



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.64 OF 2013

BENSON MWITI NTIRITU.....1ST CLAIMANT
ANTHONY KIBICHU MURIUKI.....2ND CLAIMANT
MOSES BUNDI NKANATA.....3RD CLAIMANT
JESEE WAWERU KKIAMA.....4TH CLAIMANT
JORAM GATARA MACHARIA.....5TH CLAIMANT

VERSUS

NANYUKI WATER AND SEWAGE COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The claimants filed the plaint dated 14.06.2013 through G.M. Wanjohi & Company Advocates. The claimants changed their advocates to Waweru Macharia & Company Advocates and filed on 03.10.2013 the amended statement of claim.

The plaintiffs prayed for judgment against the defendant for:

- a) A declaration that the plaintiffs are permanent employees of the defendant and the contracts of employment of the plaintiffs to the defendant to be reduced into writing or into permanent employment.
- b) In the alternative and without prejudice, the claimants be deemed to have been unlawfully or illegally terminated and they be awarded damages and full terminal benefits.
- c) A declaration that the respondent has engaged in unfair labour practices in respect of the claimants.
- d) Payment of salary in lieu of annual leaves not granted.
- e) Provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work.
- f) General damages plus interest.

g) Costs of the suit and interest at court rates.

Subsequently, the claimant's advocates ceased to act and the claimants opted to act in person.

The respondent filed on 14.01.2014 the response to amended statement of claim through J.M Mwangi & Company Advocates.

The claimants were employed by the respondent in various capacities and designated to perform various duties in what the respondent considered to be casual employment. They were employed on diverse dates between 2006 and 2009. They worked in the maintenance and repair sections. The court has considered the evidence and all material on record. It is clear that the claimants worked for a continuous period of time of more than three months and they were not given any written contracts. The respondent failed to remit statutory deductions namely NHIF and NSSF with respect to the claimant's service. By orders of 18.09.2013, the court ordered that the status quo be maintained until the suit was finalised and the claimants submitted that in disobedience of the court order, the respondent locked them out and thereby purported to terminate the claimant's employment.

Claimants No. 1, 2, 4, and 5 filed affidavits and gave oral evidence to support their respective cases. Claimant No. 3 was unwell and therefore unable to attend the hearing. Thus, on 10.12.2015 before the hearing of the case commenced, the court directed that for claimant No. 3 the parties would continue in negotiations with a view of recording a compromise or settlement.

The court has considered the pleadings, the evidence and the submissions on record. Save for the 3rd claimant's case, the court makes the following findings on the issues in dispute:

a) The claimants have established that the respondent employed them on terms of service considered by the respondent to be casual employment. The muster roll filed showed that the claimants worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Indeed, the work of maintenance and distribution was an on-going undertaking in the respondent's enterprise and the respondent continues to engage in such works. The court finds that in terms of section 37 of the Employment Act, 2007, the claimants' terms of service converted from casual to a contract of service where wages are payable monthly and section 35(1)(c) applies. While making that finding the court considers that the claimants' evidence cannot be faulted that they worked for the respondent and the respondent failed to specifically traverse the averments set out in the amended statement of claim.

b) As submitted for the respondent, the particulars of the special damages were not pleaded and the claimants would not be entitled as per the details in their submissions.

c) As it was not disputed that the 3rd claimant could not attend court due to ill health, failing the negotiation for a compromise or settlement as earlier directed, the 3rd respondent, at the earliest possible opportunity, will be entitled to a hearing and determination of his case.

d) In view of the orders on status quo pending the hearing and determination of the suit, the claimants are entitled to all remuneration and benefits under the Employment Act, 2007 throughout the period the suit had not been determined and to continue in employment with such full remuneration and benefits unless lawfully terminated from employment.

In conclusion judgment is entered for the 1st, 2nd, 4th, and 5th claimants for:

a) The declaration that the plaintiffs are permanent employees of the defendant and the contracts of employment of the plaintiffs to the defendant to be reduced into writing or into permanent employment in accordance with the provisions of the Employment Act, 2007.

b) The declaration that in view of the orders on status quo pending the hearing and determination of the suit, the claimants are entitled to all remuneration and benefits under the Employment Act, 2007 throughout the period the suit had not been determined and to continue in employment with such full remuneration and benefits unless lawfully terminated from employment; and for that purpose the claimants to report to the respondent's managing director not later than 01.04.2016 at 8.00a.m for appropriate deployment.

c) The declaration that the respondent has engaged in unfair labour practices in respect of the claimants' service.

d) The declaration that the claimants are entitled to payment of salary in lieu of annual leaves not granted.

e) The declaration that the claimants are entitled to provision of an allowance for housing, medical, water and food to be backdated to the dates when the plaintiffs began to work and in accordance with the Employment Act, 2007 or such better terms offered by the respondent to its employees at all the material time.

f) The respondent to effect all the due outstanding payments declared due under this judgment by 01.05.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

g) The respondent to pay the claimants' costs of the suit.

h) That failing the negotiation for a compromise or settlement as earlier directed, the 3rd respondent, at the earliest possible opportunity, is entitled to a hearing and determination of his case as filed in the court but not yet determined.

Signed, dated and delivered in court at Nyeri this Thursday, 24th March, 2016.

BYRAM ONGAYA

JUDGE