



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 106 OF 2015

ALOYS OBUNGA ABUJE & 5 OTHERS.....CLAIMANT

VS

KRYSTALLINE SALT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimants have brought this suit claiming terminal dues plus compensation for unlawful termination of their employment by the respondent on 12.8.2012. The claimants avers that the termination of their services was unfair and unjust under the Employment Act and as such they are entitled to damages plus Certificate of Service.

2. The respondent has declined that the claimants her employees upto 12.8.2012 or at all. She avers that the claimants were independent contractors employed on piece rate basis under the first claimant and when work was available. She further denied that she could terminate the claimants' employment because they were not her employees. She therefore denies that the claimants are entitled to the reliefs sought.

3. The suit was heard on 18.11.2015 when the first claimant testified on behalf of the other claimants' as Cw1 while the respondent called Mr. Barnabas Mwendwa Kirima as Rw1. Thereafter the counsel for the two sides filed written submissions.

Analysis and Determination

4. After carefully considering the pleadings, evidence and the submissions presented before the court, the following issues arise for determination:-

- a. Whether the claimants' were employed by the respondent under a contract of service or as independent contractors.
- b. Whether the claimants' contract of employment was unfairly terminated.
- c. Whether the claimants are entitled to the relief sought.

The Employment Contract

5. Cw1 told the court that he was employed by the respondent as a loader at the Shimanzi go-down in

1986 and his co-claimants found him there when they were employed by the respondent as loaders also. That they used to work daily and continuously. That their daily wage was kshs. 500/= payable weekly in arrears and they used to sign a payroll for the pay. That their working hours was from 7 am to 5pm but depending on the amount of work they worked overtime at the rate of kshs.50/= per hour. That they never went for any leave and or off day except when one had a need. They never contributed to NSSF but they were members of a Trade Union and made direct payment of the union dues.

6. Cw1 further explained that on 12.8.2012 they reported work and did their duties as usual until 5pm when the respondents' manager, Mr. Vinn Pidoria told them that their work had ended because the respondent was closing down the warehouse and rent it to another person. That on 13.8.2012, the claimants went to the respondents' office at Changamwe and the manager confirmed to them that their employment was over. That their dismissal was unfair because there were not served with prior notice or paid salary in lieu of notice plus their terminal dues.

7. On cross examination by the defence counsel, Cw1 admitted that the claimants were not given any written contract. He further admitted that he was the gang leader (foreman) of 25 loaders. He maintained that they were not paid on piece rate basis but a standard rate of kshs.500/= per day.

8. Rw1 is a former Driver and Salesman for the respondent having joined the company in 2008. He testified that the claimants were members of a gang employed by the respondent on piece rate basis otherwise called "soggies". That they used to work as and when work was available. That they were paid at the end of the work and they left to work in other neighbouring warehouses. That when they had no work to do they lurked at the gates of the warehouse until an opportunity arose. Consequently Rw1 denied that the claimant were employees of the respondent. He contended that he is the one who used to collect the money from the office after the claimants finished their piece work and pass it to the respondent's warehouse clerk who in turn handed over to the Cw1 as the gang leader to pay his gang members.

9. After considering the pleadings, evidence and submission, the court finds on a balance of probability that the claimants were not employed by the respondent under a contract of service. On the contrary the court finds in favour of the respondent that the claimants were independent contractors employed under a contract for services. The testimony by Rw1 is consistent with the witness statement he recorded in support of the defence filed. That the claimants were piece rate employees on hire as and when work was available. That they were paid after completing the piece work and their pay was kshs.70/= per load of one ton. That they were a gang of labourers for hire by all the neighbouring warehouses.

10. On the other hand, the court finds that the facts of this case different from the ones in **ICC No. 81 of 2013, Francis N. Bwire and others vs Keystalline Salt Limited (2014) e KLR**. In the said case the employer admitted that the claimants' were casual employees. In this case however, the respondent has maintained that the claimants were a gang of labourers (soggies) for hire by any warehouse in Shimanzi are on piece rate basis. That the respondent never gave instructions or duties to the claimants or leave. On the other hand, Cw1 admitted under oath that he was the gang leader and that their employer never deducted from their pay any Social Security contributions and she never contributed any for them. That although they were members of a trade union, they never involved the respondent in deducting and remittance of union dues to their union.

11. After considering the rival contentions, the court finds that the claimants were piece work independent contractors and not regular employees under a contract of service. at common law an employee is one who:

- a. is required to comply with the employer's instruction about when, where and how he or she must work.
- b. has been trained by the employer to gain experience for purposes of working for the employer.
- c. has been integrated into the business operations of the employer so that he is subject to the

direction and control of the employer.

d. must render services personally

e. has assistants hired, supervised and paid by the employer

f. has worked continuously for a long time

g. has specific working hours set by the employer

h. is working substantially full-time for an employer and is not free to work for other employers

i. performs work on the employers premises

j. is required to submit regular oral or written report to the employer

k. has his business trips or travel expenses paid for by the employer

l. has tools, material and other requirements met by the employer

m. is easily dismissed at the will of the employer

n. has the right to terminate his contract without incurring any liability.

12 In this courts view the claimant have not discharged the burden of proving the foregoing common law essentials elements of an employee under a contract of service. The court however agrees with the defence that the claimants were a gang of independent contractors employed under a contract of services as and when work arose. They have worked for the respondent for many years, but they never proved that they did so daily and continuously under the direct control of the respondent. They were free and indeed they worked for other employers in Shimanzi area. The claimants never denied that allegation by the defence. Cw1 also never denied that he had a hotel near the respondents' warehouse where he used to work from after finishing the piece work.

13. At common law independent contractor is distinguishable from an employee because, he is able to determine when and where work is performed, be able to work for others, provide own equipment among others which point to his independence from his employer. The common law concept of piece work or independent contracting has been enacted in the Employment Act. section 2 of the Act defines piece work as:

“Any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in the performance”.

In this case the respondent has filed documentary evidence that shows that the claimants were hired and paid on piece rate and paid as such through one representative who signed on behalf of the gang.

Relief

14. In view of the finding herein above that the claimants were a freelance gang of independent contractors, the reliefs sought are regretfully declined.

Disposition

15. For the reasons stated herein above, the suit is dismissed. Each part to bear his or her own costs.

Signed, dated and delivered at Mombasa this 26th day of February, 2016.

ONESMUS MAKAU

J U D G E