



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 725 OF 2015
BETWEEN
KENYA PETROLEUM OIL WORKERS' UNION CLAIMANT
VERSUS
INSPECTORATE EAST AFRICA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Raphael Olala, Mombasa Branch Secretary for the Claimant

Mulwa Nduya & Compnay Advocates for the Respondent

JUDGMENT

1. The Claimant Trade Union filed the Statement of Claim on behalf 6 former Employees of the Respondent, whose names are Boniface Mireri, Wycliffe Ogolla, James Muye, Benard Mbevi and Crispus Mukutano [Grievants]. The Statement was filed on 24th September 2015.
2. The Respondent is described in the Statement of Claim, as an Independent Inspection, Testing and Calibration Consultancy Service Company. The Respondent was also licensed to deal with petroleum and oil products, as a contractor, at Mombasa Joint Terminal.
3. The Grievants were employed as Cargo Inspectors. They worked under various 1 year term contracts. The last contract commenced on 22nd April 2014, to expire on 23rd April 2015.
4. They did not serve the full term. Their contracts were terminated by the Respondent on 1st November 2014. This was 6 months before the expiry date. The letters of termination state the decision was taken because the Respondent's contract with Mombasa Joint Terminal had ended.
5. It is common ground the Grievants' positions became redundant.
6. The Claimant states the Employees were not paid their redundancy dues. They sought the intervention

of the Labour Office Mombasa. Parties went through conciliation process in that Office. After hearing both Parties, the Labour Office gave the following recommendations: The Grievants are paid pending annual leave days; 28 days' wages in lieu of notice; salary for the remainder contractual period of 6 months; and they are availed their Certificates of Service.

7. The Recommendations were not acceptable to the Respondent. The Claimant prays for Judgment against the Respondent for:-

- a) Declaration that termination was unfair.
- b) 6 months' salary for the remainder of the contract.
- c) 12 months' salary in compensation for unfair termination.
- d) Refund of excess N.S.S.F deductions.
- e) House allowance.
- f) 3 years accrued annual leave.
- g) 1 month salary in lieu of notice.

The total sum is given under annexure APP 17 in the Statement of Claim, at Kshs. 3,524,914.

8. The Respondent filed its Statement of Response on 4th December 2015. It concedes to have employed the Grievants as stated in the Statement of Claim. The contracts were for 1 year, and were frustrated upon the Respondent's contract with a third party, Mombasa Joint Terminal, coming to an end. There was no other work the Respondent could assign to the Grievants. Their positions became redundant. The need to follow redundancy procedure was 'surpassed.'

9. Wycliff Ogola Kasuku, Boniface Nyamoke Mireri, and James Gambo Muye gave evidence on behalf of all the Grievants, on 21st July 2016. Respondent's Operations Manager Raphael Kyalo Munyao and Human Resources Manager James Chege Nyangweso gave evidence on 14th March 2017. The dispute was last mentioned on 28th June 2017, when Parties confirmed the filing of their Submissions.

10. The Grievants confirmed that they were employed under various 1 year contracts, the last which was terminated prematurely. They were told Respondent's contract with Mombasa Joint Terminal had come to an end. Their own contracts with the Respondent could no longer be sustained. Their positions had become redundant. Their Union and the Ministry of Labour were not given notice. The Grievants were not paid terminal dues. There was no settlement before the Ministry of Labour. The Respondent has other outlets inside and outside Kenya. The Grievants did not understand why they were not assigned duty at these other outlets. They agreed on cross-examination that the address of Mombasa Joint Terminal was given in their respective contracts of employment. They were issued notice of termination of 1 month.

11. Munyao explained that the Respondent had a Joint-Venture with Total and Kobil. The 3 Companies were to inspect Trucks before the Trucks entered oil depots. They were also, to quantify products. There were specific Employees for the venture and money set aside for specific units. The Respondent would pay Employees from its own resources and seek reimbursement from the Joint Venture. In October 2014, the Client pulled out of the Joint Venture. The affected Employees were notified it was not possible to continue employing them. They were issued notices of termination and letters of commendation. Some were absolved by the Respondent, as the Respondent grew.

12. The Respondent is still in operation, the Witness told the Court on cross-examination. The Venture stated the Respondent would provide staff. Clause 6 of the Venture Deed stated the Respondent would ensure Employees were provided with Uniforms etc. Clause 9 required the Respondent to comply with

statutory requirements. The Respondent has an Office in Nairobi and Branches in Tanzania and other East African Countries. None of the Grievants were re-employed. Termination was effective same date, 1st November 2014. The Grievants were not at fault.

13. James Chege Nyangweso restated the evidence given by Munyao. He added that the Grievants did not indicate they were Members of the Union. The Respondent did not deduct trade union dues from the Grievants' salaries. He restated on cross-examination that Grievants' contracts were terminated 6 months' before their expiry date.

The Court Finds:-

14. The Grievants were employed by the Respondent as Cargo Inspectors. They inspected Oil Trucks at Mombasa Joint Terminal. They worked under various 1 year term contracts. The last contract commenced 22nd April 2014, to lapse on 23rd April 2015. It is common evidence the contracts were terminated 6 months before expiry. The Respondent declared Grievants' positions to have fallen redundant. The Respondent, Total and Kobil had a Joint Venture with Mombasa Joint Terminal. The 3 Companies were to inspect Oil Trucks entering oil depots and quantify products. The collapse of the Joint Venture meant there was no more work for the Grievants.

15. As the Grievants were employed for the specific work available under the Joint Venture, the collapse of that Venture was quite clearly, a valid termination reason. There was a genuine redundancy situation. The contracts signed by the Grievants show their physical address as Mombasa Joint Terminal. This was also shown as their place of work. Once the Joint Venture ended, there was no Mombasa Joint Terminal, and the Grievants were rendered redundant.

16. The Court is satisfied redundancy was genuine, and termination reason valid, the next question being whether the redundancy process was fair, and in conformity with section 40 of the Employment Act 2007.

17. The Respondent concedes under paragraph 4 of the Statement of Reply that procedures were 'surpassed.' The use of the word 'surpass' appears to the Court to be misplaced. The Court understood the Respondent to mean that after the Joint Venture collapsed, the Respondent had no time or space to carry out all the essential procedural steps in executing redundancy, under Section 40 of the Act. The collapse automatically terminated Grievants' contracts.

18. There are no exceptions to the provisions of Section 40 of the Employment Act. All the procedural steps must be followed. There was no notice to the Ministry of Labour, the Union and the Employees. The reasons for, and extent of the redundancy were not given in any notice. Terminal dues, including severance pay were not availed to the Grievants. The Respondent issued a letter of termination on 1st November 2014. The letters took effect immediately. Procedure was flawed, and to this extent, termination was unfair. The Grievants are entitled to compensation for unfair termination. Based on their last applicable rates of monthly pay, ***they are each granted the equivalent of 6 months' gross salary in compensation for unfair termination.***

19. ***They are granted 1 month gross salary each, as notice pay.***

20. The pay slips on record indicate basic salaries were paid to the Grievants. There were no allowances, the basic salary being shown as the same with the gross salary. The contracts of employment did not mention house allowance. The Claimant prays for house allowance at 15 % of the basic salaries.

21. House allowance is payable under Section 31 of the Employment Act. The Court is of the view however that this dispute relates to the contract beginning 22nd April 2014, which was to lapse 23rd April 2015. Other contracts lapsed, without any outstanding obligations being demanded of the Respondent, on the date of lapse. The obligation for house allowance should therefore be limited to the contract in dispute. ***The Grievants are granted house allowance for a period of 6 months, calculated at 15 % of the basic salary.***

22. This reasoning applies to the prayer for annual leave. There is no reason why the Grievants should be seeking to enforce leave entitlement over a period of service which ended without any demands for outstanding obligations. ***They are granted 21 days' gross salary as annual leave pay they would have been entitled to, under their last contract.***

23. The advice given by the Labour Officer on the prayer for refund of N.S.S.F deductions was sound advice which the Grievants should have honoured. These are statutory deductions which should not revert to the individual pockets of the Employees. The Grievants should pursue remittance of their dues with the N.S.S.F under the relevant legal regime.

24. Lastly, the prayer for payment of salaries for the remainder of 6 months is rejected. The Court has, in granting 6 months' salary in compensation for unfair termination, considered the expectation of the Grievants, on the length of their periods of service. To grant that they are paid compensation and anticipated salaries would result in double compensation. The prayer for anticipated salaries is declined. There shall be no order on the costs.

25. For avoidance of doubt, the amounts expressed as gross salaries, shall include 15% house allowance granted under paragraph 21 above.

IN SUM, IT IS ORDERED:-

a) Termination was based on valid redundancy reason, but flawed on procedure.

b) The Respondent shall pay to the Grievants the equivalent of 6 months' gross salary each in compensation for unfair termination; 1 month gross salary as notice pay; house allowance for a period of 6 months at 15% of the basic salary and 21 days' gross salary as annual leave pay.

c) No order on the costs.

Dated and delivered at Mombasa this 29th day of September 2017.

James Rika

Judge