



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 396 OF 2014

[Consolidated with Cause Numbers. 595 of 2014, 596 of 2014 and 597 of 2014]

BETWEEN

1. JOSEPH OTIENO ONYANGO [396]
2. CHANGA CHARO [595]
3. JUMA SAID MOHAMED [596]
4. CHUPHA RUMBA MBUI [597].....CLAIMANTS

VERSUS

JIHAN FREIGHTERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company, Advocates for the Claimants

Mwakireti Ndumia & Company Advocates for the Respondent

JUDGMENT

1. The Claimants filed separate Claims against their former common Employer, the Respondent herein, on diverse dates in the year 2014.
2. They state they were employed by the Respondent, as Clerk and Loaders, on various dates. The Respondent terminated Claimants respective contracts in May 2012. Termination was on the ground that the Claimants' went on strike, claiming salaries paid to them were insufficient. Some of their colleagues were reinstated by the Respondent. The Claimants pray the Court to find termination was unfair, and grant to them Judgment against the Respondent in the following terms:-
 - a) 1 month salary in notice pay.
 - b) Equivalent of 12 months' salary in compensation for unfair termination.
 - c) Accrued annual leave.
 - d) House allowance.
 - e) Overtime.
 - f) Certificate of Service to issue.

g) Costs of the Claim.

3. Under paragraph [a] to [e] above, the 1st Claimant prays for a total sum of Kshs. 1,068,957; 2nd Claimant, Kshs. 976,000; 3rd Claimant, Kshs. 976,000; and 4th Claimant, a similar amount of Kshs. 976,000.

4. The Respondent filed a Statement of Response to each Claim on different dates. In general the Respondent states Claimants were employed on fixed term contracts. They were paid an all inclusive salary. Their claims for unpaid annual leave are time-barred. They did not work excess hours and are not owed overtime pay. Upon expiry of fixed term contracts, the Claimants became casual Employees paid daily wages as and when work was available. The Respondent prays the Court to dismiss the respective Claims with costs to the Respondent.

5. The Claims were consolidated through an order recorded in Cause Number 595 of 2014, on 10th June 2015. They were heard under file number 396 of 2014. The 1st Claimant gave evidence on 22nd September 2016; 3rd Claimant on 29th November 2017; and 2nd Claimant on 24th July 2018. The 4th Claimant did not give evidence.

6. Respondent's Human Resource Officer, Anne Ndanu Kiema and Supervisor Ernest Owuor Oluoch, both gave evidence on 24th July 2018 when hearing closed. The matter was last mentioned in Court on 28th September 2018, when Parties confirmed the filing of the Closing Submissions.

Claimants' evidence

7. The Claimants told the Court the Respondent is a courier, clearing and forwarding business. The Claimants were mostly performing clerical duties. They were initially employed as Casuals. They were later placed on term contracts. After expiry of these contracts, they were reverted to casual employment. They continued to perform the same roles. They were dismissed in May 2012. They state that the relationship with the Respondent soured, after they joined a Trade Union. They were not dismissed after they refused to avail their identity cards to the Respondent. Casual Employees, who gathered at the gate daily, were required to give their identity cards to be granted access to the workplace. The Respondent however, had Claimants' details from the date of their employment. They had supplied copies of identity cards to the Respondent. They worked in continuity.

8. Cross-examined, the Claimants testified that they were given fixed term contracts of 2 years each. The Respondent had a commercial contract with Kenya Ports Authority at the time. The commercial contract did not terminate at the same time Claimants' contracts terminated. Termination was on account of their association with the Transport Workers Union. The Respondent paid Claimants' annual leave dues. Employees did not go on strike. They did not work for neighbouring transport companies. They did not recall when they joined the Union, and did not have subscription cards, or receipts showing when they paid membership fees. The Claimants were not paid annual leave dues for the years preceding their term contracts. They seek annual leave pay for the years before they were given fixed term contracts.

Respondent's evidence

9. Respondent's Human Resource Officer, Anne, told the Court that the Respondent had a contract with KEMSA. There were medical supplies to be transported within Mombasa. The Respondent looked for loaders, among them the Claimants, and placed them on contracts. They did not work all days. The Respondent has a warehouse where clients' cargo is kept. Employees are not given access without producing their identity cards. The Respondent holds the identity cards until the end of the day. The Claimants were rightly denied entry after they refused to produce their identity cards. Cross-examined, Anne told the Court she has worked with the Respondent for 11 years. She is not required to produce her identity card. Claimants' personnel files were closed after their contracts expired. They had staff identity cards valid until 20th July 2012. Anne did not exhibit KEMSA contract in Court. Redirected she told the Court there were security concerns surrounding the warehouse, hence the limited access to Employees.

10. Oluoch associated himself fully with the evidence of Anne. The Claimants did not work in continuity. On 24th April 2012, some Employees ganged up and refused to produce their identity cards to access Respondent's warehouse. Oluoch insisted on production of the identity cards. They alleged that the Respondent already knew them, and there was no need for them to produce their identity cards. The Respondent uses the identity cards and pay sheets to pay Employees at the end of the day. Some Employees produced their identity cards and continued working. Cross-examined, Oluoch stated petty cash vouchers on record were not signed by him. The Claimants worked for other companies while not engaged by the Respondent.

The Court Finds:-

11. The Claimants were employed by the Respondent on various dates. They worked as Loaders and Clerks. They were initially employed as Casual Employees. They were then offered 2 year term contracts. The contracts expired, and the Claimants reverted to casual terms.

12. The Court does not think that after the Claimants had worked for over 6 years, they would be considered as Casual Employees. They were employed in 2005 and 2006. The aggregate period worked, qualified the Claimants to be deemed to have been regular Employees.

13. The number of days they were shown in the evidence of Oluoch to be absent, cannot, seen against the aggregate number of days worked, lead to the conclusion that the Claimants did not work in continuity. Of importance is the aggregate number of days worked. They did the same work for an aggregate period of over 6 years.

14. The Respondent's conversion of the Claimants' terms into fixed term contracts of 2 years, and reversion to casual terms, cannot be justified on the expiry of the commercial contract between the Respondent and KEMSA. The Claimants performed the same roles before and after the expiry of the KEMSA contract. Why were their contracts of employment accorded different status?

15. The Court agrees that the Claimants, ought to have been treated as regular Employees, and accorded all the rights and protections due to regular Employees, under the Employment Act 2007.

16. The questions which follow are whether the Claimants' contracts were terminated fairly under Sections 41, 43 and 45 of the Employment Act 2007; whether they are entitled to compensation and terminal dues; whether they merit certificates of service; and whether they should have costs of the Claim?

17. They were asked to surrender their national identity cards at the warehouse entrance, to be granted access. They refused. They ganged up, and persistently refused to surrender their identity cards.

18. Their argument was that they were longstanding Employees of the Respondent. Their personal details were known to the Respondent.

19. The Court does not accept that argument. It was not for the Claimants to direct the Respondent on how to conduct its business. The Respondent explained that the warehouse contained Respondent's Clients' cargo. This cargo had to be secured. Employees would not be granted free access. It was also the position of the Respondent that these identity cards were used, together with pay sheets, to pay the Employees at the end of the day. The Respondent had good reason to instruct the Claimants to surrender their identity cards. Employees who complied were allowed access and continued working.

20. In the view of the Court, the Claimants engaged in an act of gross misconduct under Section 44[4] of the Employment Act 2007. They declined to obey reasonable instructions, reasonably and lawfully issued by their Employer. The Respondent would have been entitled to summarily dismiss the Claimants for insubordination.

21. The prayer for notice pay has no merit, as the Respondent would have been entitled to terminate the contracts without notices, under Section 44[4] of the Employment Act.

22. The Claimants refusal to produce their identity cards, when asked to do so, meant there was no access to the workplace. Without such access it was difficult to have disciplinary hearing. The Respondent should however, have attempted to subject the Claimant to disciplinary hearing. There ought to have been letters issued to the Claimants asking them to explain insubordination. There ought to have been charges presented against the Claimants. They ought to have been heard. The Respondent appears to have disregarded Claimants' procedural protections and guarantees under Sections 41 and 45 of the Employment Act, on the ground perhaps, that the Claimants were thought to have been casual Employees.

23. Considering the role played by the Claimants' leading to termination, the Court shall allow minimal compensation for unfair termination, the equivalent of 1½ months' salary.

24. The Claimants seek accrued annual leave over the entire period worked. The evidence by the Respondent is that they were paid Kshs. 11,500 in leave dues. They testified that they took annual leave over some days. Charo testified he took annual leave of 30 days in 2011. He testified on cross-examination that he was paid all annual leave days. The Respondent also established that there were days when the Claimants did not report for work. Onyango testified he recalled taking annual leave. He received annual pay and signed in acknowledgement. This evidence does not justify claims for annual leave pay, over the entire period worked. The prayer is rejected.

25. The Claimants calculate overtime pay based on uninterrupted service. As shown above however, they were given to many days of absence. They do not take into consideration, the hours of their absence, in calculating overtime. They also did not establish when they worked excess hours, and whether such work was necessary and authorized. They similarly did not establish that there are days they worked, and were not paid for their work. The claims for overtime, and for unpaid salaries, are not well-founded in law and fact and are rejected.

26. They seek house allowance in arrears over the entire period worked, at the rate of 15% of monthly basic salary of Kshs. 10,000. They worked on a salary of Kshs. 10,000 for the duration of their 2-year contracts. All other time, they agreed to be paid daily rates. They negotiated these rates with their Employer. They would be entitled to house allowance over the period they worked on contracts or 2 years. The pay slips from this period describe salaries paid to the Claimants as basic. There was no provision for housing. ***The prayer for house allowance is allowed to each Claimant at 15% of Kshs. 10,000, for 24 months = Kshs. 36,000.***

27. The Claimants are allowed the prayer for Certificates of Service, under Section 51 of the Employment Act 2007.

28. No order on the costs.

IN SUM, IS ORDERED:-

a) Termination was based on valid reason, but flawed on procedure.

b) The Respondent shall pay compensation for unfair termination to each Claimant at 1½ months' salary at Kshs. 15,000.

c) The Respondent shall pay to each Claimant arrears of house allowance over a period of 2 years, at Kshs. 36,000.

d) Certificates of Service to issue.

e) No order on the costs.

Dated and delivered at Mombasa this 14th day of December 2018.

James Rika

Judge