



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KISUMU

CAUSE No. 91 OF 2013

(FORMERLY NAIROBI CAUSE No. 1030 OF 2012)

(Before Hon. Lady Justice Maureen Onyango)

KENYA BUILDING, CONSTRUCTION TIMBERLAND

FURNITURE INDUSTRIES EMPLOYEES UNION CLAIMANT

-VS-

SHILOAH INVESTMENT LTD.....RESPONDENT

J U D G M E N T

The claimant herein is a trade union registered in Kenya and filed this suit on behalf of the grievants who were its members until the termination of their employment by this Respondent. The claimant is registered to represent employees in the building construction, civil engineering sector and related activities.

The Respondent is a limited liability company carrying on business of building and construction in Kenya.

According to the claimant the grievants were employed by the Respondent for the periods and in the capacities as specified show hereunder:-

NO	NAME	PERIOD IN SERVICE	JOB CATEGORY	RATE OF PAY
1.	Ayooch Lazaro	05.05.2009 - 30.08.2009	Carpenter	350/-
2.	Fredy Ouma	21.06.2009 - 30.08.2009	Carpenter	350/-
3.	Julius Omondi	24.05.2009 - 30.08.2009	Carpenter	350/-
4.	Vincent Adalo	13.05.2009 - 30.08.2009	Steel Fixer	350/-
5.	John Jolle	12.05.2009 - 30.08.2009	Steel Fixer	350/-
6.	Moses Omondi	05.06.2009 - 30.08.2009	Labourer	200/-

7.	Antony Ochieng	05.05.2009 - 30.08.2009	Labourer	200/-
8.	Caleb Odera	21.06.2009 - 30.08.2009	Carpenter	350/-
9.	Andrew Ochieng	13.05.2009 - 30.08.2009	Steel Fixer	350/-

It is the claimants contention that the services of all the grievants were terminated on 30th August 2009 on grounds that there was no work.

It is the claimant's case that it did not have a recognition agreements with the Respondent setting terms of service of the grievants and their terms are therefore those set out under the provisions of the Regulation of Wages (Bbuilding and Construction Industry) Order 2004.

The claimant's claim on behalf of the grievants is that upon termination of their employments the grievants were not paid in lieu of notice, pro-rata leave and arrears of wages and that each of the grievants is entitled to the following.

A. Ayooh Lazaro - CARPENTER

Employed 5th May 2009 - 30th August, 2009 @ 350 per day

- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

1 month compensation - 26 days x 352 = 9,152.00

20,680.00

B. Fredy Ouma - CARPENTER

Employed 21st June 2009 - 30th August, 2009 @ 350 per day

- required @ 352 per day

CLAIMS.

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 2 months x 352 = 1,584.00

1 month compensation - 26 days x 352 = 9,152.00

19,888.00

C. Julius Omondi - CARPENTER

Employed 24th May, 2009 - 30th August, 2009 @ 350 per day

- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.350 x 26	= 9,152.00
Prorate leave - 2 1/4 days x 3 months x 352	= 2,376.00
1 month compensation - 26 days x 352	= <u>9,152.00</u>
	<u>20,680.00</u>

D. Vincent Adolo - STEEL FIXER

Employed 13th May 2009 - 30th August, 2009 @ 350 per day
- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.350 x 26	= 9,152.00
Prorate leave - 2 1/4 days x 3 months x 352	= 2,376.00
1 month compensation - 26 days x 352	= <u>9,152.00</u>
	<u>20,680.00</u>

E. John Jolle - STEEL FIXED

Employed 12th May 2009 - 30th August, 2009 @ 350 per day
- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.350 x 26	= 9,152.00
Prorate leave - 2 1/4 days x 3 months x 352	= 2,376.00
1 month compensation - 26 days x 352	= <u>9,152.00</u>
	<u>20,680.00</u>

F. Moses Omondi - LABOURER

Employed 5th June, 2009 - 30th August, 2009 @ 200 per day
- required @ 275 per day

CLAIMS

Notice - one month notice Kshs.275 x 26	= 7,150.50
Prorate leave - 2 1/4 days x 2 months x 275	= 1,237.50
Arrears of underpayment 275 - 200 x 69 days	= 5,175.00

1 month compensation - 26 days x 352 = 7,150.00

20,712.50

G. Antony Ochieng - LABOURER

Employed 5th May 2009 - 30th August, 2009 @ 200 per day

- required @ 275 per day

CLAIMS

Notice - one month notice Kshs.275/- x 26 = 7,150.00

Prorate leave - 2 1/4 days x 3 months x 275 = 1,856.25

Arrears of underpayment 275 - 200 x 95 days = 7,125.00

1 month compensation - 26 days x 275 = 7,150.00

23,281.25

H. Caleb Odera O. - CARPENTER

Employed 21st June, 2009 - 30th August, 2009 @ 350 per day

- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.352 x 26 = 9,152.00

2 months Prorate leave - 2 1/4 days x 2 months x 352 = 1,584.00

1 month compensation - 26 days x 352 = 9,152.00

19,888.00

I. Andrew Ochieng - STEEL FIXER

Employed 13th May 2009 - 30th August, 2009 @ 350 per day

- required @ 352 per day

CLAIMS

Notice - one month notice Kshs.352 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

1 month compensation - 26 days x 352 = 9,152.00

20,680.00

The total amount claimed by the Claimant on behalf of the grievants is **Kshs.226,945.74**

The claimant prays for Judgment for the total sum of Kshs. 226,945.75 and compensation for each grievant equivalent to 3 months salary for unfair redundancy and costs.

The Claimant contends that it filed a dispute with the Minister for Labour and a conciliator was appointed but the Respondent refused to cooperate, hence no settlement was reached.

The Respondent filed a Statement of Reply to the Claim through Wasuna & Company Advocates in which it denies ever employing any of the grievants.

This suit was originally filed in Nairobi on 15th June, 2012 but was transferred to Kisumu by letter dated 18th December, 2012.

At the hearing all 9 grievants testified. The Respondent also called one witnesses SUKU SHAWIM ELISHA

Five grievants testified that they were employed by the Respondent to work at the construction site of the building now known as Vic Hotel in Kisumu City. CW I JOHN OTIENO JOSE testified that he started working at the construction site on 12th May 2009 and was paid weekly through Onyango Mbusi the foreman. His employment was terminated on 31st August, 2009 when the Respondent learnt that he had joined the union.

CW 2 ANDREW OCHIENG OMONDI testified that he is a mason and stated working for the Respondent on 13th May, 2009 until he was terminated.

CW 3 JULIUS OMONDI ARONO testified that he is a carpenter by profession and was employed by the Respondent on 24th May, 2009. He worked until 31st August 2009. His wages were paid by Onyango Mbusi the Respondent's foreman.

CW4 OCHIENG ODERA CALEB testified that he was employed by the Respondent on 1st June 2009 to work on the construction project of VIC Hotel. His wages of Kshs. 350 per day was paid weekly through Onyango Mbusi the foreman.

CW5 FRED OCHIENG AUMA testified that he worked for the Respondent from 21st June to 31st August 2009 as a carpenter. He was doing joinery in the workshop. His wages were paid by Onyango Mbusi and he worked 8 hours a day from Saturday to Sunday. Work on Sunday was optional and was from 8am to 12 p.m and wages were paid on Saturdays.

For the Respondent RW I testified that he is the Human Resource Manager of the Respondent and has worked for the Respondents from January, 2010. At the time he joined the Respondent it was working on the project of VIC Hotel.

RW I testified that he learnt about this case when he was called by the conciliator but did not attend any conciliation meetings. He further testified that the conciliator wrote several letters which he did not respond to. He testified that he told the conciliator that he will never attend any conciliatory meeting.

Under cross examination he stated that the Respondent does not have records inspected by a labour officer. He stated that he did not have records from 2009 or of the grievants in this case. He further stated he did not have records of labourers who worked during construction of VIC Hotel project and that what the Respondent filed in court are payroll records of people who do not do the actual construction. He testified that the Respondent subcontracted another contractor but he did not have a copy of the contract.

DETERMINATION

The issues for determination are whether the grievants worked for the Respondent, whether they were unfairly terminated and if they are entitled to the prayers sought.

In the written submissions filed by the claimant it is submitted that all the grievants worked for this Respondent, that the Respondent failed to produce records of labourers. It was submitted that the Respondent's witness confirmed that the Respondent undertook the construction of the project in which the grievants were working.

For the Respondents it was submitted that the claimant did not call Onyango Mbusi as a witness, that the said Onyango Mbusi is not known to the Respondent and it is the claimant's responsibility to call him to court. It is submitted that having failed to call the said Onyango Mbusi the claimant had failed to prove the grievants were employed by the Respondent.

The Law relating to keeping of employment records is contained in sections 10 and 74 of the Employment Act. An employer is required to keep records of the following -

(a) the name, age, permanent address and sex of the employee;

(b) the name of the employer;

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

(f) the place of work;

(g) the hours of work;

(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) the intervals at which remuneration is paid; and

(j) the date on which the employee's period of continuous employment

began, taking into account any employment with a previous employer which counts towards that period; and

(k) any other prescribed matter.

Section 53 of the Labour Institutions Act further required employers to keep records as follows -

Records and notices.

53. (1) The employer of employees to whom a wages a wages order applies shall—

(a) keep such records as are necessary to show whether or not the employer is complying with the wages order; and

(b) retain the records for at least three years after the date of the last entry therein.

With respect to subcontracted employers section 54 (1) of the Labour Institutions Act provides as follows -

54. (1) Where the immediate employer of an employee is himself in the employment of another person and that employee is employed on the premises of that other person, that other person is for the purposes of this Part deemed to be the employer of that employee jointly with the immediate

employer.

In the present case the grievants all testified that they worked for the respondent at the construction site for VIC Hotel. RW I confirmed that indeed the Respondent undertook the project. The grievants testified that they dealt with a foreman by the name Onyango Mbusi. The Respondent has not either denied or confirmed that Onyango Mbusi was either its employee or a sub-contractor. Under section 54(1) of the Labour Institutions Act the Respondent is deemed to be the employer of the grievants if indeed they sub-contracted the work that was performed by the grievants as was admitted by RW1.

Having failed to produce records of labourers who worked on the VIC Hotel Project, the Respondent is under duty to prove or disprove the allegations by the claimant as provided in section 10 (7) of the Employment Act.

I find that the Respondent has failed to disprove the claimant's allegation that the grievants were its employees and therefore reach the conclusion that the grievants were employees of the Respondent in the project of construction of VIC Hotel in Kisumu.

On issue number 2 that is if the employment of the grievants were unfairly terminated the Respondent did not controvert the evidence of the grievants. The evidence that they reported to work on 31st August, 2009 and were not allowed to work due to having joined the Union therefore remains uncontroverted.

Under the Regulation of Wages (Building and Construction Industry) Order 2004 , Rule 19 provides for termination of employment as follows -

19. (1) The first two weeks of employment with the employer may be treated as a probationary period and during such period the contract may be terminated by not less than one day's notice to be given by either party or one day's pay in lieu of notice, such notice to expire at the end of the normal hours of work on any day:

Provided that—

(a) in the case of an employee who has completed two weeks but less than two months' continuous service with the employer, the employment shall be terminable by not less than seven days notice in writing to be given by either party, or otherwise by the payment by either party in lieu of notice of not less than seven days month's wages;

(b) in the case of an employee who has completed two months but less than three years' continuous service with an employer, the contract shall be terminable by not less than one month's notice in writing to be given by either party or otherwise by the payment by either party in lieu of notice of not less than one month's wages;

(c) in the case of an employee who has completed three years' service with an employer, the contract shall be terminable by not less than two months' notice in writing to be given by either party or otherwise by payment by either party in lieu of notice of not less than two months' wages; and

(d) in the case of an employee's service being terminated at the initiative of the employer after completion of two years' continuous service, such employee shall be entitled to payment at the rate of fourteen (14) day' salary for every completed year of service by way of gratuity to be based on the employee's wages at the time of termination of his services.

(2) Nothing in this paragraph shall prejudice the right of either party to terminate a contract summarily for any lawful cause.

All claimants having completed 2 months service, they were entitled to one month's notice or payment of salary in lieu of notice. The grievants are also each entitled to pro-rata leave and underpayments. The

grievants having worked for barely 3 months are not entitled to compensation.

For the foregoing reasons I award each grievant the following -

A. Ayooh Lazaro - CARPENTER

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

11,528.00

B. Fredy Ouma - CARPENTER

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 2 months x 352 = 1,584.00

10,736.00

C. Julius Omondi - CARPENTER

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

11,528.00

D. Vincent Adolo - STEEL FIXER

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

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E. John Jolle - STEEL FIXED

Notice - one month notice Kshs.350 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

11,528.00

F. Moses Omondi - LABOURER

Notice - one month notice Kshs. 275x26 = 7,150.00

Prorate leave - 2 1/4 days x 2 months x 275 = 1,237.50

Arrears of underpayment 275 - 200 x 69 days = 5,175.00

13,562.00

G. Antony Ochieng - LABOURER

Notice - one month notice Kshs.275/- x 26 = 7,150.00

Prorate leave - 2 1/4 days x 3 months x 275 = 1,856.25

Arrears of underpayment 275 - 200 x 95 days = 7,125.00

16,131.25

H. Caleb Odera O. - CARPENTER

Notice - one month notice Kshs.352 x 26 = 9,152.00

2 months Prorate leave - 2 1/4 days x 2 months x 352 = 1,584.00

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I. Andrew Ochieng - STEEL FIXER

Notice - one month notice Kshs.352 x 26 = 9,152.00

Prorate leave - 2 1/4 days x 3 months x 352 = 2,376.00

11,528.00

The Respondent shall pay the claimant the sum of Kshs. 50,000 as reasonable expenses and disbursements for the case.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE