



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 797 OF 2010

JAMES NYAEGA 1ST CLAIMANT

ELPHAS KIYAI 2ND CLAIMANT

JOHN MUTETI (suing on their own behalf and on behalf of the employees
of Auto Spring Manufacturers Limited)**3rd CLAIMANT**

VERSUS

AUTO SPRING MANUFACTURERS LIMITED.....RESPONDENT

M/S Auka for claimants

Mrs Machi for respondent

JUDGMENT

1. The suit was filed on 7th March 2007 at the Chief Magistrate's Court vide a plaint dated 5th February, 2007.
2. The facts of the claim are that on diverse dates between 1988 and 2005, the defendant employed the plaintiffs to work in its factory in various capacities.
3. The respondent purports that the plaintiffs were employed as casuals and were not entitled to terms and conditions of service available to permanent and pensionable employees. The plaintiffs content to the contrary on the other hand.
4. The plaintiffs state that they worked for more than three months and the Employment Act, Cap 226 of the Laws of Kenya (repealed, by Employment Act, No. 11 of 2007) applied to them.
5. The plaintiffs claim that they were entitled and should be paid; house allowance, travel allowance, medical allowance and overtime for the period they served and severance pay in respect of workers declared redundant. They also seek general damages.
6. The plaintiff filed an application for leave to be granted to the plaintiffs to sue on behalf of 55 persons listed in a document titled "Authority to commence proceedings pursuant to Rule 9(3) of the Industrial Court (procedure) Rules, 2010.
7. The list was struck off the plaint by a ruling of Justice Onesmus Makau delivered on 12th October

2012. The suit is therefore only limited to the plaintiffs in the plaint.

Defence

8. Defendant filed a statement of defence on 9th April 2007 in which it avers that the plaintiffs were employed as casual labourers and were paid a daily wage at the end of each day. That upon separation, their dues as casual employees had been paid in full and they are not entitled to any relief as claimed or at all. That the suit be dismissed with costs.

9. Mr. Elphas Kiyai filed a witness statement on 6th November, 2015 which he adopted as his evidence in chief in his sworn testimony before court.

10. He told the court that he was authorized to testify on behalf of other plaintiffs and produced letter of authority dated 9/5/2011.

11. CW1 told the court that they were employed as general labourer and were not issued letters of employment. That he served from 2002 to 2006. That he resigned from the employment. That he was a member of Kenya Engineering Workers Union. That the union did not take up their complaints.

12. That the Collective Bargaining Agreement covered the permanent employees and did not cover them. That this is wrong and they pray to be paid terminal benefits in terms of the CBA.

13. CW2 was James Ongechi Nyaega. He adopted a written statement filed on 6th January 2015. He told court that he worked for the respondent from 1986 January as a supervisor. That the respondent is an engineering company. That he was paid Kshs.7,000 per month. That they were paid cash and worked eight (8) hours a day from 8.00 a.m. to 5.00 p.m. That they were paid overtime as and when they worked overtime.

14. That from 1986 up to 1994, they worked continuously but were declared redundant. That they had been given letters of appointment.

15. That not all were retrenched and others were recalled in the year 2000 from time to time. That CW2 rejoined in 2001 and worked as a casual until 2015. That they were paid Kshs.240.00 per day. That NSSF and NHIF was deducted. That they were paid less as compared to the terms in the CBA document.

16. They complained to the union officials. The union wrote to the respondent in 2013 and 2014. The dispute was reported to labour. They wanted to be recognized as permanent employees after three (3) months service.

17. CW2 left employment in 2015. They refused to sign three (3) months contracts. They were sent away when they refused to sign. They were not given leave and were underpaid.

18. CW2 prayed that the court awards the plaintiffs as per the plaint with respect to house allowance, in lieu of leave, travel allowance and medical allowance and two months termination notice per Clause 17 of the CBA.

19. They claim to be paid per Clause 22 (f) (iii) severance pay calculated at twenty two (22) days salary for each completed year of service.

20. The respondent did not call any witness in support of its case but relied on the statement of defence and written submissions.

Determination

21. The issues for determination are;

(i) Whether the claimants have proved on a balance of probability that they were entitled to the terms contained in the Collective Bargaining Agreement between the respondent and the Kenya Engineering Union meant for permanent employees.

22. It is trite law that he who alleges must prove. The plaintiffs allege that though they were employed and served for various periods in the respondent's employ as casuals, they were in terms of the Employment Act, Cap 226 and the CBA in place to be treated as permanent employees by the respondent and be paid the reliefs set out in the plaint.

23. The plaintiffs rely on their testimony under oath and states in the main that since they all served continuously for ten (10) years period, they were deemed permanent employees in terms of the law and are entitled to the benefits they seek.

24. The plaintiffs produced a list of documents on 10th May 2016 including Collective Bargaining Agreements dated 3rd March 2008 and 13th July 2008 respectively.

25. The CBA's produced by the claimants cover the period 1st July 2006 to 1st July 2008 and period 1st July 2008 to 1st July 2010 and to be in force until replaced by another.

28. Clause 34 in both documents provide

“(b) casual employees who work for three months consecutively shall be converted into permanent terms of employment.”

27. The claimants have demonstrated that they all worked continuously for periods longer than three (3) months and they converted to permanent unionsable employees.

28. The terms and conditions of service in the CBA documents therefore applied to them and the court finds accordingly.

29. The court therefore enters Judgment in respect of James Nyaega; Elphas Kiyai and John Muteti as follows;

House allowance

The claimants are entitled to a monthly house allowance calculated at 15% of their basic salary for the entire period of their service excluding the first three months.

Annual leave

The claimants are entitled to 26 days leave or payment in lieu thereof for each completed year of service. Leave allowance is only payable upon taking of leave. The claimants did not take leave and are not entitled to the allowance.

Notice pay

30. CW1 worked from 2002 until 2006. The CBA's produced in court were not in place by the time he quit employment.

31. CW2 worked from 1986 until 1994 when he was declared redundant. He was re-employed in 2001 as a casual until 2015 when he quit upon refusing to sign a three months contract stating that he was a permanent employee.

32. CW3 was also recalled in 2001 and quit in 2015 upon refusing to sign a three (3) year contract.

33. The court is of the considered view that the CBA was applicable to the claimants from 2006 and they had served for more than ten (10) years by the time their employment was terminated in 2015. They are entitled in terms of Clause 17 of the CBA to two months salary in lieu of notice and the court awards the three of them accordingly.

Severance pay

34. There is no evidence that the claimants were declared redundant in 2015. The earlier separation before they were re-employed in 2001 is not covered by the CBAs produced in court. Accordingly, the claimants have not proved on a balance of probability that they were entitled to payment of severance pay.

Compensation for unlawful dismissal

35. A party must stand or fall within his/her pleadings. Even though the testimony by the claimants show that they were constructively dismissed upon their refusal to sign three (3) months contract, there is no prayer for compensation for the unlawful termination of their employment in the plaint filed on 7th March 2007. Indeed at the time the suit was filed, the claimants were still in employment until they were constructively dismissed on diverse dates. This claim does not lie therefore.

36. Accordingly, the court enters judgment in favour of the 1st, 2nd and 3rd claimants as follows;

a) Payment of house allowance calculated at Kshs.2950 per month from 1st July 2006 to 1st July 2007 and Kshs.3,000 from the year 2008 and Kshs.3,100 for the year 2009 until date of termination and in the alternative it be calculated at 15% of the basic salary from the year 2006 to date of termination if the amount per month is greater than the amounts above.

b) Payment of 26 days salary in lieu of leave per year from the respective dates of employment until date of termination. This payment is premised on the Employment Act, Cap 226 of the Laws of Kenya (now repealed).

c) Notice pay

Payment of two months salary in lieu of notice based on the gross salary earned by the claimants at the time of termination. Computation to be done and filed by the claimant within thirty (30) days and a response if any within fifteen (15) days of service.

d) Interest on the awards at court rates from date of filing suit till payment in full.

e) Costs to follow the outcome.

Dated and delivered at Nairobi this 28th day of July, 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE