



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 185 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th July 2017)

WILFRED K. ONYANGOCLAIMANT

VERSUS

DHL EXCEL SUPPLY CHAIN KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent on 8th February, 2013, seeking damages for wrongful and unfair termination. He states that he was employed by the Respondent on 8.10.2010 as a loader earning a salary of Kshs. 13,898/=.
2. He further alleges that he served the Respondent with loyalty and diligence until 22nd October, 2012, when the Respondent terminated him without notice and without payment of terminal dues. He contends that on the date of termination he was supposed to negotiate for a salary increment. He prays for unpaid salary for October 2012, house allowance, leave allowance and 12 months' salary as compensation for unfair dismissal totaling to 145,742/=.
3. The Respondent filed a Memorandum of Response on 12th July, 2013, wherein they admit the employment relationship and the particulars of salary. They deny that the Claimant was wrongfully terminated and that he is entitled to any damages. They contend that the Claimant's salary was a consolidated salary which included housing allowance.
4. It is the Respondent's further contention that the Claimant was procedurally and substantively terminated for negligent performance of his duties. They pray for the Claim to be dismissed with costs.
5. In evidence the Claimant led evidence according to his pleadings and urged the Court to order the Respondent to pay him his terminal dues and compensation.
6. The Respondent in evidence put one witness one Andrew Ondieki their Supply Chain and Distribution Manager and admitted having known the Claimant who was in their employment from October 2010 to 2012 as a casual paid on a piece rate basis. He further stated that due to the nature of the Claimant's employment he was not entitled to house allowance, leave allowance and NSSF.
7. It was the Respondent's evidence that on October 2012, the Claimant together with a few others downed their tools without notice and never reported to work thereafter. The Respondent's witness stated that the Claimant was never sent home and thus he does not have a substantive claim.

8. In submissions the Claimant submitted that he was a permanent and pensionable employee of the Respondent paid a monthly salary and not on a piece rate basis. He avers that the Respondent being the custodian of employment records did not produce documentary evidence to prove otherwise.

9. The Claimant further submits that even if he was being paid at piece rate, he is still entitled to allowances accorded by the law. He relies on the case of **Bernard Mariita Nyangara vs. Packaging Industries Limited (2015) eKLR** where it was held that:

“Piece work is contemplated as lawful under the law. An employer can contract an employee based on the nature of work contemplated. Such a contract is lawful and allowed to specify the terms and conditions that should apply but should not go below the minimum allowed terms and conditions of employment that contemplate a wage below the legal minimum.”

10. On whether he was wrongfully terminated he states that he was not issued with a termination notice as envisaged under Section 35(1) (c) of the Employment Act. He contends that since he was paid a monthly wage, he was entitled to at least a month’s notice. He also relies on the case **Alex Muriuki Bundi vs. Kakuzi Ltd Civil Case No. 195 of 2003** where Justice Odunga cited a publication of the ILO during its 82nd Session of 1995, entitled “Protection Against Unjustified Dismissal” where the Committee of Experts in their report at paragraph 147 stated:

“The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled to compensation in lieu of notice. Such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed.”

11. The Claimant further submits that the procedure under Section 40 and 45(1) of the Employment Act was not adhered to and as the termination was unlawful. He states that since there was no reason for dismissal and the procedure to terminate him was unlawful the Court should award him damages.

12. The Respondent on the other hand submits that the Claimant was neither a permanent or contract employee of theirs but a piece rate worker who was paid whenever the invoices he raised were approved. They are of the view that the Claim is untenable in law as no benefits accrued to him by virtue of the nature of his engagement with the Respondent.

13. They cite the case of **Amos Manoa Erastus vs. Boc Kenya Limited Cause No. 509 of 2014** where the Claimant’s case was dismissed on grounds that the Claimant was on Piece Rate work basis, that is the Claimant being paid for work done each month and therefore he could not claim for dues under any other form of employment with the Respondent.

14. Further that the Claimant was not terminated unlawfully as he is the one who failed to report to work and thus absconded his duties. They pray for the Claim to be dismissed with costs.

15. I have considered the evidence and submissions of both parties. The issues for determination are as follows:

- 1. Whether there was a valid employment contact between the Claimant and the Respondent.***
- 2. If yes, how this relationship was terminated.***
- 3. What remedies if any to grant in the circumstances.***

16. The Claimant was unable to provide to Court any employment contract.

17. The Respondents have denied employing him but have on “no prejudice basis” stated that the Claimant was employed on piece rate basis and was paid on account of the number of crates loaded.

18. The Respondent's witness RW1 stated in his oral evidence in Court that Claimant was one of their casual employees at Kenya Breweries Limited but was doing piece work and was paid 60 cents for each crate carried. The witness indicated that Claimant was not entitled to payment of any allowance nor NSSF or NHIF.

19. In cross examination RW1 stated that Claimant worked for them and was being paid every 2 weeks but that their Company paid his NSSF and tax to KRA. He admitted that they trained Claimant on safety issues and issued him with a uniform and supervised his work. That he was also subject to disciplinary process and the Company had control over his work and he was not allowed to work for anybody else.

20. Considering the sentiments expressed by RW1 on the nature of control the Respondent had over the Claimant, it cannot be denied that the Claimant was an employee of the Respondent. The Respondent paid salary and was a member of NSSF which contributions were paid by the Respondent. In this regard, there was an employment relationship between Claimant and Respondent.

21. The Court of Appeal at Mombasa **Krystalline Salt Limited vs. Kwekwe Mwakele & Others** considered Court of Appeal No. 79/2015 on issue of piece rate work and stated as follows:-

“The Employment Act recognizes four main types of contracts of service; contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment. (underlining ours).

Piece work form of employment is defined in Section 2 to mean; “... Any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance”.

“In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece worker arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.”

22. Section 18(1) of Employment Act 2007 on the other hand deals with piece rate contracts and states as follows:

1) “Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled:

a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

b) In the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier”.

23. This piece rate work is not dependent on length of time spend doing a particular assignment but on the nature of the assignment itself.

24. The Claimant has told Court that he was being paid a total of Kshs.13,800/= per month which fact the Respondent have not denied.

25. This contract being piece rate and where wages were paid every 2 weeks, for the contract to be

terminated, a notice of 2 weeks was payable as envisaged under Section 18(2)(b) of Employment Act.

26. The Respondent have averred that the Claimant and others absconded duty, however it is on record that the Claimant's Counsel wrote to the Respondent on 7/11/2012 a demand notice complaining of unfair termination. The reply coming vide a letter dated 27.11.2012 never indicated that the Claimant and others had absconded duty instead the reply indicated that they were not entitled to allowances sought. The issue of absconding duty is therefore an afterthought and it is my finding that the Claimant was dismissed without due process and for no valid reasons.

27. I therefore find the dismissal unfair and unjustified. I award the Claimant as follows:

1. 1 months salary in lieu of notice = 13,800/=.

2. 12 months salary as damages for unfair termination = 13,800 x 12 = 165,600/=.

Total = 179,400/=

3. The contract being piece rate, the claim for house allowance is not payable.

4. The Respondent will pay costs of this suit.

Read in open Court this 20th day of July, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent