



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 96 OF 2016

(consolidated with ELRCC No. 98, 99,100,101,102,105,109,110,111 and 114 of 2016)

1. RASHID MAZURI RAMADHAN1ST CLAIMANT
2. ANTONY DZUYA MAZERA.....2ND CLAIMANT
3. MOHAMMED PETER TSUMA3RD CLAIMANT
4. RASHID ALI4TH CLAIMANT
5. ANTONY ONYANGO WAGA5TH CLAIMANT
6. SILVANUS ADRIANO ATUGI6TH CLAIMANT
7. JAMES MWANGOMBE KALAMA..... 7TH CLAIMANT
8. HAMISI ATHMAN MTOA8TH CLAIMANT
9. SAID BAKARI BUKI9TH CLAIMANT
10. BRIAN MULI KITUMA10TH CLAIMANT
11. TUMAINI CHANGAWA MWAGANDI.....11TH CLAIMANT

VERSUS

1. DOSHI & CO. (HARDWARES) LTD.....1ST RESPONDENT
2. DOSHI ENTERPRISES LTD2ND RESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. All the claimants herein were employed by the respondent on casual basis for periods ranging between

there and seventeen years. It is their case that they served continuously without any interruption for the said years until they were wrongfully and unfairly terminated by the respondent for lack of materials. It is further their case that due to their continuous service, their employment had converted from casual to regular terms contract and therefore was protected by the law from wrongful or unfair termination.

2. The claimants were terminated on diverse dates between 2013 and 2015 and brought separate suits against the respondent which suits were consolidated under this suit. The suit seeks to recover salary in lieu of notice, accrued leave, service pay, compensation for wrongful dismissal and unfair termination of their employment plus certificate of service.

3. The respondents have admitted that they employed all the claimants as casual employees but they deny that the claimants worked continuously and without any interruption. They aver that the claimants were only hired intermittently as and when the need for casual labour was required. They further aver that none of the claimants ever worked continuously for one complete month. They therefore deny that the claimants' casual employment converted to regular terms contract as alleged by the claimants.

4. The suit was heard on 30/11/2016 when the first claimant testified as CW1 on behalf of all the 11 claimants while the respondents called their HR officer Mr. George Ongany as RW1. Thereafter both parties filed written submissions.

ANALYSIS AND DETERMINATION

5. There is no dispute that the claimants were employed by the respondent on diverse dates between 1996 and 2015. There is also no dispute that the claimants' employment was terminated on different dates between 2013 and 2015.

6. The issues for determination are:

- a) Whether the claimants' casual employment ever converted to regular term contract.
- b) Depending on the answer to (a) above, whether the claimants contract of employment was wrongfully and/or unfairly terminated by the respondent, or they are the ones who deserted the employment.
- c) depending on (a) and (b) above, whether the claimants are entitled to the reliefs sought or any part thereof

CONVERSION TO REGULAR TERMS EMPLOYMENT

6. CW 1 adopted his written statement and the statements written by the other claimants as the evidence in chief to support their suit. He reiterated that they were all employed as casual employees, without any written contract, and earning a daily wage of ksh.547 which was net of statutory deductions. He however confirmed that they were never registered for contribution to the National Social Security Fund (NSSF) or any pension or gratuity scheme. He further confirmed that they were never given any annual leave during their entire period of employment.

7 On cross examination CW1 stated that the claimants used to clock in and out when attending work and were also signing when going out to receive payment. He however confirmed that they were going to work depending on the availability of materials. He broke the camel's back when he admitted that they used to work for two days per week and then give others chance to work. He denied ever working continuously from 2011 to 2015 and maintained that all the claimants were casual employees.

8 CW1 further explained that the respondent had permanent employees who were working continuously and whom he left working when he was terminated on 2/8/2015. He however contended that he should have been given a notice before the termination because he had served for many years. He contended further that all the claimants were terminated in similar manner after being told that there was no

material. He however denied that they were offered seasonal contracts of employment and declined.

9 RW1 denied that the claimants worked continuously. He produced summary of attendance records to prove that none of the claimants ever served for one complete month. He maintained that all the claimants were casual employees hired for a daily wage and only when the need arose. He therefore denied that the claimants were permanent employee entitled to reliefs sought in the suit.

10 On cross examination, RW1 confirmed that they opened NSSF accounts for the claimants but no remittance was made. He contended that they offered to convert the claimants' to contract workers but they refused and disappeared. He however admitted that the respondent, paid service pay to some of her employees who are not claimants in this suit.

11 After careful consideration of the evidence and the submissions filed, it is clear that the claimants herein were employed on similar as casual employees and they were paid a daily wage. They never worked continuously but intermittently. As admitted by the CW1, they used to work in rotation for two days in a week to give a chance to other casuals employees depending on the availability of materials of work. They were different from the permanent staff of the respondents who worked continuously.

12 In view of the contention by RW1 and the admission by CW1 that the claimants were casual employees who never worked continuously but only hired as and when the need arose, I find and hold that the claimants' casual employment never converted to regular term contract of service within the meaning of Section 37 of the Employment Act.

13 Section 37(1) provides:

“(1) notwithstanding, any provisions of this Act, where a casual employee;

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service”.

14 Section 35(1) (c) of the Act protects the termination of employees contract without first giving him notice of 28 days in writing. In this case the claimants have not proved that they served continuously for the period or continuous working days totalling to one month or more to qualify for the conversion of their casual employment to regular terms contract of service. I therefore find and hold that they remained casual employees throughout their entire period of service.

WRONGFUL/UNFAIR TERMINATION VERSUS DESERTION

15 Under section 47(5) of the Act the burden of proving wrongful dismissal or unfair termination lies on the employee who alleges that he was unfairly or wrongfully dismissed. In this case the claim for unfair termination is founded on the mistaken believe by the claimants that their casual employment had converted to regular terms contract. In view of the finding herein above that the claimants' employment never converted to regular terms contract of service, their claim for unfair or wrongful termination is unfounded. They were casual employees who under Section 35(1) (a) of the Act were terminable without notice and without any protection by Section 35 (1) (c), 40 and 45 of the Act. Section 35(1) (a) provides that a contract of service shall be deemed

“Where the contract is to pay wages daily, a contract termable by either party at the close of any day without notice”.

16 section 40 and 45 of the Act on the other hand deals with redundancy and fair termination of regular terms employment contract. Consequently, I find and hold that the claim for unfair or wrongful termination of the claimant's is unsustainable in the circumstances of this case. On the other hand I find on a balance of probability that the claimants deserted work protesting against conversion of their employment contract to short term contracts. I have perused the contracts produced by the defence as exhibits and found them to be consistent with the testimony of RW1 and the defence pleaded.

RELIEFS SOUGHT

17 In view of the findings herein above that the claimants were casual employees and that they were not availed the protection of Section 35(1) (c), 40 and 45 of the Act, I dismiss their prayers for salary in lieu of notice and compensation for unfair or wrongful termination of their employment.

18 In addition to the foregoing, I dismiss the prayers for annual leave because as already observed herein above, the claimants never worked for continuous period of even one month. Under Section 28 of the Act an employee is entitled to not less than 21 leave days with full pay after serving twelve consecutive month; or to pro rata leave after serving at least 2 complete months.

19. Likewise, I dismiss the claim for service pay because the claimants never served for one complete year. Under Section 35 (5) of the Act, an employee is only entitled to service pay for every complete year of service. Although RW1 admitted in evidence that the respondent paid some former employees service pay, no evidence was adduced to prove that the claimants were entitled to service pay like those other former employees.

20 Finally, I dismiss the claim for certificate of service because the claimant never qualified for the same. Section 51(1) of the Act provides that:

“an employer shall issue to an employee a certificate of service upon termination of his employment unless the employment has continued for a period of less than four consecutive weeks.

CW1 admitted that all the claimants were casual employees who never worked continuously but 2 days in a week.

DISPOSITION

21 For the reason that the claimants were casual employees and that they deserted their employment deliberately, I dismiss the suit with no order as to costs.

Dated, signed and delivered this 31st March 2017

O.N. Makau

Judge