



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 230 OF 2017

CONSOLIDATED WITH CAUSE NO 231 OF 2017

AND

CAUSE NO 233 OF 2017

MWANASITI HAMISI MWANG'ANZI.....1ST CLAIMANT

KASSIM HAMISI NG'ANZI.....2ND CLAIMANT

RASHID KOMBO MRABU.....3RD CLAIMANT

VS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated cause is brought by Mwanasiti Hamisi Mwang'anzi as the 1st Claimant, Kassim Hamisi Ng'anzi as 2nd Claimant and Rashid Kombo Mrabu as 3rd Claimant.
2. By consent of the parties, the 3rd Claimant testified on his own behalf and on behalf of the other two claimants. The Respondent called its Legal Officer, David Kulecho. The parties further filed written submissions.

The Claimants' Case

3. The 1st Claimant, Mwanasiti Hamisi Mwang'anzi states that she was employed by the Respondent as a cane cutter from 12th April 2012 until 20th September 2015 when her employment was terminated.
4. The 1st Claimant avers that the termination of her employment was without justifiable cause and in violation of due procedure. She now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 5,460
- b) Leave pay for 3 years.....16,380
- c) House allowance for 42 months.....34,390
- d) Public holidays (12.4.2012-20.9.2015).....14,700
- e) Unremitted NSSF dues.....9,600
- f) Underpayment.....45,214
- g) 12 months' salary in compensation.....65,520

5. The 2nd Claimant, Kassim Hamisi Ng'anzi states that he was employed as a labourer from 26th May 2012 until 20th September 2015 when his employment was terminated. He adds that the termination of his employment was without justifiable cause and in violation of due procedure and therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 5,460
- b) Leave pay for 3 years.....16,380
- c) House allowance for 41 months.....33,790
- d) Public holidays (26.5.2012-20.9.2015).....13,680
- e) Unremitted NSSF dues.....16,400
- f) Underpayment.....45,214
- g) 12 months' salary in compensation.....65,520

6. The 3rd Claimant, Rashid Kombo Mrabu states that he was employed as a labourer from 26th May 2012 until 20th September 2015 when his employment was terminated. He too avers that the termination of his employment was without justifiable cause and in violation of due procedure. His claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 5,460
- b) Leave pay for 3 years.....16,380
- c) House allowance for 41 months.....33,790
- d) Public holidays (26.5.2012-20.9.2015).....13,680
- e) Unremitted NSSF dues.....5,600
- f) Underpayment.....45,214
- g) 12 months' salary in compensation.....65,520

The Respondent's Case

7. The Respondent filed separate but similar Replies stating that the Claimants were engaged as casual labourers from time to time when necessary. They were paid their wages on a daily basis in accordance with the requisite minimum wage guidelines.

8. The Respondent denies that the Claimants were terminated and states that they merely failed to report to work sometime in mid-September 2015.

9. In response to the claim for house allowance, the Respondent states that the daily wage paid to the Claimants was inclusive of house allowance. The Respondent states that NSSF dues on account of the Claimants were deducted and remitted during the months in which they were engaged.

10. The Respondent takes the view that the Claimant's claims for leave pay and public holidays are untenable and unmerited in the circumstances.

Findings and Determination

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

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

Unlawful Termination?

12. In support of their claims for unlawful termination, the Claimants state that on 20th September 2015, they were told by the Respondent's Farm Supervisor one Becha that there was no more work for them. In its defence, the Respondent states that the Claimants were casual employees who were not required to report to work every day. They therefore failed to report to work sometime in mid-September 2015 and that was the end of their relationship with the Respondent.

13. Under Sections 10 and 74 of the Employment Act, 2007 the employer is under an obligation to keep employment records. In this regard, the Respondent ought to have produced a casual attendance register or payment vouchers to prove its averment that the Claimants were casual employees. Having failed to do so, the Court invokes Section 10(7) of the Act and thereby adopts the Claimants' testimony that they were regular employees of the Respondent.

14. Further, the Respondent's witness, David Kulecho had no first hand information regarding the circumstances leading to the Claimants' exit from the Respondent's employment. The Claimants' testimony in this regard was unchallenged and the Court had no reason to disbelieve them. The Court therefore finds and holds that the Respondent terminated the Claimants' employment without justifiable cause and in violation of due procedure.

Remedies

15. In light of the foregoing findings, I award each Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's conduct in the termination transaction. Additionally, I award the Claimants one (1) month's salary in lieu of notice.

16. Having rejected the Respondent's defence that the Claimants were casual employees, the claims for leave pay succeed and are allowed.

17. The Claimants admitted that their salary was calculated on the basis of daily wage which is ordinarily a consolidated figure. The claims for house allowance therefore fail and are dismissed.

18. Regarding the claims for unremitted NSSF dues the only thing to say is that any such dues would be payable to the statutory body and not to the Claimants.

19. The claims for underpayment and public holidays were not proved and are dismissed.

20. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: Mwanasiti Hamisi Mwang'anzi

a) 6 months' salary in compensation.....	Kshs. 37,800
b) 1 month's salary in lieu of notice.....	6,300
c) Leave pay for 3 years (210x21x3).....	13,230
d) Prorata leave pay for 5 months (210x1.75x5).....	<u>1,649</u>
Total.....	58,979

2nd Claimant: Kassim Hamisi Ng'anzi

a) 6 months' salary in compensation.....	Kshs. 37,800
b) 1 month's salary in lieu of notice.....	6,300
c) Leave pay for 3 years (210x21x3).....	13,230
d) Prorata leave pay for 5 months (210x1.75x3).....	<u>1,103</u>
Total.....	58,433

3rd Claimant: Rashid Kombo Mrabu

a) 6 months' salary in compensation.....	Kshs. 37,800
b) 1 month's salary in lieu of notice.....	6,300
c) Leave pay for 3 years (210x21x3).....	13,230
d) Prorata leave pay for 5 months (210x1.75x3).....	<u>1,103</u>
Total.....	58,433

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

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

23. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Njoru for the Respondent