



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 345 OF 2015

CHITSAKA RUNGWA CHAROCLAIMANT

VERSUS

REA VIPINGO PLANTATIONS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 14/3/15. The respondent has denied ever employing the claimant and avers that she was employed by Kazungu Agricultural Supply who was an independent contractor retained by her to supply labour under a valid outsourcing agreement. She therefore prayed for suit to be dismissed with costs.

2. The suit was heard on 10/2/2016, 4/5/2016, 20/6/2016 and 10/11/2016 when the claimant testified as CW1 and the defence called Ms. Janet Omulindi as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

3. CW1 stated that he was employed by the respondent in 2008 as a General labourer earning ksh.7000 per month. During his employment, the employer deducted NSSF contributions but never remitted the same to the fund. As at 23/8/2013, CW1 was employed by the respondent as a Sisal Cutter when she was injured while on duty. She then filed suit number SRMCC 143/14 against the respondent to recover compensation for the bodily injuries sustained. In return the respondent dismissed him wrongfully and unfairly without any prior notice and for no good reason.

4. She produced DOSH/WIBA 5/A form signed and stamped by the respondent acknowledging that she was the respondent's employer and admitting to pay Khs.26313 to her as assessed by the Director Occupational Safety and Health (DOSHS) on 29/6/2015. She also produced a copy of the cheque no. 018244 for ksh.26313 issued by the respondent to the claimant as settlement for the said compensation. CW1 maintained that she was at all material times employed by the respondent and the reason for her dismissal was that she commenced legal proceedings against the employer to recover damages she suffered while in the course of her employment as sisal cutter. She prayed for salary in lieu of notice, compensation for unfair termination, gratuity, accrued leave, unpaid salary and unremitted NSSF deductions equaling to Ksh.164,270.

5. On cross examination CW1 stated that she did not know the reason for her termination. She further stated that she used to be paid ksh.7000 per month and in cash form by cashier called Kazungu. She however maintained that she was employed by the respondent. She admitted that she was registered to the NSSF on 1/10/2014. On re-examination CW1 described Mr. Kazungu as the supervisor at the respondent's farm who used to take the workers to the officer for payment.

DEFENCE CASE

6. RW1 is the respondent's HR Manager. She stated that the claimant was never employed by the respondent as a general labourer or in any other capacity. She further stated that the respondent had an outsourcing agreement with an entity called Kazungu Agricultural Supply for provision of various axillary support and general agricultural services and possibly the claimant was employed by the said contractor. Under the said outsourcing agreement, the contractor was solely responsible for the performance of the personnel it assigned work, and payment to them among others.

7. RW1 explained that the respondent never employed general labourers at Ksh.7000 per month and contended that all her employee had defined role and that terms of service including the pay were governed by a Collective Bargaining Agreement (CBA) between the Sisal Growers and Employers Association and the Kenya Plantations and Agricultural Workers Union. She maintained that had the claimant been employed by respondent, she would have been paid in accordance with the CBA.

8. RW1 admitted that the claimant was injured on 23/8/2013 while cutting sisal in the respondent's premises and pursuant to the provisions of the work Injury Benefits Act (WIBA) the respondent was obliged to fill form WIBA 5/A since the injuries were sustained within her premises. RW1 contended that by filling the said form did not render the respondent the employer of the claimant. She produced labour Outsourcing Contracts and NSSF records and letters from the NSSF to prove that the claimant's employer was Kalama Kazungu Nguma. Her attempt to produce outsourcing contracts dating back to 2008 was thwarted after the claimant objected due to late filing. The only contract produced is the one running from 1/11/2014 – 31/11/15 which was filed in time.

9. On cross examination she referred to clause 5.44 of the Outsourcing Agreement which confirmed that the service provider was Kazungu and that he was responsible for workers compensation. She however admitted that the employer cited on the Form DOSH/WIBA 5/A dated 5/6/15 was the respondent. She also admitted that the respondent paid her by cheque the ksh.26313 quantifies on the said form DOSH/WIBA/5/A. She further confirmed that by the time the claimant suffered the injury in August 2013, the outsourcing agreement produced as exhibition had not been signed.

10. On re-examination, RW1 stated that the WIBA form is signed whenever an employee or visitor is injured within the workplace. According to her, it is a form in respect of occupiers' liability and it is for all persons injured and not just the employees only. RW1 maintained that the claimant was employed by Kazungu within the respondent's premises and she was ordered to pay the compensation by the DOSH.

ANALYSIS AND DETERMINATION

11. The issues for determination herein are:

- a. Whether the claimant was employed by the respondent from 2008 to 14th march 2015.
- b. If (a) above is affirmed, whether the respondent unfairly terminated the claimant's contract of service on 14/3/15.
- c. Whether the claimant is entitled to the reliefs sought.

EMPLOYMENT RELATIONSHIP

12. No written contract of employment between the parties herein was produced as evidence to prove the

existence of alleged employment relationship between the parties herein. The claimant has however produced as exhibit, copy of Form DOSH/WIBA 5/A filled by the respondent's Estate Manager on 5/6/2015 which indicate that the claimant was an employee of the respondent serving as a Sisal Cutter. By the said form, the respondent as the employer admitted to pay ksh.26313 under the WIBA and indeed proceeded to pay the same vide her cheque number 0182244 dated 5/6/2015. In addition to the foregoing, she has contended that she was working in the respondent's farm and the said Mr. Kazungu was just their supervisor and cashier at the farm.

13. The respondent has denied the alleged employment relationship with the claimant and maintained that the claimant was employed by Mr. Kalama Kazungu Nguma an independent contractor retained by her to provide labour under a Labour Outsourcing Agreement. She further contended that had she employed the claimant, her terms of service including her salary would have been regulated by the CBA operating in the said plantation industry. As regards the form DOSH/WIBA 5/A, and the payment of the compensation assessed by the DOSH, the respondent contended that such forms are filled and compensation done to every person injured within the employer's premises whether he is an employee or a visitor. She therefore maintained that the claimant was never employed by her.

14. After careful consideration of the evidence and the submissions presented to the court, I find that the claimant was employed by the respondent starting as a general labourer in 2008 and ending up as a Sisal Cutter on 14/3/2015 when her services were terminated. There is clear evidence of written contracts produced by respondent which prove that during the same period the respondent had signed a labour outsourcing contract with Mr. Kalama Kazungu Nguma, she was directly hiring some employees to do the same manual jobs including Sisal Cutters. The claimant is an illiterate and fairly old lady but she has been consistent in her evidence that she was employed by the respondent and that is why, the respondent's manger voluntarily completed the DOSH/WIBA 5/A acknowledging that she was employed by the respondent as a Sisal Cutter. Unlike the defence allegations, it is clear that the respondent paid the compensation as employer under WIBA and not as occupier under Occupational Health and Safety Act (OSHA). The said form was filled shortly after this suit was filed on 26/5/2015, and payment done. She acknowledged employer status on 5/6/2015 and cannot reasonably deny the same by a defence filed on 23/6/2015. On a balance of probability therefore, I find and hold that at all material times herein, the claimant was employed by the respondent under an unwritten contract of service.

UNFAIR TERMINATION

15. The claimant has contended that no reason was given by the respondent for terminating her employer contract and she maintains that the reason for her termination was because she commenced the suit against the respondent being SRMCC 143/2014 to recover damages for the bodily injuries she suffered while in the course of her employment as a Sisal Cutter by the respondent. RW1 said nothing in response to that allegation during her testimony. She also never said anything to justify the reason for the termination of the claimant's service or to prove that it was done after following a fair procedure. Consequently, it is my finding that the respondent has failed to discharge her burden of proving that the termination of the claimant's contract of service was fair.

16. Under Section 45(2) of the Employment Act, termination of the employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure which basically refers to a fair hearing of the employee before the termination. In this case, the unrebutted evidence is that the dismissal was on the grounds that the claimant had sued the employer to recover damages for injuries suffered while in the course of her employment. Under Section 46 of the Employment Act, terminating the employment of an employee on ground that he has sued the employer, is not a fair reason for the termination and it renders the termination unfair. I therefore find and hold that the claimant has successfully proved on a balance of probability as required under Section 47(5) of the Act, that she was unfairly dismissed by the respondent on 14/3/2015.

RELIEFS

17. Under Section 49 of the Employment Act, I award to the claimant ksh.7000 as one month salary in

lieu of notice as prayed. I also award to her ksh84000 being 12 months' salary as compensation for unfair termination. The reason for the said compensation is that the claimant committed no misconduct to warrant the termination.

18. She is also awarded ksh 3270 being salary for the 14 days worked in March 2015 as prayed. The claim for unremitted NSSF deductions is dismissed for want of evidence. She will however get gratuity for six years prayed. Under clause 22 of the CBA produced by the respondent, an employee who served for at least 2 years, was entitled to gratuity at the rate of 18 days pay per year of service, provided the termination is not through resignation or gross misconduct. In this case, the claimant neither resigned nor was she dismissed for gross misconduct. She is therefore entitled to get $Ksh.7000 \times 18/26 \times 6$ years = 29076.96. However, she will get the pleaded being ksh.21000. Finally, the claimant is entitled to leave for 5 years being $ksh.7000 \times 21/26 \times 5$ - ksh.28269.25. She will however get the pleaded sum of ksh.21000.

DISPOSITION

19. For the reasons that the respondent terminated the claimant's contract of employment unfairly, I enter judgment in favour of the claimant in the sum of ksh.136270 plus costs and interest.

Dated, signed and delivered this 19th May 2017

O.N. Makau

Judge