.7.2016, 5.3.2018 and 16.5.2018 when 7 claimants testified and the respondents' HR Officer Mr. Nicholas Maina who testified as the only defence witness. Thereafter counsel for two sides filed written submissions.

Claimants' Case

4. Risper Momanyi Samson testified that he was employed as a General Labourer in 2008 and her salary was Kshs.7,900 per month. She stated that in August 2012 there was a strike at the workplace by all employees complaining about low salary, unfairness, transport for night shift, leave and overtime compensation. The matter was escalated to the labour office and the dispute was resolved and the employees were told to report back to work on 9.8.2012. However, on 9.8.2012, the manager and watchman Mr. Ongutu stopped her and other employees from entering the work place and told them that their services had been terminated. She had worked for 3 years 9 months before the termination and during the whole period she never went for annual leave and was working for 12-15 hours per day. She admitted that she participated in the strike on 6.8.2012.

5. Martin Ngare Ndwiga testified as Cw2. He told the Court that he worked for the respondents from 2010 to 2012 and his salary was Kshs.7,000 per month. He testified that while away on paternity leave, the other employees went on strike and when he reported back to work after one week, he was locked out and told by the Personnel Clerk that he had been terminated. He denied even participating in the strike and maintained that he was away on leave for one week. He prayed for the reliefs sought in the suit contending that he never went for any annual leave or rested during public holiday or Sundays.

6. Geoffrey Okari Ondara testified as Cw3. He worked for the respondents from July 2008 earning Kshs.8,001 per month. In July 2012, he was given 6 days annual leave and then applied for 14 days paternity starting 10.7.2012. During his said leave, the other employees of the respondent went on strike and when he reported back from the leave he was told that his job had been terminated in July 2012 even before the strike. No reason was given for the termination. He however admitted that his contract expired on 1.7.2012 but maintained that his name appeared on the list of the dismissed employees. He admitted that his contract was not renewed and that by August he had been terminated.

7. M/s Evalyne Nyakenga Ong'ubo testified as Cw4. She stated that in 2011 she was employed by the respondent as a General Labourer earning Kshs.7,000 per month. She worked until 6.8.2012 when all the employees went on strike demanding annual leave, protective clothing and lunch break. The matter was resolved by the Labour officer and they were told to go back to work on 9.8.2012. However when she reported back on 9.8.2012 she was locked out by the security guards. She admitted that she was absent from 6.8.2012 to 9.8.2012. She returned the following day but again she was locked out with Cw3 whom she found at the gate. She prayed for the reliefs pleaded in the claim including salary upto 9.8.2018. She contended that she signed a contract of service but the salary stated therein was not the one she was receiving and she was never issued with any payslips.

8. Mr. Daniel Omboga Onsabwa testified as Cw5. He stated that he worked for the respondent as a Machine Attendant from 7.1.2009 earning Kshs.8,000 per month. On 20.7.2012 the workers wrote letter to the management demanding for better terms of service including salary increment. On 22.7.2012, while in working in the 3 p.m shift the supervisor started removing some workers at 5 p.m. alleging that they were drunk. Cw5 was one of the person thrown out and dismissed but he denied that he was drunk and blamed his predicament on the grievance letter by the workers dated 22.7.2012 because he was their Chairman.

9. He further testified that the other workers worked well until 30.7.2012 when the company pinned a memo on the Main Gate Notice Board stating that the operations were to be closed down for 4 days and all the workers were to stay away. The workers reported the matter to the labour office and the management was summoned there and a Return to work formula was signed. However some workers were locked out.

10. He denied ever signing the apology letters dated 23.7.2012 and 25.4.2015 by which he allegedly promised to improve. He further denied ever participating in the strike and contended that as at that time he had already been dismissed and he was sick. He contended that during his employment he never went for any annual leave and his salary was underpaid. He further contended that his dismissal was abrupt and for no valid reason and prayed for the reliefs pleaded in his suit including salary for the 22 days worked in July 2012 which was never paid.

11. Mr. Solomon Ole Ndemo testified as Cw6. He told the court that he was employed by the respondent from 2008 as a Machine Attendant under one year renewable contract. His salary was stated as Kshs.8,000 but he was receiving Kshs.7,091 per month which was below the statutory minimum pay of Kshs.9,049 per month. He further stated that in 2012, the labour office published new salaries but the respondent failed to accordingly increase salaries for her employees forcing the employees to write a letter of grievances to the respondents giving a strike notice. In response, the respondent published a memo closing down the company for stock taking until 6.8.2012 when the employees were to report back. That on 6.8.2012, some works including himself were locked out by the security guards at the gate. He named first, fourth and sixth claimants as some of the employees who were with him when he was locked out at the gate. He prayed for the reliefs sought in the suit.

12. M/s Alice Sharon Chauro testified on Cw7. She stated that she was verbally employed by the respondent as Casual Labourer from 2009 to 2012 earning Kshs.7,916 per month. She testified that the labour office increased salaries on 1.5.2012 but the respondents failed to increase the salaries for her staff as a result the employees wrote complaint letter followed by strike notice. The company closed down for stock taking between 1.8.2012 to 5.8.2012 and the employees reported back on 6.8.2012 only to stage a strike. A return to work formula was signed but when she reported back to work on 9.8.2012 as agreed, she was locked out with some other employees whose names were published in a list pinned on the notice Board. She prayed for the reliefs pleaded in the suit contending that she never went for any leave or given any off day or public holidays.

13. M/s Gladys Nyamwatuga testified as Cw8 and told the court that she was employed by the respondent in November 2009 as casual labourer earning Kshs.7,900 per month. That from 1.8.2012 there was stocktaking and the whole company went on strike demanding salary

arrears from salary increment that had been published on the Labour day among other grievances. That a strike notice was served on 20.7.2012 by the workers lead by Nanyuki and Dan. That the labour officer called for a meeting and a Return to work formula was signed and the workers were told to report back to work on 9.8.2012. However, on the said date, she was locked out together with some other employees and whose names were published in a list as having been fired. She prayed for the reliefs sought in the suit contending that she was working throughout without off or public holidays except Christmas when they used to a break.

Defence Case

14. Nicholas Maina testified as Rw1. He confirmed that the claimant were employed by the respondent and they had also signed written contracts. He further confirmed that the claimants were all paid monthly salary either in cash or through the bank. He further stated that the claimants were going for their annual leave but some were selling their leave.

15. Rw1 testified that on 7.8.2012, the respondents workers went on strike complaining about salary, transport, equipment, leave and delay of salary. That the labour officer intervened and a Return to work formula was signed and the workers advised to resume work. That all the employees resumed work except the claimants despite a notice being pinned on the Notice Board asking workers to resume work.

16. He however clarified that Mr. Daniel Omboga (1st claimant) was dismissed earlier for attending work while drunk a fact which was confirmed at St Matia Mission Hospital where he was taken. He further clarified that Martin (3rd Claimant) Teresia (7th Claimant) were given contract break, after the lapse of the contracts as it was the practice, and directed to report back on 24.8.2012 but they absconded. That Solomon Ndemo was to report on 26.8.2012 but he also absconded. That the contract of Geoffrey (2nd Claimant) lapsed and it was not renewed due to productivity related issues. That Kepha (4th claimant) reported that he was sick but after being cleared he never resumed back to work. He denied that Evalyne, Gladys and Edina reported back to work after the signing of the Return to work Formula. He therefore prayed for the suit to be dismissed. He however admitted that he was not at the gate when the claimants were locked out. He also admitted that he had not records to prove that the claimants were paid for their annual leave.

Analysis and Determination

17. There is no dispute that all the claimants herein were employed by the respondents. The issues for determination are:

- a. Whether the claimants deserted work or their contracts of service were unfairly terminated by the respondents on 9.8.2012 or at all.
- b. Whether the reliefs sought should be granted.

Unfair termination

18. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair reason is one that relate to the employee's conduct; capacity or compatibility; or based on the employers operational requirements. Fair procedure on the other hand refers to due process which is basically according the employee a fair hearing whereby he is informed the reason for which termination of his services is being considered and thereafter granting him a chance to defend himself. Under section 41 of the Act, the said proceedings must be conducted in a language of the employee's understanding and in the presence of another employee or shop floor representative of his choice.

19. In this case, the first claimant was accused of attending work while intoxicated and unable to perform his job. He was taken to hospital for examination and medical examination report was prepared confirming that he was indeed drunk and uncontrollable. The said medical documents were admitted by consent and they were not even challenged during cross examination. I therefore find that he was terminated for a valid reason under section 44(4) (b) of the Act. He was informed of his misconduct and when he denied he was taken to the hospital and a medical report was prepared as stated above. Other employees were present and they witnessed the proceedings. After considering the circumstances of this case, I find and hold that the first claimant's contract of service was terminated fairly. First, there was a valid reason, which he was told, and secondly, when he denied, he was escorted to the hospital and he was proved to have been drunk. The said medical report was never disputed by the claimant before the termination or even in this suit.

20. The second claimant admitted in evidence that his contract lapsed in July 2012 and it was not renewed. The same position was restated by Rw1 in his evidence. I therefore find and hold that the second claimant's contract of service lapsed by affluxion of time and hence not unfairly terminated by the respondents.

21. Third claimant stated that he was on paternity leave or off when the strike occurred and he reported back on 21.8.2012 but he was locked out and told that he had been terminated. On cross examination however he stated that he resumed work on 21.8.2012 but after some moments, the Personnel Clerk told him to go away. The name of the personnel officer was not given and the third claimant admitted that the time sheet for August 2012 indicated that he had worked for nil hours. Rw1 contended that the third claimant never reported to work on 21.8.2012 as directed by the employer. The burden of proving that he was on paternity leave or off and attendance to work on 21.8.2012 is on the third claimant. However, he has not produced any written evidence of the said leave or called any eyewitness from among the fellow employees who saw him resume work on 21.8.2012 and being thrown out by Personnel Clerk. He has also not called any one to confirm that he was seen at the gate on 21.8.2012 and that he was denied entry back to the workplace. I therefore find that the third claimant has not proved that he was dismissed by the respondents as alleged.

22. The 4th, 7th and 9th claimants never testified in this case. The counsel stated that she had 3 more witnesses in court but proceeded to close the case without giving any reason for them not giving evidence. There is therefore no evidence on record to prove that they reported to

work either on 9.8.2012 or 21.8.2012 and they were lockout by the employer. Consequently, I return that they have not proved that the respondent unfairly terminated them.

23. The 10th and 8th claimants testified as Cw1 and Cw4 respectively. They stated that after the strike, they reported back to work but they were locked out verbally. Cw1 never mentioned seeing the 5th claimant at the gate. She spoke in plural but she never gave a single name of the other employees who were with her when they were allegedly locked out. Cw4 however testified that she saw Cw1 that day. In view of that contradiction, I return that both the 8th and 10th Claimants never reported back to work on 9.8.2012 at 8 a.m. as per the Return to work formula or on 24.8.2018 as directed by the notice from the employer vide the notice to the 15 employees produced by the defence. If the two were there, they would have given similar story about what happened that day. They could have seen each other and mentioned each other in their respective testimonies.

24. The 5th and 6th claimants testified as Cw7 and 8 respectively. They told the court that they also reported to work on 9.8.2012 but they were locked out. Cw7 stated that upon arrival she found her name in the list of other employees who had been fired. They however never named other people they saw at the gate. Cw7 stated that she was locked out by security guards but Cw8 never stated the person who blocked her entry. Cw7 stated that she found the list of the employees on the Notice Board when she arrived there on 9.8.2012 but Cw8 stated that the list of the fired employees was published on 9.8.2012 in the afternoon. The said contradiction in the claimant's evidence is material and can only be construed in favour of the defence that the said claimants failed to report back to work on 9.8.2012 as agreed under the Return to work formula and that entitled the respondent to deem that they had resigned or deserted from their employment.

25. Finally the 11th claimant testified as Cw6 and alleged that he reported back to work on 9.8.2012 accompanied by the 4th claimant and the first claimant. That contradicted with the evidence of the first claimant (Cw5) who testified that he was dismissed on 22.7.2012. The inference I draw from the said contradiction is that the 11th claimant is not telling the truth because the 1st claimant had no business reporting back to work on 9.8.2012 as he had already been fired and was not a beneficiary of the Return to work formula.

26. In view of the said contradictions and the deficiency in the evidence adduced by the claimants, I return that the claimants have failed to prove on a balance of probability that they were terminated by the respondents unfairly as required by section 47(5) of Employment Act. On the other hand I find and hold that the respondents have proved on a balance of probability that the first claimant's services were terminated fairly and for a valid reason while the contract for the second claimant expired automatically by an effluxions of time. In addition I find and hold that the respondents have proved on a balance of probability that the 3rd – 11th claimants deserted and/or they resigned from their employment voluntarily after a Return to work formula was signed and/or after the employer directed them to report back to work on 24.8.2018 under what Rw1 described as a contract break in the respondent's company policy.

Reliefs

27. In view of the foregoing finding that the claimants were not unfairly terminated by the respondents, I dismiss the claim for salary in lieu of notice and compensation for unfair termination. Likewise, the claim for salary underpayment and House Allowance are dismissed because according to the verdict of the Labour Officer in the Return to Work formula produced by the claimants, the employer was paying the correct salary and House Allowance under the Wage Order. The claim for shift allowance is not supported by any cited law or term of a contract and as such it must fail.

28. The claim for Rest days and public holidays is unsupported by evidence and it also fails. Likewise, the claim for severance pay is dismissed because the claimants were not terminated on account of redundancy. The claim for leave is also dismissed for lack of particulars and evidence because some of the claimants testified that they went on leave during Christmas holiday when the company closed down. The fact that the company used to close down during Christmas holiday meant that the claimants have withheld some material particulars.

29. However the claim for salary for the days worked and not paid for in July and August, where applicable must be assessed by the respondents and paid within 30 days of today. The said pay shall include the arrears of salary for claimants who were earning below the minimum salary published through the 2012 General Wage Order if any. Finally, the claim for certificate of service is allowed as prayed.

Conclusion and disposition

30. I have found that the first claimant was fairly dismissed while the second claimant's contract lapsed automatically by affluxion of time. On the other hand I have found that the 3rd to 11th claimants were not dismissed but they deserted and/or resigned from their employment voluntarily despite the existence of a Return to Work Formula and Notice by the employer directing them to report back to work on particular dates.

31. Finally, I have entered judgment for the claimant for payment all of their unpaid salary for July and August 2012 plus arrears from June 2012 for any claimants who were earning below the minimum salary published under the 2012 General Wage Order. The said salaries plus the arrears shall be assessed and paid by the respondents within 30 days of today and shall attract interest at the courts rates from the date of filing this suit until payment in full. The award shall be paid subject to the applicable statutory deductions. The assessment shall be filed in court for adoption as the court's decision within the said 30 days period. The claimant will get half the costs of suit to be agreed or taxed.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October 2018

ONESMUS N. MAKAU

JUDGE