



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 1388 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st May, 2017)

KENYA BUILDING, CONSTRUCTION,

TIMBER, FURNITURE & ALLIED

INDUSTRIES EMPLOYEES UNIONCLAIMANT

VERSUS

IMARA ENTERPRISESRESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 28th August 2013 where the Claimants seeks:-

a. *Kshs.137,629.00 as terminal dues for the 2 Grievants particularized as:*

1. Cyrus Karimi

Wages

Kshs. 9,854 x 2 months + Kshs. 379 x 14 days =

Kshs. 25,014.00

Appropriate Notice

Kshs. 9845 x 2 months = Kshs. 19,708.00

Gratuity

Kshs 379 x 15 days x 5 years = Kshs. 28,425.00

Underpaid Wages

Kshs 335 – 300 x 26 days x 11 months =

Kshs. 10,010.00

TOTAL = Kshs. 83,157.00

2. James Mbogo

Wages

Kshs 9,854.00xx 2 months + 379 x 12 days =

Kshs 25,014.00

Kshs 9,845.00 being one months salary

Kshs 9,854.00 being one months notice Underpaid wages

335-300 x 26 days x 11 months = Kshs 10,010.00

TOTAL: Kshs.54,472.00

b) 12 months salary compensation for wrongful dismissal for each grievant

c) Costs of this dispute.

2. The two Grievants who are members of the Claimant were employed by the Respondent in September 2006 and September 2010 Respectively. They were terminated on the 2nd of May 2012 each earning a consolidated monthly wage of Kshs 7,800.00 or Kshs. 300 per day.

3. The Grievants state that they had returned to duty after their lunch break when a Director, Mr. Kamata informed them that they had been late which was strange as lunch was served within the work premises. They were sent on compulsory leave for 62 days and after they reported back, they were informed that they had been dismissed and were not paid their salary for the two months leave, nor were they paid any other terminal benefits.

4. The Claimant states that the letters that were given to them by Mr. Kamata informing them of their suspension were unsigned and they declined to sign the same. They sought the assistance of the Claimant who took up the matter and tried a settlement with the Respondent which failed.

5. The Claimant reported the existence of the labour dispute to the Minister and a Conciliator was appointed at the Thika Labour Offices. Meetings were called between the two parties but the Respondent did not turn up for any and a certificate of failure to resolve a dispute was issued. At the expiry of the three months they went back to the Respondent but were informed that their positions had been filled. They have not been paid their terminal dues.

6. They state that they were underpaid as the general provision for earning of daily wages is that of Kshs.379.00 if working within a Municipality or Kshs. 9,854.00 as monthly wages.

7. The Respondents filed a Reply to Memorandum dated 2nd October 2015 on 12.10.2012. It is the Respondent's evidence that they have no recognition agreement with the Claimant Union and the Union has never approached them.

8. However, they stated that the Grievants worked as casuals in their shop and were never permanent employees. That they were hired on need basis and were never given appointment letters.

9. The Respondent stated that they was told that some people were caught stealing while loading materials. These people ran away and he only heard of them when they reported to the Union. He too

reported to the police but the suspects disappeared.

10. They aver that the Claimants are not entitled to prayers they seek.

Submissions by the Claimant

11. The Claimants rely on the pleadings and add in their submissions that they were paid less than their dues according to the Regulations of the Wages (Building and Construction Industry) Order 2004.

12. They submit that there were averments by the Respondents that they are not entitled to any dues as they were just casual laborers which are false. That the Respondent was ignorant of the law of employment and should not be allowed to get away with it.

13. They pray that the Court should allow the claim as prayed.

14. The Respondent submits that Section 2 of the Employment Act defines a casual labourer as:-

“a person the terms of engagement provide for his payment at the end of each day and is not engaged for longer period than twenty four hours at a time” .

15. They submit that the Claimants were employed as loaders and were casual labourers and did not produce any evidence to the contrary. All employees were given letters of employment and the Claimants herein had no such letters. Oral agreements were used to retain them and they worked on a need basis.

16. They submit that the Claimants have not produced any form of document to prove the averment of their salary being Kshs 7,800.00 a month.

17. They submit that the Claimants terms cannot be converted to that of a permanent worker as envisioned in Section 37 of the Employment Act as they only worked as and when there was availability.

18. They cite the case of **Peter Wambugu Kariuki And 16 Others vs. Kenya Agricultural Research Institute [2013] eKLR and Samwel Okinda Aponga & Another vs. Match Master Limited [2015] eKLR** which stated that the Employment and Labour Relations Court has in the wake of the Employment Act 2007 nevertheless appreciated that failure to pay wages at the end of the day does not by itself remove one from the ambit of a casual worker.

19. The Respondents submit that the Claimants have failed to show that they are indeed members of the Union. They submit that the Claimants have not also produced evidence of their being asked to go on compulsory leave. It is the Respondent's submission that he who alleges something must prove it.

20. They submit that it was the right of the Respondent to dismiss the Claimant where they felt that they have suffered gross misconduct or on reasonable and sufficient ground or of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

21. They submit that the Claimant disappeared when they realized there was a likelihood of their being arrested because of gross misconduct.

22. The Respondents' property had been lost due to their action they were going to take disciplinary action and summarily dismiss them.

23. They submit that the Claimants had been caught stealing and upon calling of the police, the Respondents' dissented and ran away from work. They submit that the Claimant has not come to court with clean hands and that they should not benefit from wrongdoing.

24. They submit that the Claimants have not proved their case on a balance of probability as required by law. They submit that under Section 2 of Legal Notice No 94 the Regulations of Wages and Conditions of

Employment Act Cap 229, the said Act applies to all persons (other than managerial and executive staff) employed in the undertaking which consists in the carrying on for gain one or more of the following activities:

(a) The construction, structural alteration, maintenance of any building, the demolition of any building and the preparation for and laying the foundation of any intended building or

(b) The construction of any railway line or siding and the construction, structural alteration and repair or the demolition, navigation works, road tunnels bridge..

(c) Electrical installation, lift installation, plumbing installation, painting and decoration works and allied building activities.

25. They submit that the Grievants do not fall within the definition they were employed as loaders who are not part of the above category.

26. They submit that under the Labour Institutions Act 2012 Legal Notice No 63, the Grievants can only fall on the category of unskilled employees where their salary per month amounts to Kshs 3,765.00. Under the Kenya Subsidiary Legislation 2011 a General Labourer is only entitled to Kshs. 4,047.00 and under the Labour Institution Act Number 12 of 2007 Legal Notice Number 70 an unskilled employee is entitled to Kshs. 4,258.20 per month or Kshs. 178.80 per day.

27. They also submit that under the Kenya Subsidiary Legislation 2012 General Laborers are entitled to Kshs. 4,577.20 per month or Kshs. 232.00 per day. They submit that the Claimants are not entitled to the damages as claimed.

28. As to costs, they submit that they should be awarded costs.

29. Having considered evidence and submissions of both parties, issues to determine are:

1. Whether there was an employment relationship between Claimants and Respondent and

2. If yes what were the terms of the employment relationship.

3. If the Claimants were dismissed by the Respondents without any justification and unfairly.

4. What remedies to grant in the circumstances.

30. On the 1st issue, there is evidence that Claimants worked for Respondent but the terms of engagement are not clear. From Claimants' evidence, they worked daily and were paid 300 per day. By virtue of the fact that the Claimants were paid daily, they could have been considered as casual employees. However, this matter was reported to Ministry of Labour and a Conciliator appointed.

31. The Respondents were summoned to appear but they didn't appear. The Conciliator referred the case to Court.

32. The Respondents have stated that they didn't even know the Claimants who were casuals and only worked on need basis. This fact is however disputed by the Claimants and rightfully so because the Respondent did not submit to Court crucial documents such as their muster roll which shows attendance of employees whether casual or permanent.

33. In absence of producing the muster roll, the Respondent should prove the allegation that the Claimants were casuals as opposed to permanent employees.

34. Without the muster roll being produced, I will assume that had the muster roll been produced, it would be detrimental to the Respondents. I find that the evidence as stated by the Claimants is the correct

position. They were employed and dismissed without any appointment letters. The amounts being paid whether daily or per month is also not proved by the Respondents through their documents.

35. Under Section 10(7) of Employment Act:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

36. From the above provision, the burden of proving any particulars in an employment relation without any written contract lies upon the Respondent which they have failed to do.

37. I therefore find that the Claimants were dismissed having worked for Respondent for some time and being paid 300 per day translating to 7800/= per month.

38. The Claimants have alleged underpayment but I note from the wages order of 2011 general laborers were being paid 7,586/= per month but daily rate was 364.95 in Nairobi, Mombasa and Kisumu.

39. The Respondent’s address is Thika from the letter addressed to them by the Labour Officer. Being a Municipality the mean wage there was 6,999/= and a daily rate was 335/=. This means that the claimants were underpaid in 2011 by 35/= per day = $35 \times 30 = 105$ /= per month = 12,600/= per year.

40. In 2012, the minimum wage in same area was 8,001 and daily rate was 386.95. The Claimant were therefore unpaid by 86.95/= per day = 2,608.5 per month and thus = $2,608.5 \times 5$ months = 13,045.5

41. It is my finding that the Claimants were dismissed without due process and orally having served Respondent for over 3 months and I therefore find for them and award as follows:

1. Underpayment of wages = 25,642.5/=

2. 1 months’ salary in lieu of notice = 8,001/=

3. 6 months salary as damages for unlawful termination = $6 \times 8,001 = 48,006$ /=

4. Service pay for 1st Claimant for 15 days for each year worked = $\frac{1}{2} \times 8,001 = 20,002.5$ /=

Total = 1st Claimant = 101,652/=

2nd Claimant = 81,649.5/=

5. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Biamgisha holding brief for Chege for Claimant – Present

Ongicho holding brief for Machio for Respondent - Present