



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 21 OF 2017

CONSOLIDATED WITH CAUSE NO 22 OF 2017

RAGOSE KATANA CHIDYANGA.....1ST CLAIMANT

KITHEKA MULWA.....2ND CLAIMANT

VS

CHINA JIANGXI INTERNATIONAL KENYA LIMITE.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated cause is brought by Ragose Katana Chidyanga as the 1st Claimant and Kitheka Mulwa as the 2nd Claimant against their former employer, China Jiangxi International Kenya Limited. The claim is contained in separate Memoranda of Claim dated 5th July 2017 and filed in court on 7th July 2017. The Respondent filed separate Memoranda of Response and Counterclaim on 28th August 2017 to which the Claimants responded on 3rd January 2018.

2. When the matter came up for hearing, the Claimants testified on their own behalf and the Respondent called its Kikambala Site in Charge, Michael Musembi Kioko. The parties also filed written submissions.

The Claimants' Case

3. The 1st Claimant, Ragose Katana Chidyanga states that he was employed by the Respondent as a carpenter from 2nd June 2014 until 19th December 2016. He was initially employed on casual basis but his employment status later changed to term contract.

4. The 1st Claimant earned a daily rate of Kshs. 430. He was not issued with a written contract of employment or pay slip.

5. The 1st Claimant claims that he was underpaid and was not allowed weekly rest day as required by law. Moreover, he was not granted annual leave. The 1st Claimant further claims that the Respondent did not remit all his National Social Security Fund (NSSF) dues.

6. On 19th December 2016, the 1st Claimant reported on duty as usual but was refused entry into the Respondent's premises. The Respondent's supervisor, one Mr. Nducko informed the 1st Claimant that his employment had been terminated.

7. The 1st Claimant states that the termination of his employment was unlawful and unfair in that no reason was given for the termination and he was not given an opportunity to be heard. Further, he was not paid his terminal dues and was not issued with a certificate of service. The 1st Claimant now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 14,710.80
- b) Accumulated leave pay for 2.55 years.....29,704.50
- c) Underpayment for 2.55 years.....108,187.58

d) 12 months' salary in compensation.....176,529.00

e) An order compelling the Respondent to remit the 1st Claimant's NSSF dues for 10 months (June-September 2014 & August-December 2016)

f) Certificate of service

g) Costs plus interest

8. The 2nd Claimant, Kitheka Mulwa states that he was employed by the Respondent as a labourer at a daily rate of Kshs. 411 from 19th May 2015 until 25th March 2017. He was initially employed on casual basis but his employment status later changed to term contract. He was not issued with a written contract of employment or pay slip.

9. The 2nd Claimant claims that he was underpaid and was not allowed weekly rest day as required by law. Moreover, he was not granted annual leave. The 2nd Respondent further claims that the Respondent did not remit all his National Social Security Fund (NSSF) dues.

10. On 25th March 2017, the 2nd Claimant reported on duty as usual but was refused entry into the Respondent's premises. He was informed by the Respondent's supervisor that his employment had been terminated.

11. The 2nd Claimant states that the termination of his employment was unlawful and unfair in that no reason was given for the termination and he was not given an opportunity to be heard. Further, he was not paid his terminal dues and was not issued with a certificate of service. The 2nd Claimant's claim is as follows:

a) One month's salary in lieu of notice.....Kshs. 12,287.60

b) Accumulated leave pay for 1.85 years.....18,368.28

c) Underpayment.....35,647.66

d) 12 months' salary in compensation.....293,779.20

e) An order compelling the Respondent to remit the 2nd Claimant's NSSF dues for 6 months (April-September 2015)

f) Certificate of service

g) Costs plus interest

The Respondent's Case

12. In its Memorandum of Response to the 1st Claimant's claim, the Respondent states that the 1st Claimant was its casual employee for about 7 working days in December 2016 before he deserted duty.

13. The Respondent adds that the 1st Claimant, having worked for only 7 days had not earned any rest day nor annual leave. The Respondent denies that the 1st Claimant was underpaid.

14. The Respondent denies the allegations that it failed to remit NSSF dues on the 1st Claimant's account.

15. The Respondent denies the allegations of unlawfully terminating the 1st Claimant's employment and states that it is in fact the 1st Claimant who deserted duty on or about 15th December 2016 way before 19th December 2016 when he alleges to have been terminated.

16. The Respondent avers that it could not reasonably have issued a certificate of service to the 1st Claimant who had deserted duty without notice. The Respondent states that the certificate of service is readily available for the 1st Claimant's collection.

17. In its counterclaim/set off, the Respondent states that by an oral agreement the 1st Claimant was hired as a casual labourer to provide general labour at one of the Respondent's construction sites in Kikambala in consideration for a daily wage of Kshs. 430 payable monthly.

18. The Respondent avers that the 1st Claimant appeared for work from 1st to 4th December 2016 and subsequently from 12th to 14th December 2016, after which he deserted duty without any notice. The Respondent therefore claims from the 1st Claimant the sum of Kshs. 12,900 being one month's wages in lieu of notice.

19. In its Response to the 2nd Claimant's claim, the Respondent states that the 2nd Claimant was its casual employee as a labourer for general duties from 2nd October 2016. The 2nd Claimant was employed by oral contract and was paid a daily rate of Kshs. 411. The Respondent adds that the 2nd Claimant was allowed one day off after every 6 days and/or was paid in lieu of overtime.

20. The Respondent denies the allegations that it failed to remit NSSF dues on the 2nd Claimant's account. The Respondent further denies the 2nd Claimant's averment that he was underpaid.

21. The Respondent denies the allegations of unlawfully terminating the 2nd Claimant's employment and states that the 2nd Claimant worked up to 25th March 2017 after which he deserted duty from 26th March 2017.

22. The Respondent avers that it could not reasonably have issued a certificate of service to the 2nd Claimant who had deserted duty without notice. The Respondent states that the certificate of service is readily available for the 2nd Claimant's collection.

23. In its counterclaim/set off, the Respondent states that by an oral agreement the 2nd Claimant was hired as a casual labourer to provide general labour at one of the Respondent's construction sites in Kikambala in consideration for a daily wage of Kshs. 411.

24. The Respondent avers that 25th March 2017 was the last day the 2nd Claimant appeared for work after which he deserted duty without any notice. The Respondent therefore claims from the 2nd Claimant the sum of Kshs. 12,330 being one month's wages in lieu of notice.

Findings and Determination

25. There are Four (4) issues for determination in this case:

- a) The nature and status of the Claimants' employment;
- b) Whether the Claimants deserted duty or were unlawfully terminated;
- c) Whether the Claimants are entitled to the remedies sought;
- d) Whether the Respondent has made out proper counterclaims against the Claimants.

Nature and Status of the Claimants' Employment

26. In its Memoranda of Response, the Respondent states the Claimants were casual employees. The Respondent did not however produce any documentary evidence such as attendance register or casual payment vouchers to support this averment.

27. Further, the Respondent's witness, Michael Musembi Kioko told the Court that the Claimants started working for the Respondent in June 2014 and May 2015 respectively. Kioko's testimony in this regard differs sharply with the Respondent's pleadings and tallies with the Claimants' pleadings.

28. The allegation that the Claimants were casual employees is therefore unsupported by any evidence and is rejected. Consequently, the Court finds and holds that the Claimants were regular employees on term contract.

Desertion of Duty or Unlawful Termination?

29. In response to the Claimants' claims that they were unlawfully terminated, the Respondent states that it is the Claimants themselves who deserted duty. Desertion of duty is a serious administrative offence which renders an employee liable to dismissal.

30. Like all other grounds however, desertion of duty must be proved. In this regard, an employer alleging desertion must demonstrate efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on account of desertion is under consideration. This was the holding in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*.

31. There was no evidence of any effort made by the Respondent to reach out to the Claimants and the defence that they deserted duty was unproved and is rejected. The result is that the Claimants' testimony that their employment was unlawfully and unfairly terminated was unchallenged and the Court had no reason not to believe them.

32. The Court therefore finds and holds that the termination of the Claimants' employment was substantively and procedurally unfair and they are entitled to compensation.

Remedies

33. In light of the foregoing findings, I award each of the Claimants six (6) months' salary in compensation. In arriving at these awards, I have taken into account the Claimants' length of service and the Respondent's conduct in the termination process. I further award the Claimants one (1) month's salary in lieu of notice.

34. In the absence of any leave records, the claims for leave pay succeed and are allowed.

35. The claims for underpayment were premised on job positions within the Building and Construction Industry. The Claimants did no

however present any certificates to confirm their level of training for these jobs. The claims for underpayment were therefore not proved and are dismissed.

The Respondent's Counterclaim

36. Flowing from the finding that the Claimants' employment was unlawfully terminated, the Respondent's counterclaim cannot stand.

Final Orders

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

1st Claimant: Ragose Katana Chidyanga

a) 6 months' salary in compensation.....	Kshs. 77,400
b) 1 month's salary in lieu of notice.....	12,900
c) Leave pay for 2 years (430x21x2).....	18,060
d) Prorata leave for 5 months (430x1.75x5).....	<u>3,763</u>
Total.....	112,123

2nd Claimant: Kitheka Mulwa

a) 6 months' salary in compensation.....	Kshs. 73,980
b) 1 month's salary in lieu of notice.....	12,330
c) Leave pay for 1 year (411x21x1).....	8,631
d) Prorata leave for 9 months (411x1.75x9).....	<u>6,473</u>
Total.....	101,414

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

39. The Respondent is directed to remit all unremitted NSSF dues on the Claimants' accounts within the next thirty (30) days from the date of this judgment.

40. The Claimants are also entitled to certificates of service and costs of the case.

41. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2018

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JUDGE

Appearance:

Mrs. Kariuki for the Claimants

Mr. Kithinji the Respondent