



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 737 OF 2015

HARDLEY MULANDA & 53 OTHERS.....CLAIMANT

VS

GIEFCON LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues following termination of the claimants' employment contract by the respondent without notice. The respondent has denied liability for terminating the claimants' employment and avers that it is the claimants who deserted employment and went to work for Toyo Construction Ltd (TOYO). In addition, the respondent avers that the dispute herein was the subject matter in a dispute lodged with the Labour office by the claimant's trade union and which dispute was fully settled.

2. The suit was disposed of by written submission on the basis of the pleadings, witness statements and documentary evidence filed by both parties.

Claimants case

3. The claimants were employed by the respondent on diverse dates between July 2012 and August 2014 to provide labour to Toyo. That they worked until they were terminated by the respondent without notice on diverse dates between 7.5.2014 and 21.5.2015 on the assumption that they had transferred to Toyo. That as a result of the said termination the claimants have suffered financial loss and stress.

4. In addition, the claimants contend that they never took their leave and they therefore prayed for cash in lieu of leave. They also prayed for salary arrears resulting from salary underpayment and non-payment of House Allowance. Lastly they prayed for Certificate of Service.

Defence case

5. Mr. Cavine Kebaso is respondent's HR Manager. He filed a written statement herein stating that the respondent was contracted by TOYO to provide labour for the company. That respondent employed some of the claimants' herein to provide labour for TOYO. That the claimants were members of a Trade Union. That the claimants voluntarily deserted their employment without notice and went to work directly for Toyo under private contracts. That sometime in July 2015, the claimants union agitated for payment of leave allowances among other demands and the dispute was resolved by the Labour officer and the respondent complied with the recommendations by the Labour officer.

6. The respondent therefore denied the claims by the claimants' on ground that it is the claimants who deserted work without notice. In addition she maintained that the claimants were paid all the dues as proposed by the Labour officer less one month salary in lieu of notice. The respondent has however denied that Erick Nyamumba Morwabe, William Otieno Ogweyo, Danson Majani, Rodgers Mwaki Nyagondi, Joseph Gitau Kamau and Muhamed Omar Mwanchinga were her employees.

Analysis and Determination

7. There is no dispute that, apart from the six persons stated above and who are not parties herein, all the claimants were formerly employed by the respondent to provide labour to her client, Toyo Construction Limited. The issues for determination are:-

a. **Whether the claimants deserted employment without notice or they were terminated without notice by the respondent.**

b. **Whether the claimants are entitled to the reliefs sought.**

Desertion vs. Dismissal

8. The claimants contend that it is the respondent who terminated their employment on assumption that the claimants had transferred to work for Toyo directly. On the other hand the respondent contends that it is the claimants who deserted her employment without notice and went to seek for greener pastures at Toyo. The court finds that the claimants contracts were terminated on diverse dates but no evidence adduced by them to prove that they were terminated by the respondent.

9. Under section 47 (5) of the Employment Act the burden of proof lies with the employee who alleges that he was wrongfully dismissed. The respondent's case that it is the claimants who deserted her for greener pastures is corroborated by the proceeding before the Labour officer where some workers and their union were agitating for better terms and conditions of service. Consequently the answer to the first issue for determination is that it is the claimants who deserted their employment with the respondent in search for greener pastures. That the said desertion was without prior notice to the respondent.

Reliefs

Notice

10. In view of the foregoing finding that it is the claimants who terminated their employment contract without notice to the respondent their claim for salary in lieu of notice must fail.

Leave

11. The claimants prayed for leave but the particulars of the leave prayed have not been given either in the pleadings or witness statements. Consequently that relief also fails.

House Allowance

12. Likewise the claim for House Allowance has not been proved in evidence. The pleadings merely states figures but there is no basis shown both in the pleadings and witness statements how the figures were arrived at. That relief is also declined.

Underpayment

13. The claimants have all prayed for kshs.1,000 per month as underpayment. There is however no basis shown for the said claim. Firstly the claimants never proved that they were underpaid either in respect of their salaries or at all. The claimants have referred the court to the Respondent's Memo dated 1.7.2015 and the Return to Work Formula signed in June 2015 between the Respondent and their Trade Union. I

however of the view that the said Memo and the said Formula did not apply to the claimants because by then all the claimants herein had already left the respondent's employment.

14. The foregoing view is supported by the express wording of paragraph 8 of the Claim which stated that the respondent only paid leave as per the Memo dated 1.7.2015 to the employees who were in her employment and refused to pay the claimants. The reason for the failure to pay them is because all had by then deserted the respondent's employment to work for Toyo. The claim for underpayment on the basis of the said Return to Work Formula which was made after the claimants had deserted employment is therefore dismissed.

Certificate of Service

15. The right to Certificate of Service is provided under section 51 of the Employment Act. I therefore order the respondent to issue the certificates to the claimants as prayed.

Disposition

16. For the reasons stated above the claimants suit is dismissed save for the order for Certificate of Services granted above. Each party will bear his or her own costs.

Signed, Dated and Delivered this 29th day of July 2016.

ONESMUS MAKAU

JUDGE