



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 638 OF 2016

BETWEEN

KENYA PETROLEUM OIL WORKERS' UNION.....CLAIMANT

VERSUS

1. KASSAM CONSTRUCTION COMPANY LIMITED

2. HARBOUR SERVICE STATION.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Claimant Union appearing through its Branch Secretary Raphael Olala

Wanjiru Chege & Company Advocates for the Respondent

JUDGMENT

1. The Claimant Union filed this Claim on behalf of its 8 Members [Grievants], who were previously employed by the Respondent in various positions. The Claim was filed on 1st September 2016. The Grievants are Njemo Muti Saidi [Pump Attendant/Cashier], Kahindi Mumba Ramadhan [Pump Attendant/Cashier], Donald Matana [Supervisor], Patrick Mkalla [Pump Attendant/Cashier], Granton Ponga [Pump Attendant] Starnley Madeba [Pump Attendant], Jack Makhino [Pump Attendant] and Joseph Ndaru [Service Attendant].
2. They earned a monthly salary of Kshs. 14,600 except for Donald Matana, who earned Kshs. 19,665.
3. They state their contracts of employment were unfairly and unlawfully terminated by the Respondents. The Claimant prays for Judgment for the Grievants against the Respondents for notice pay; annual leave pay; severance pay; underpayment of salary; public holidays pay; and compensation for unfair termination, all added up at Kshs. 2,912,575.

4. The 1st Respondent filed its Statement of Response on 7th October 2016. It explains it had a contract with a company called Vivo Energy, who owns the 2nd Respondent. The 1st Respondent was to run the 2nd Respondent Petrol Station, on the condition it met certain sale targets, set by Vivo Energy. The 1st Respondent failed to meet its targets, and Vivo Energy terminated the commercial agreement. The Grievants, who worked at the Station, were instructed to report to 1st Respondent's Office to be allocated other duties, as they could not continue working for the 2nd Respondent. They declined reassignment and filed the Claim prematurely. They absconded. The 1st Respondent did not terminate the Grievants' contracts. They are not entitled to the prayers sought. The 1st Respondent prays the Court to dismiss the Claim with costs to the 1st Respondent.

5. Grievant Patrick Mkalla testified for the Claimant, while Ibrahim Hussein Mangale 2nd Respondent's Human Resources Manager testified for the Respondents. Both Witnesses testified on 19th June 2017 when hearing closed. The matter was last mentioned on 24th July 2017 when the Claimant confirmed filing of its Closing Submissions.

6. Patrick told the Court the Grievants previously worked under another Dealer, Bayusuf Limited. Patrick worked for a total of about 20 years at the Petrol Station. They left employment on 28th August 2016. They were not issued with letters of termination.

7. Abdul Rashid took over the Station from Kassam. The Grievants wished to go on working with Abdul Rashid. He was ready to continue employing the Grievants. They demanded for their dues from the outgoing Dealer Kassam. Kassam expressed his anger claiming that the Grievants had reported him to their Trade Union. He vowed he would ensure the Grievants did not continue working with the new Dealer. Abdul Rashid confided in the Grievants he was under pressure not to employ the Grievants.

8. Patrick was not aware of any other Petrol Station operated by Kassam. He did not know of any other Office or business premises operated by Kassam at Miritini. He did not know where they were being asked to report to.

9. The Grievants were not at fault for Kassam's failure to meet dealership targets. They never took annual leave for 7 years. The Station remained opened throughout Public Holidays. They were entitled to salary of Kshs. 16,300 a month. They were paid Kshs. 14,600 instead. They were not paid any terminal benefits.

10. Cross-examined, Patrick testified Abdul Rashid did not issue Grievants with fresh letters of employment. The letters of employment issued to the Grievants did not give a specific location where they would work from. Patrick did not report to Miritini as instructed. No Employee reported to Miritini. The Grievants thought they were being asked to work for a construction company. Redirected, the Witness testified Kassam was changing Grievants' terms of employment. No Employee had been transferred before. Patrick did not know about 2 other Employees who reported to Miritini, and who continued in employment.

11. Mangale testified Kassam Construction is one company in a Group of Companies. Kassam operated the main Station, 2nd Respondent herein. There is a smaller Station at Miritini.

12. Kassam worked in a dealership with Vivo Energy. There was failure on the part of Kassam to meet targets set by Vivo. The Grievants could not continue working at the 2nd Respondent. They were advised to report to 1st Respondent's Office at Miritini for reassignment. Kassam is still in business; it did not close down. 2 Employees, Shabir and Arafat, reported at Miritini and are still working. The Respondents did not terminate Grievants' contracts.

13. Employees normally went on annual leave. The Station operated throughout, even on public holidays and weekends. Mangale was not aware of Employees failing to utilize their annual leave. He did not have annual leave records in Court. The Respondents did not pay terminal dues because they did not terminate Grievants' contracts.

14. The 1st Respondent owned 1 fuel pump at Miritini. The number of pumps was going to rise. Grievants were to be reassigned duties according to their capacities. They had been working as Pump Attendants. Redirected, Mangale testified Grievants worked as Cashiers and Pump Attendants. They did not need Pumps to continue in employment.

The Court Finds:-

15. There is no dispute that the Grievants worked for the 2nd Respondent Petrol Station for about 20 years. They worked for those years, mainly as Pump Attendants, under different Dealers. The last Dealer was Kassam Construction Company Limited, 1st Respondent herein, who had a dealership agreement with Vivo Energy. The dispute arose between the Parties, when the dealership was terminated by Vivo Energy, on the ground that Kassam had failed to meet commercial targets set by Vivo.

16. The Grievants state they were informed by Kassam through a letter dated 19th August 2016, that the Petrol Station was closing down. They were directed to an unknown Office at Miritini. Their position is that Kassam did not have any Petrol Station at Miritini; what was there was a single pump used for workshop functions. The Claimant submits Grievants' positions became redundant. They were trained as Petrol Station Attendants, and could not serve in other roles.

17. The Respondents agree their dealership with Vivo was terminated after the Respondents failed to meet certain commercial targets. They did not terminate Grievants' contracts however; the Grievants were asked to report to Respondents' Office at Miritini for reassignment. The end of dealership did not result in closure of the 1st Respondent as a business. The Grievants declined reassignment and cannot turn around and allege termination was at the instigation of the Respondents.

18. The Grievants did not act reasonably in refusing to report at Miritini, as instructed by their Employer. It was not cast in bronze that they work only as Pump Attendants at the Respondent Petrol Station. The 1st Respondent seems to have other lines of economic activities, beyond petroleum dealership. The Grievants were being offered alternative work by Kassam, on similar terms and conditions of employment. They did not give the offer reasonable consideration, insisting they preferred to continue working with the new Dealer. The Court does not see how the Grievants can hold their contracts were terminated by the Respondents.

19. The Employer acted reasonably, by offering to continue employing the Grievants. They had not been told they would work at the single pump at Miritini. If the Court understood the Respondents' evidence well, the Respondents operate multiple lines of business, and offered to accommodate the Grievants on the same terms and conditions of service. The Grievants did not as much as offer themselves to the Respondents' Office at Miritini, to discuss what offer was on the table. They walked away and filed this Claim on 1st November 2016, rather than report at Miritini on the following day, 2nd September 2016. 2 of the Employees who reported- Arafat and Shabir- were reassigned work and are still in employment.

20. The Respondents did not terminate Grievants' contracts. It cannot be said there was unfair redundancy, unfair termination, warranting the Respondents to pay the Grievants compensation and notice pay. The Grievants defied the instructions of their Employer to avail themselves at Miritini. They would not be entitled to notice pay, as the Respondents did not terminate their contracts and was ready to continue working with the Grievants.

21. When, however, it was clear to the Respondents that the Grievants were not ready to work elsewhere, other than at the 2nd Respondent Service Station, the Respondents should for purposes of amicable separation, treated the Respondent's positions as having become redundant. The collapse of the dealership, barring other offers made to the Grievants, signified end of their contracts as Pump Attendants. Positions, and not Employees, become redundant. The positions of Pump Attendants were no longer available in Respondents' business. But employment was still available. Neither the Respondents nor the Grievants can be blamed for the collapse of the dealership. Commercial transactions can fail because of factors unrelated to the performance of the people who execute these transactions. They had

worked as Pump Attendants for long. They must have had a strong attachment and familiarity to the role of Pump Attendants and to the Petrol Station. There would ordinarily be a redundancy situation where a dealership is ended, and the new dealer does not take over the old Employees, under the terms of dealership. But the Respondents acted in redressing the situation. The Grievants did not accept the remedy suggested by the Respondents. They probably were not at ease in moving into new roles and workplaces. The Respondents should therefore have considered the years served and grant the Grievants what they would have earned by way of severance, had there been a clear case of redundancy. ***The Court is of the view that the prayer for severance pay, as detailed in Claimant's annexure 6 is merited.***

22. The Respondent's Witness was not able supply the Court with documents showing Grievants' annual leave profiles. All Mangale told the Court is that Employees normally went on leave. Annual leave pay is granted as prayed in the schedule contained in annexure 6 of Claimant's documents, dated 1st September 2016.

23. The prayer for underpayment of salary is grounded on Legal Notice Number 117 of 2015. The Respondents did not exhibit any document to contradict the Legal Notice. They did not dispute the rate paid to the Claimants, and the rate indicated as payable under the Legal Notice. ***The prayer for underpayment of salary is allowed as detailed in annexure 6.***

24. Mangale confirmed that the Petrol Station was open throughout, including on Weekends and Public Holidays. He did not dispute the prayer for Public Holiday Pay. There was no evidence that any of the Grievants was paid for work done on Public Holidays. ***The prayer for Public Holidays' Pay is granted.***

25. ***Certificates of Service to issue.***

26. No order on the costs.

27. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a. The Grievants' contracts of employment were not terminated by the Respondents.

b. Termination was not unfair or unlawful.

c. No compensation or notice pay is available to the Grievants.

d. The Respondents shall pay to the Grievants through the Claimant Union, annual leave pay totaling Kshs. 98,472; severance pay at Kshs. 492,150; underpayment of salary at Kshs. 428,400; public holiday pay at Kshs. 313,133- total Kshs.1,332,155.

e. Certificates of Service to issue.

f. No order on the costs.

Dated and delivered at Mombasa this 24th day of October 2017.

James Rika

Judge