



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 177 OF 2015

(Before D. K. N. Marete)

KENYA BUILDING, CONSTRUCTION, TIMBER & FURNITURE

INDUSTRIES EMPLOYEES UNION.....CLAIMANT

VERSUS

M/S JIANGXI ZHONGMEI ENGINEERING CONSTRUCTION

(K) CO. LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 8th May, 2014. The issue in dispute is therein cited as;

Unlawful Dismissal of 11 employee namely Shadrack K Langat, David Langat, Mzee arap Kirui, Samwel Njogu Ndungu, Gilber K Cheruiyot, Nicholas Cheruiyot, Walter Kirwa Kimeli, Peter Kabunga, Ayubu Murhuma Nyangau, Isack Kipruto Koech and Paulkeen Kipngetich tanui.

The respondent in a Memorandum of Defence dated 27th October, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, the grievants were employees of the respondent having being employed on diverse dates and engaged in accordance to their diverse trades and all terminated from service in June, 2011.

The claimant's further case is that the parties have not in place a negotiated CBA but rely on the General Wages Order 2010 a copy of which is filed as annexure II of the claim.

The claimant's other case is that the grievants worked diligently and were dismissed for justifiable cause or at all. Again the claimant sought to have the matter amicably settled but the respondent was uncooperative thereby prompting this suit.

She prays as follows;

a. A declaration that the termination of employment of the 11 grievants by the Respondent was unlawful.

- b. Kshs.301,313/= being collective terminal dues for all the 11 grievants.*
- c. 12 months salary for each grievant as compensation for unlawful termination of employment.*
- d. Issuance of certificate to each grievant'*
- e. Costs of this claim.*

The respondent's case is a denial of the claim.

It is her case that the claimants' were employed by the respondent on diverse dates but their services were never terminated, or at all.

It is her further case that the suit as presented is inept, ambiguous and does not disclose proper particulars for deliberation. It is also bad in law, an abuse of the process of court and ought to be dismissed on the following grounds;

- i. The claimant's were duly informed in advance (verbally) that their services would come to an end upon the completion of roads which were being constructed by the Respondent and of which the Government of Kenya was a financier. The Respondent could not have them in employment when the work they were performing for roads construction had come to an end.*
- ii. The suit is time barred as per section 90 of the Employment Act, No. 11 of 2007 Laws of Kenya in that;*
 - a. The claimants last month in employment or service was April 2011 and not June 2011.*
 - b. The documents filed by the claimants as union receipts i.e page 26 for one Samuel Njogu Ndungu shows that he made his contribution on 9th December, 2011. One may ask, if he was terminated on June 2011 as per paragraph 4 and page 5 (date dismissed) of the claim, then where was he employed on 9th December 2011 when he made contribution to the union?*

The respondent in the penultimate deny service of any correspondence from the union, the labour officer or even ministry of labour. Further, the allegations of victimizing the claimant for joining the union are farfetched and in all, the respondent did not know that indeed they had become unionized.

The matter came to court variously until 9th October, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was termination of the employment of the grievants by the respondent.
2. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was termination of the employment of the grievants by the respondent. The claimant in his written submission dated 8th December, 2017 submits a case of termination of employment in that even after such termination work continued. The claimants were merely told that their services were no longer needed without prior notice. They had worked for a period of less than 12 months. This entitled them to notices of termination in accordance with section 35 (1) of the Employment Act, 2007 as follows;

35 (1) A contract of service.....if performed in Kenya, be deemed to be – a)...

b) Where the contract is to pay wages or salary periodically at intervals of or exceeding one months, a contract terminable by either party at the end of the period of twenty – eight days next following the giving of notice in writing.

This not being the case termination ensued and therefore the quest for redress.

The respondent in her written submission dated 14th December, 2017 denies the claim. It is her submissions that the claimants were never terminated in the first place. This is the probable case. From the onset, one notes that this was a seasonal road construction contract based on the subsisting contract. It did not amount to permanent employment and was always pegged on the continuation of the project. Bearing this in mind, and looking at the respective cases of the party, the probable scenario and version is that of the respondent.

Overall, this matter tilts in favour of the respondent. On a test of balance of probabilities, the respondent's case takes sway. I therefore find a case of no termination of employment and hold as such. This answers the 1st issue for determination.

On a finding of no case of termination, the other issues for determination crumble into nothingness. They are not worthy of any further recourse.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Chege for claimant union.
2. Mr. Mitei instructed by Sila Munyao & Company Advocates for the respondent.