



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 378 OF 2016**

**1. BENARD OCHIENG ODHIAMBO**

**2. VINCENT MUTUNGA MUTUA**

**3. SHEDRACK LEWA CHIRO .....CLAIMANTS**

**VERSUS**

**MULJI DEVRAJ & BROTHERS LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for accrued terminal benefits plus compensation for the alleged unfair termination of the claimant's contract of employment by the respondent on 5/7/2014. It is the claimants case that they were discharged without any prior notice or being accorded fair hearing contrary to the provisions of Section 41,43,45 and 49 of the employment Act, ILO convention 92 on termination of employment and Article 41 of the constitution of Kenya.

2. The respondent has denied the alleged employment relationship with the claimants and avers that they were employed by one Mr. Mulatya Mwitanzi who has been subcontracted by her. She further denies having unfairly terminated the claimant's employment and avers that she was never their employer and was therefore a stranger to the alleged unfair termination. She therefore prays for the suit to be dismissed for being incompetence, frivolous, vexatious and incapable of disclosing a reasonable cause of action.

3. When the suit came up for pre-trial direction on 31/8/2016, the parties agreed to dispose of the suit by written submission on the strength of their respective records. The claimant filed his submissions on 21/9/2016 thereafter respondent filed further 8 documents and a witness statement on 3/11/2016 followed by her written submissions on 24/11/2016. The claimant objected to the documents filed by the defence on 3/11/2016 and the same were struck out for being filed without the leave of the court.

**CLAIMANT'S CASE**

4. The claimants relied on the witness statement by the first claimant Mr. Bernard Ochieng Odhiambo dated 26/5/2016 and filed in court on the same day. He stated that he was employed by the respondent on 8/4/2013, while the second and the third claimants were employed on 19/4/2013 and 8/7/2013 respectively. They were employed as carpenters earning ksh.310, ksh.650 and ksh.310 per day respectively. On 5/7/2014 they were verbally terminated by the respondent without any valid reason

being given to them.

5. After the termination, the claimants lodged a dispute at the labour officer Mombasa who summoned the respondent to a conciliation meeting on 4/11/2014 but she defaulted. The labour officer then served the demand letter dated 2/4/2015. On 27/5/2015, the claimants instructed a lawyer who also served demand letter and thereafter brought this suit.

#### DEFENCE CASE

6. The respondent adopted the statement of her Administrator Ms. Lucy N. Tsaka dated 19/10/2016. The witness stated that she was employed by the respondent in February 2009. She explained that the respondent's policy on casual employment is that all the casual employees must undergo interviews and thereafter they are issued with appointment contracts which are signed by both the employee and the respondent.

7. She further explained that the claimants were not employed by the respondent but a subcontractors called Mulatya Mwitanzi who hired them and paid their wages. She concluded by contending that the claimants should have sued the said subcontractor whose contract they have. The respondent produced her letters dated 17/4/2015 and 9/6/2015 respectively responding to the demand letters by the labour officer and the claimants' advocates. By her said two letters, the respondent sought to clarify that the claimants were never employed by her, but they were employees of her subcontractor Mr. Mulatya Mwitanzi.

#### ANALYSIS AND DETERMINATION

8. The issues for determination are:

- (a) Whether the claimants were employed by the respondent
- (b) If (a) above is affirmed, whether the claimants' contract of employment was unfairly terminated.
- (c) Whether the claimants are entitled to the reliefs sought.

#### EMPLOYMENT RELATIONSHIP

9. I have carefully considered the evidence and the submissions presented to the court by both parties. The claimants have not filed any reply to the defence to deny the allegation in the defence and exhibits that they were employees of Mr. Mulatya Mwitanzi who was a sub-contractor for the respondent. They have also not sought any leave to respond to the statement by Ms. Lucy Tsaka which supported the said averments in the defence and the supporting letters. They also never denied knowledge of Mr. Mulatya Mwitanzi.

10. In addition to the foregoing deficiency, the claimants never gave any description of their employment relationship with the respondent. They never stated whether, and how the respondent recruited them, who supervised them, the premises they operated from, the owner of the tools they were using and the nature of work they were doing. Although they alleged that they were paid wages by the respondent, they never proved that they received the wages directly from the respondent. On a balance of probability, I find that the claimants have not proved their allegation that they were employed by the respondent between April 2013 and July 2014. In my considered view, the claimants' evidence is not sufficient to prove the alleged employment relationship between the claimants and the respondent.

11. The claimants have cited FRANCIS N. BWIRE & 12 OTHERS -VS- CRYSTALLINE SALT LTD [2014] e KLR where Radido J, held that gang employees who had worked on casual basis for a long time were not independent contractors but regular employees of the respondent. The present case is however distinguishable from the said precedent because in this case, the issue is whether the claimants were

employees of a subcontractor as opposed to the issue in in the former case which was about independent contractors alleging that they were employees. Having satisfied myself that the claimants have not proved that they were employees of the respondent the answer to the first question for determination, this case is negative.

#### UNFAIR TERMINATION

12. In view of the foregoing finding that the claimants were never employees of the respondent, it follows naturally that they were incapable of being dismissed by the respondent. Consequently the safeguard of fair termination of employment contract were not applicable in this case between the parties herein.

#### RELIEFS

13. For the reasons that the claimants had no employment relationship with the respondent and that the respondent did not dismiss them, no employment benefits or compensation accrued from the alleged termination on 5/7/2014.

#### DISPOSITION

14. For the reason that the claimants did not prove that they were employed and dismissed by the respondent, I dismiss the suit with no order as to costs.

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

**O. N. Makau**

**Judge**