



REPUBLIC OF KENYA  
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 157 OF 2016

**1. SAFARI JOSEPH NGALA**

**2. KOMBO CHIMOYO ALFANI**

**3. BAVU NYAE BAVU.....CLAIMANTS**

**VERSUS**

**RAPID KATE SERVICES LTD .....RESPONDENTS**

J U D G M E N T

1. This is a claim for terminal dues plus compensation for the alleged unfair termination of the claimants' employment contract by the respondent on 23/3/2014 and 10/7/2014. It is the claimants' case that the termination was not preceded by any notice, or fair hearing with respect to the theft they were accused of. The respondent has denied the allegation that the claimants were his employees and that she terminated their services unfairly. She therefore prayed for the suit to be dismissed with costs.

2. The suit was disposed of by written submissions on the basis of their respective records.

CLAIMANTS CASE

3. The first claimant Mr. Safari Joseph Ngala stated in his written statement that he was employed by the respondent in 1994 as a casual worker in the loading and offloading department earning a daily wage of ksh.800. On 23/3/2014, he went to work as usual but after working for some time, the respondent told him that he has stolen sacks from the warehouse and that he should leave her premises immediately and never to return. He complied with the order and left without any terminal dues despite his faithful long service at the respondent premises.

4. The second claimant Mr. Kombo Chimoyo Alfani stated in his written statement that he was employed by the respondent in 1996 as a casual labourer in the loading and offloading department earning daily wage of ksh.800. On 10/7/2014, the gang manager Mr. Mzee kassi Mwavayema told him to leave the warehouse premises alleging that the second claimant was involved in theft of sacks. Mr. Mzee told him that he was given the names of the alleged thieves by the godown manager Mr. Salim Abdalla Tsama. He therefore obeyed the order and left without any terminal benefits after a faithful long service of 18 years.

5. The third claimant, Mr. Bavu Nyae Bavu stated in his written statement that he was employed by the respondent in 1997 as casual labourer at the loading and offloading department earning a daily wage of ksh.800. He was terminated on the same day under the same circumstances as the first claimant. He was

not paid any terminal benefits for the long service of 17 years. Like the first and the second claimant, he never went for any leave during his said period of service.

### DEFENCE CASE

6. Mr. Salim Abdalla, the respondents Senior Operations Coordinator since 2006 filed a written witness statement as the defence evidence. He stated that his duties included organizing the loading and offloading of fertilizer bags from the warehouse to the trucks, organizing payment and other expenses to labourers and other related sections at the warehouse, supervising the respondents staff (supervisors and clerks), and acting as the bridge between the labourers and the employer (respondent).

7. He confirmed that he knew the claimants as casual labourers but denied that they were employed by the respondent. He contended that the claimant were recruited at the respondents gate by a gang leader who had been contracted by the respondent to provide gang labourer of loading and off-loading goods at the respondent's warehouse on piece work basis. That after completion of the piece work given, the respondent paid the gang leader as an independent contractor who in turn paid the casual employees he had picked according to their agreement which did not involve the respondent.

### ANALYSIS AND DETERMINATION

8. There is no dispute that the claimant used to work at the loading and offloading department of the respondents warehouse between 1994 and 2014. The issues for determination are:

- (a) Whether the claimants were employed by the respondent or by an independent contractors engaged by respondent in the warehouse.
- (b) Depending on the answer to (a) above, whether claimants were unfairly dismissed from the respondent.
- (c) Whether the claimants are entitled to the reliefs sought.

### EMPLOYMENT RELATIONSHIP

9. In this case no written contract of employment was produced by either party. The claimants merely alleged that they were employed to work at the respondent's loading and offloading department earning ksh.800 per day. However they never stated the person who recruited them and the procedure followed. They also never stated who used to pay their said wages and on what basis. The first and the third claimants never named the person and the rank of person who terminated their employment. They only stated in their statement that they were terminated by the respondent. On the other hand, the second claimant was candid that he was dismissed by the gang manager Mr. Mzee kassi Mwavvema.

10. The respondent has maintained that the claimants were employees of an independent contractor who was retained by her to provide labour of loading and offloading on the piece work basis. That after completing the task, she paid the contractor who in turn paid the claimants based on their agreement to which the respondent was not privy.

11. The burden of proving that there existed employment relationship between the claimants and the respondent is on the claimants. On a balance of probability, however, I find that the said burden has not been discharged. The evidence by the second claimant has clearly corroborated the respondent's case that the claimants were employees of an independent contractor engaged to provide services to the respondents loading and offloading department of her warehouse. That respondent only dealt with the contractor on piece work basis and the contractor hired the claimants among other casual employees.

12. The said arrangement of hiring labour from independent contractors is now a common phenomenon in Mombasa and other parts of the country under what has become known as gang labour. In such arrangement, the owner of business like in this case shuns the vigour of employing staff directly because

of the urgency and the temporal nature of the task and therefore engages an independent contractors called 'gang leader' who is in charge of an organized gang who are readily available for temporary manual jobs in a particular industry like construction or shipping industry. The relationship between the claimant and the contractor is governed by the objective or out put in the task given. In such scenario, the employer of the gang member is the contractor and there cannot be any employment relationship between the casual employees of the contractors and the contracting client unless the client exercised control or supervision over the contractor or her employees.

13. In my view, there is nothing wrong with such arrangement where a person engages an independent contractor to provide labour to perform on piece work basis. That is what happens even with the Government when it contracts corporations to build roads among other tasks. The independent contractor employs his own staff to perform the task under agreements to which the government has no privy. If the employees have not been treated well, they cannot sue the government but the contractor.

14. In this case the claimants were employees of Mr. Mzee kassi Mwavvema who was contracted to provide temporary labour services to the respondent at her loading and off-loading department. They were dismissed by the said contractor on the allegation that they stole sacks at the respondent's warehouse. After careful consideration of all the material presented to the court, I am persuaded on a balance of probability to find that the claimants were not employed by the respondent on the dates they were dismissed from her premises on 23/3/2014 and 10/7/2014. The evidence on record supports the view that they were employees of an independent contractor retained by the respondent to provide temporary labour.

#### UNFAIR TERMINATION

15. In view of the finding that the claimants were not employees of the respondent on the date they accuse her of unfair termination, I decline to find that they were unfairly dismissed by the respondent. The reasons for the foregoing view is that without employment relationship between the parties herein there could not reasonable be an unfair termination of a relationship that never was.

#### RELIEFS

16. For the same reason of non-existence of employment relationship between the parties herein, the claimants are not entitled to the reliefs sought.

#### DISPOSITION

17. The suit is dismissed for want of merits. No order as to costs.

Dated, signed and delivered this 28<sup>th</sup> April 2017

O.N. Makau

Judge