



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO.731 OF 2016

(Consolidated with 725,726, 727,728,729,730,732,733,734,735,736 &737 of 2016)

IDD SALIM MWADELE1ST CLAIMANT
MWANAMKUU MWATENDE.....2ND CLAIMANT
SAUMU SHEE ABDALLA3RD CLAIMANT
JACOB KAMBU MTSONGA4TH CLAIMANT
HASSAN KITAURO SHEE 5TH CLAIMANT
MUHAMED HASSAN MWARINDANO 6TH CLAIMANT
ALIMA ABDALLA DARUSI 7TH CLAIMANT
KASSIM JUMA ABDALLA 8TH CLAIMANT
CAROLINE ATIENO OSINYA 9TH CLAIMANT
UMAZI CHIKOPHE MWERO 10TH CLAIMANT
MWANAULU DARUSI JEKE11TH CLAIMANT
MWANGOMBE BAKARI HASSAN.....12TH CLAIMANT
JABIRI BAKARI MWANZIWI13TH CLAIMANT
MUHAMED MASUDI RASHID14TH CLAIMANT
MWANAISHA MKULU KASSIM15TH CLAIMANT
MKULU SULEIMANI MKULU.....16TH CLAIMANT
MWANAISHA ALI MWASARIA17TH CLAIMANT

ALI HASSAN JUMA18TH CLAIMANT

YABI DARUSI MOHAMED..... 19TH CLAIMANT

HASSAN KASSIM RASHID.....20TH CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR CO. LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1.The claimants were employed by the respondent as casual employees from different dates to do different manual jobs in her sugar plantation but allegedly terminated summarily on diverse dates between 2010 and 2016 for demanding their delayed wages. They brought separate suits in 2016 contending that their said termination was unfair and praying for payments of salary in lieu of notice, accrued leave, public holidays worked and compensation for unfair termination of their contract of service.

2. The respondent denied the alleged unfair termination and averred the claimants were casual employees who were engaged as and when the need arose and as such they were not capable of being unfairly terminated.

3. On 17/5/2017 the suits were consolidated under this file by the consent of all the parties who further agreed to have the claimant herein testify on behalf of all the others and the respondent to call one witness. In addition the parties adopted all the written witness statements filed by both the other claimants as their respective testimonies. The issues for determination herein revolve around the nature of employment relationship between the claimants and the respondent, the manner of the termination of the claimants' services and merits of the reliefs sought by the suit.

CLAIMANTS' CASE

4. Mr. Idd Salim Mwadele (1st claimant) testified as CW1. He stated that he was employed by the respondent on 27/7/2012 as a Borehole Attendant/ Operator earning kshs.350 daily but paid weekly in arrears. He used to work from Monday to Saturday. He worked well until July 2015 when the respondent started delaying the weekly pay and when he questioned the delay, he was send away. Thereafter he kept on going to the respondents office to demand for his delayed pay until 18.9.2015 when he was chased away by police and his employment formally terminated without any accrued benefits. He contended that the termination was unfair because he was not paid his terminal dues and issued with certificate of service.

5. Cw1 confirmed that he knew all the other claimants as his colleagues at the respondent's farm and that they were all dismissed summarily and chased away by police on diverse dates for demanding their delayed pay. He however admitted on cross examination that they were never working continuously but as and when required depending on weather and seasons. He admitted that he was not required to pump water for irrigation when it rained.

6. He prayed for the reliefs sought by each claimant in their respective suits including one month salary in lieu of notice, accrued leave, public holidays worked and compensation for unfair termination.

DEFENCE CASE

7. Mr. Khalfan Omari Benga testified for respondent as RW1. He is the respondent's HR Clerk. He confirmed that all the claimants were known to him as casual workers employed by the respondent on the need basis. That they were paid a daily wage plus overtime at the end of the week without failure. That

any overtime worked, the claimants were paid 150% of the normal pay while for every Sunday or public holiday worked the pay was 200% of the normal pay. He further stated that the overtime work had to be pre-arranged and payment made and nothing was carried forward.

8. On cross examination, Rw1 denied that the claimants were terminated and contended that they used to come and go on their own volition depending on the respondent's need. He however did not produce any attendance register to verify the alleged irregular attendance by the claimants contending that the respondent employs over 1500 casuals on a normal day and she only keeps loose departmental registers. He denied knowledge that the claimants were entitled to notice before termination and confirmed that they were not given notice before termination and certificate of service after the termination.

ANALYSIS AND DETERMINATION

9. There is no dispute from the evidence and submissions that all the claimants were employed by the respondent on casual basis. The issues for determination are:

- (a) Whether claimants' casual employment converted to regular term contract and acquired protection from unfair termination.
- (b) If the answer to (a) above is in the affirmative, whether the claimants' contract of service was unfairly terminated by the respondent.
- (c) Whether the claimants are entitled to the reliefs sought.

Conversion of casual employment to regular term contract

10. Conversion of casual labour to regular term contract is provided for under section 37 of the Employment Act. It states that:

“(1) Notwithstanding any provision of this Act, where employee-

(a) Works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month; or

(b),

the contract of service of the casual employee shall be deemed to be one where, wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two or more months from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.”

11. The burden of proving continuous service for purposes of conversion of casual employment to regular term contract lies with the employee who alleges that he worked continuously. In this case the claimants have not alleged that they worked for the respondent continuously either in their pleadings or evidence. Although on cross examination Rw1 was asked about existence of an Attendance Register, in my view, that was irrelevant and unsupported by the claimants' pleadings and evidence. The matters became worse when CW1 admitted during cross examination that the claimants never worked continuously especially when there was rain and irrigation was not necessary. That corroborated the testimony by RW1 that the claimants were not working continuously but only as and when the respondent needed their labour. Consequently I find and hold that the claimants' casual employment never converted to regular term contract of service under section 37 of the Act because they never met the threshold for the conversion.

Unfair termination of employment contract

12. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. However, the foregoing protection against unfair termination is a right that is only available to employees who are employed under a regular term contract of service.

13. In this case however the claimants were casual employees whose contract of service never converted to regular term contract of service as held herein above. Consequently I find and hold that they were not capable of being unfairly terminated and they were not so terminated. I also dismiss as without merits, their narrative about the reason and the manner of termination for being unsupported by the pleading. I say so because, although they all allege that they were dismissed and chased away by police for claiming their delayed pay, the claimants have not prayed for the delayed wages in their respective suits.

Reliefs sought.

14. In view of the foregoing finding that the claimants were casual employee and that they were not unfairly terminated I decline to grant all the reliefs sought because they are not availed to casual employees by the law.

Disposition

15. The suit is dismissed with direction that each party shall bear his or her own costs.

Dated and signed at Mombasa this 17th November 2017

O. N. Makau

Judge