



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 1520 OF 2011

ALBERT ODUOK ODOK.....1ST CLAIMANT
DANCAN IDAH ININDA.....2ND CLAIMANT
DANIEL OTIENO NDOLO.....3RD CLAIMANT
JOHN MBITHI KING'ELE.....4TH CLAIMANT
BENSON KISAYI MUINDE.....5TH CLAIMANT
SAMSON OTIENO NDOIO.....6TH CLAIMANT

VERSUS

LANDMARK HOLDINGS LIMITED.....1ST RESPONDENT
WANANCHI SUPPLIERS LIMITED.....2ND RESPONDENT

JUDGEMENT

1. By memorandum of claim filed on 8th September 2011, the claimants averred that they were respondents' employees on various capacities. The 1st, 3rd and 5th claimants were employed as carpenters while 2nd claimant was a mason, 4th one a painter and 6th a machine operator. They were earning a daily wage of Kshs.450/=.
2. The claimants further averred that on 26th July 2011 their service were terminated by the respondents for unknown reasons. Their requests to be reinstated were not heeded hence the suit.
3. The claimants therefore sought from the court an order that the respondents do compensate them as variously pleaded in the memorandum of claim.
4. The respondents in their memorandum of response denied the claimants' claim. Particularly the 2nd respondent denied it ever employed the claimants.
5. The 1st respondent further pleaded that it employed the claimants as casuals on diverse dates and non-continuous basis in the months of May 2011 up to 26th July 2011 when the claimants without lawful

cause absconded duties.

6. According to the respondents the dispute was adjudicated by the Labour Office vide a meeting held on 17th August 2011 wherein the claimants were in attendance and a resolution reached that they resume duty, as their services were not terminated.

7. The claimants gave evidence through one Daniel Oriento Ndolo who stated that the respondents were two companies and both had one Director.

8. It was his evidence that at times they would be paid by the 1st respondent and at times the 2nd.

9. Mr. Ndolo further stated that by 26th July 2011 they had worked for three weeks without pay. They all left the workshop and went to the account's office to inquire about their pay. The Accountant, Mr. Kamau told them he could not refuse to pay if given money.

10. Mr. Kamau asked them to wait by the gate for the Director. When the Director came, he asked what they were doing there and they told him their problem. The Director however told them they would be paid when he wants to and if they did not like it, they could go away. According to him, the Director then called the security who ejected them and locked the gate. They tried to come back the next day but were refused entry.

11. He further stated that they used to earn daily and each person was paid according to his work. It was also his evidence that they were registered with NSSF.

12. For cross-examination, they stated that they reported the issue to Labour Officer and Mr. Kamau came on behalf of the respondents.

13. The respondent's witness Mr. Zablon Abadale testified that he know the claimants and that they started working for the respondent in May 2011 left in July 2011. According to him, they were casual workers who used to do piece work.

14. They finished their assignments and left in July 2011. It was further his evidence that the claimants completed their assignments and left in July 2011.

15. According to him, they were not terminated by the respondent. They left on their own accord. He also stated that the respondent informed the Labour Officer and they met on 17th August 2011 and that the claimants were present at the meeting. The dispute was heard by the Labour Officer and the claimants advised to return to work since their services had not been terminated but the claimants failed to do so.

16. In cross-examination, he stated that the respondent did not use the petty cash vouchers the type the claimants exhibited. He further stated that both respondents were in the same premises and that he used to oversee both as Operations Manager.

17. The claimants aver that their services were terminated when they sought payment of their wage, which had been overdue. The respondent denied terminating the claimants' services.

18. It was common ground that the employment dispute herein was referred to the Labour Officer and the claimants and the respondents attended the said meeting. Whereas the claimants aver that they were not assisted, the respondent on its part stated that the matter was resolved and the claimants asked to resume duties since their services had not been terminated. According to the respondent, the claimants refused to resume duties.

19. The respondent produced as exhibit a letter from the Labour Officer documenting this fact and

deserving that the claimants had not resumed duties.

20. Absence from duty without lawful excuse is a valid and justifiable ground for termination of an employee's services. The burden of proof that there existed no valid or justifiable ground for termination of services rests on the employee while proof of validity or justification of termination of services rests on the employer.

21. The claimants have not reasonably shown that they made attempts to resume duties and were refused by the respondent. On the other hand, the respondent too had not reasonably shown any effort it made to notify the claimants to resume duties.

22. The court in the circumstances reduces the separation between the claimant and the respondents as a normal termination of service and award each of them as follows: ;-

(a) One month's wages in lieu of notice.

(b) Wage arrears for the month of July 2011.

(c) Payment in lieu of untaken leave for each of the claimants as pleaded.

Parties to liaise with the Deputy Registrar of the court for computation of amount due to each claimant.

23. There will be no order on service gratuity since the claimants were registered with NSSF. The court will also not declare the termination unfair. Each party to bear their own costs.

24. It is so ordered.

Dated at Nairobi this 8th day of December, 2017

Abuodha J. N.

Judge

Delivered this 8th day of December, 2017

In the presence of:-

..... for the claimant

..... for the Respondent

Abuodha J. N.

Judge