



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 481 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

TERESIA BOSIBORI ASSA.....1ST CLAIMANT

MONICA MUNYIVA MUTIE.....2ND CLAIMANT

HOSEA AMBASA.....3RD CLAIMANT

VERSUS

DIANI FLOWER AND LANDSCAPING LIMITED...1ST RESPONDENT

UNITED NATIONS NAIROBI OFFICE.....2ND RESPONDENT

JUDGMENT

The claimants TERESIA BOSIBORI ASSA (1st claimant), MONICA MUNYIVA MUTIE (2nd claimant) and HOSEA AMBASA (3rd claimant) filed suit against DIANI FLOWER AND LANDSCAPING LIMITED, the 1st respondent and United Nations Nairobi office as 2nd respondent.

Background

The 1st claimant avers that she was employed by the respondent on 21st October 1994 as confirmed by the certificates of recognition for long service. She avers that she was terminated and or had her terms of employment changed from term to casual on 31st March 2004 and was paid service for 9 years without being given reasons or justification for the action, not paid compensation and not paid damages or one month salary in lieu of notice as was required by statutory laws in force for the time being.

That the 1st claimant avers that she was subjected to forced contracts which were unlawful according to the statutory laws in force for the time being from 1st April 2004 to 30th September 2012, when she was told that her contract had expired after serving the company for a cumulative period of 19 years.

The 2nd claimant avers that she was employed by the respondent on 1st March 2004 and her employment terminated on 31st August 2012 after working for the respondent for a period of 9 years without any reason, justification, nor paid one month in lieu of notice.

The 3rd claimant avers that he was employed by the 1st respondent on 1st April 2004. He avers that he was terminated from employment without reasons, justification or the provisions of the law being respected within the provisions of his employment rights.

The claimants aver that they were never given a certificate of service on termination of employment.

The claimants avers that their terms and conditions of employment were in contravention of the Trade Dispute Act Employment Act 2007, the Labour Institutions Act 2007, the Constitution of Kenya 2010 with impunity hence null and void. The claimants aver that terms and conditions of employment applied by the respondent contravened United Nations Fair Pack Policy and that the terms and conditions of employment applied by the respondent to engage them and arbitrarily terminate their employment was discriminatory as it was against the government policy that applies to employees within the Public Service and in accordance to the Employment Act 2007 section 5 which prohibits discrimination.

The claimants avers that their employment on temporary and fixed term contracts for 19 years for the first claimant and 9 years for the 2nd and 3rd claimants was in contravention of the Trade Disputes Act and the Employment Act 2007 which stipulates that a casual contract shall be converted to term contract after an employee has worked for a period or number of working days which amounted in aggregated to the equivalent of six (6) months and one (1) month respectively, hence any contract in contravention of these laws is null and void. They aver that the failure to convert their contracts to term employment as required by the law in force and to terminate their contracts after serving the respondent for the specified period of time was to hold them in modern day slavery and servitude which is unconstitutional.

They aver that the 1st Respondent caused them monthly pay slips and to be deducted statutory pension which was submitted to the National Social Security Fund a right only enjoyed by employees who are on permanent and pensionable terms of employment, hence for the 1st respondent to treat them as casuals was unlawful and unconstitutional. They aver that they were entitled to reasonably work up to the mandatory retirement age of 60 but for unlawful contracts and termination and have a legal right to be protected from unemployment, unlawful, and unfair terms and conditions of employment hence they seek compensation for the same in accordance with the statutory laws in place. They pray for compensation as follows –

a) TERESIA BOSIBORI ASSA

i... Maximum Compensation

(12 months x Gross Salary 13,022.6) Kshs.156, 271.2

ii.. Damages number of years to retirement x salary

(8 years x Kshs.13,022.6 x 12 months) Kshs.1,250,169.6

iii. 1 month in lieu of notice..... Kshs.13,022.6

TOTAL Kshs.1,419,463.4

b) MONICA MUNYIVA MUTIE

i.. Maximum Compensation

(12 months x Gross Salary 13,022.6) Kshs.156, 271.2

ii.. Damages number of years to retirement x salary

(12 months x Kshs.13,022.6 x 24 years) Kshs.3,750,508.8

iii. 1 month in lieu of notice..... Kshs.13,022.6

TOTAL Kshs.3,919,902.6

c) HOSEA AMBASA

i... Maximum Compensation

(12 months x Gross Salary 13,022.6) Kshs.156, 271.2

ii.. Damages number of years to retirement x salary

(12 months x Kshs.13,022.6 x 30 years)..... Kshs.4,688,136.0

iii. 1 month in lieu of notice..... Kshs.13,022.6

TOTAL Kshs.4,857,429.8

They seek the following prayers –

1. A declaration that the contracts that the respondent had subjected the claimants to were unlawful, unconstitutional, hence, null and void.
2. A declaration that casual contracts that the claimants were subjected to are deemed to have been converted to term/permanent employment in compliance with the law in force for the time being.
3. A declaration directing the respondent to pay the claimants their dues in lieu of notice, maximum compensation, and damages as

hereunder:-

TERESIA BOSIBORI ASSA = Kshs.1,419,463.4

MONICA MUNYIVA MUTIE = Kshs.3,919,802.6

HOSEA AMBASA = Kshs.4,857,429.8

4. An order convicting the respondent to a six month jail for refusing to issue the claimants with certificate of service and a fine of Kshs.100,000.

The suit against the 2nd respondent was withdrawn on 14th October 2015 and this suit proceed against the 1st respondent (the respondent) as the only respondent in the suit.

The respondent filed a response to the memorandum of claim denying the averments therein, save that it employed the claimants.

At the hearing of the claim, all the claimants testified while the respondent called MR. URS RINGLER, a Director, who testified on its behalf. The parties thereafter filed and exchanged written submission. The claimants' case was heard before Nderi Nduma J. and I heard respondent's evidence.

The uncontested facts are as follows:

a. The 1st Claimant was employed on 21st October 1994 and received severance pay for 12 years and 6 months the period worked to 31.3.2004, a sum of Kshs.18,644.

b. On the 17th of June 2004, the 1st Claimant applied for employment as a gardener and was employed as such on fixed term contracts which were different durations of time and signed by the Claimant from time to time. The last 'Contract Agreement and Appointment Letter' is dated 1st September 2012, the Contract duration in Clause 5 is from '1st September 2012 to 30th September 2012 and is executed by the 1st Claimant on 10th September 2012. Her recommendation letter indicates that her services were terminated after her contract with the Company expired on 31st August 2012.

c. The 2nd Claimant was employed in 2004 on fixed term contract for varying durations, the last one being the Contract Agreement and Appointment Letter dated 1st March 2012. The contract duration in Clause 5 of the same is 'from 1st March 2012 to 31st August 2012'. Her recommendation letter indicates that her services were terminated after her contract with the Company expired on 31st August 2012.

d. The 3rd Claimant was employed on 1st April 2004 on fixed term contracts of varying durations, the last one being the Contract Agreement and Appointment Letter dated 1st March 2012, the contract duration in Clause 5 of the same is 'from 1st March 2012 to 31st August 2012'. His recommendation letter indicates that his services were terminated after his contract with the company ended.

The Evidence

The 1st Claimant testified that she was told to return company property and that her work was over and that she did nothing wrong at all. She was not paid any service pay. The 2nd Claimant testified that her employment was terminated but she did no wrong. In cross-examination, the 2nd Claimant stated that she had contracts for every year and she never applied for them. The 3rd Claimant testified that he got contracts every year. He testified that he was told to go away on 31st January 2012 as his contract was over and that he got appreciation for good work. He testified that he was terminated without notice and service pay. He was paid for leave and salary for days worked and he did two jobs without extra pay. He was not given any reason for termination. He testified that he got a letter regarding the price of electrical cables but there was no disciplinary cause on the matter and he wrote a letter to explain. He was under pressure of work.

URS RINGLER, the Managing Director of the 1st Respondent testified that the 1st Respondent complied with the law with regard to the 1st Claimant who until 2004 was employed on permanent basis. Upon the advice of the Labour Office he paid the 1st Claimant her severance pay for years worked.

The 1st Respondent was constrained to issue fixed term contracts to all its staff as 80% of its work was dependent on the Principal Agreement with the United Nations Office at Nairobi for the care and maintenance of its vast grounds. It was a short -term contract sometimes for as few as 3 weeks and hence the Company was not assured that it would remain engaged.

That indeed in November 2017, the 1st Respondent lost the UN contract and even had to move out of the UN premises where its work station was located.

The Claimants applied for their positions and were issued with fixed term contracts which they were at liberty to accept. No claimant was forced to sign the contract agreement and appointment letter; and no one was held in servitude as alleged in the memorandum of claim.

The 1st Respondent ensured that it complied with the UN Fair Pack Policy, which aims at improving the working conditions of UN

Contractors employees. These benefits include complying with the legal requirements laid out in the Laws of Kenya, enrolling employees in medical insurance schemes, access to treatment of HIV/AIDs staff, 4 months maternity leave, substantial and nutritious lunch, transport shuttle to and from the City Centre and proper equipment to ensure safety of employees to the highest industry standards. The Staff were made aware of the Fair Pack Policy and that they could complain to the UN Ombudsman and other avenues including UN Legal Counsel in the event the 1st Respondent was in breach.

The 1st Respondent is a private entity and could not undertake to employ the Claimants until they reached the retirement age of 60. The Public Service is able to do that but not the 1st Respondent. The witness testified that he too was not assured of a job until the age of 60.

The 1st Respondent had complied and met its bargain as far as the Claimants were concerned. They all left the employ of the 1st Respondent upon expiry of their contracts on August 31st 2012 and were issued with certificates to that effect.

In addition, the 3rd Claimant miscondacted himself by failing to purchase 75 metres of armoured copper cable and instead bought the cheaper and less suitable aluminium cable presenting an invoice for the more expensive copper cable. He testified that the matter was discussed at length with the 3rd Claimant as it also involved another Staff and correspondences were exchanged.

The 3rd Claimant did not hold the job of gardener and electrician as alleged by him. On the contrary, the 3rd Claimant was employed as a gardener but over time he exhibited interest in matters electrical for which he had some skill and training, and also, swimming pool handling. For all the extra tasks that the 3rd Claimant carried out, he was duly paid,

In cross-examination, the witness testified that he also evaluated the performance of both the 1st and 2nd Claimants and found the same to be unsatisfactory. The 1st Respondent did not however maintain a record of the minutes for those deliberations.

Determination

The issues for determination are the following –

- 1) Nature of employment contracts of the claimants.
- 2) Whether the employment of the claimants were unfairly terminated or their contracts lapsed.
- 3) Whether the claimants are entitled to the orders sought.

It is not contested that the respondent initially employed staff on regular terms of employment until 31st March 2004 when the respondent terminated contracts of all its employees and paid off all employees severance pay for periods worked at the rate of 15 day salary per year worked. Thereafter the respondent employed the employees on short-term renewable contracts.

The 1st claimant was employed on 21st October 1994 until 2004 when she was paid off for all years worked and thereafter was issued with short term contracts up to 2012 when her last contract was not renewed.

The 2nd claimant was employed on 1st April 2004 and worked on fixed contract terms until 31st September 2012 when her last contract lapsed.

The 3rd claimant was employed on 1st March 2004 until 31st October 2012 when he was told his contract was over.

According to the respondent, the United Nations (UN) which supplied 80% of its work started giving it short-term contracts and it was advised by the Labour Officer to pay off all employees and then employ them afresh on short terms contracts in lien with the contracts for UN.

All the claimants signed the short-term contracts offered to them by the respondent. Apart from the 3rd claimant whose employment was terminated on grounds of gross misconduct, the other claimants' contracts expired and were not renewed. Teresia Bosibori's last contract expired as pleaded at paragraph 3 under "*Background*" in the memorandum of claim. Likewise the 2nd claimant's last fixed term contract expired on 31st August 2012 and was not renewed.

The 3rd claimant's services were terminated by letter dated 28th July 2014. The letter states that he was given an opportunity to explain why he bought substandard materials at an inflated price of Kshs.450 per meter while the correct price in the same shop was confirmed to be Kshs.175 per meter, thus defrauding the company of Kshs.20,625 for the 75 meters he bought. The letter further refers to several meetings held to get the claimant's explanation, which he failed to do.

From the foregoing, it is clear that none of the claimants' employment was unfairly terminated.

Remedies

The claimants prayed for maximum compensation, payment of salary to retirement date and notice.

Having found that they were not unfairly dismissed, they are not entitled to compensation. They are further not entitled to payment of salary to date of retirement as they were all on fixed term contracts, which did not provide for employment to date of retirement.

The 1st and 2nd claimants are not entitled to notice as their contracts expired. The 3rd claimant is also not entitled to notice as he was summarily dismissed from employment for gross misconduct

The upshot is that the suit is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE