



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR
 RELATIONS COURT AT MOMBASA
 CAUSE NUMBER 176 OF 2015

BETWEEN

GARAMA KARISA MASHA CLAIMANT

VERSUS

KRYSTALLINE SALT LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 27th March 2015. He states he was employed in April 1998 by the Respondent, as a Loader. Initial employment was casual. He continued to work uninterrupted, for 15 years and 9 months. He was paid Kshs. 500 per day as of the date of termination. He worked 8 hours a day for 7 days a week. There was no rest day. Sometime mid-December 2013, the Respondent through its Supervisor Mr. Joseph Otiato, abruptly informed the Claimant he was no longer needed, and should leave the workplace immediately. The Claimant was not paid any terminal benefits. He was not registered to any Pension Plan. He considers termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 13,000.
- b) 331 accrued annual leave days at Kshs. 165,500.

- c) Service pay at the rate of 15 days' salary for each completed year of service at Kshs. 112,500
- d) 12 months' salary in compensation for unfair termination at Kshs. 156,000.
- e) Punitive damages.
- f) Certificate of service to issue.
- g) Any other suitable relief.
- h) Costs and interest.

2. The Respondent filed its Statement of Response on 25th May 2015. Its position is that the Claimant was employed on 'piece work' terms. His pay was determined by the amount of work performed, irrespective of time utilized in its performance. He was paid Kshs. 26 per every tonne of finished products loaded onto a Trailer. He was engaged only when work was performed. He would not be engaged during rainy seasons, when there was no salt harvested. He did not work continuously. Sometimes in December 2013, the Respondent hired 9 new Loaders. The Claimant and 6 other existing Loaders refused to work when the new Loaders were hired. The 7 malcontents abandoned their duties. After 1 week, they, with the exception of the Claimant returned. The allegation that the Claimant was dismissed by the Respondent is false. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. Parties agreed on 22nd February 2016, to have the Cause considered and determined on the strength of their Pleadings, Documents and Submissions. They confirmed the filing of their Submissions at the last mention on 23rd June 2016, when the Decision of the Court was reserved for 5th September 2016.

The Claim:-

4. He submits he worked for the Respondent continuously for over 15 years. He would therefore be a regular Employee under Section 37 of the Employment Act 2007. The claim that the Claimant deserted was not supported by the evidence of the Respondent. There was no evidence given by the Respondent to show the Claimant worked on piece rate. The Respondent did not produce work register showing the Claimant's frequency of duty. Pay sheets availed by the Respondent to the Court were inadequate.

5. The Respondent did not issue the Claimant notice of termination, or provide reasons justifying the decision. Sections 36, 41, 43 and 45 of the Employment Act 2007 were disregarded.

6. The Claimant submits, having served for 15 years, he became a regular Employee under Section 37 of the Employment Act 2007, and entitled to all the protections given under the Act. He deserves, under the same Act, notice pay under Section 36; annual leave pay under Section 28; service pay under section 35; and compensation for unfair termination under section 49. He prays for certificate of service under section 51.

The Response

7. The Respondent submits that the Claimant was engaged as a Loader. His pay was determined by the amount of work done. He would visit the Respondent's premises accompanied by other Loaders. The Group Leader would negotiate terms of engagement with the Group Leader. He reported with other Loaders under their Group Leader, on the date he alleged he was dismissed. There was excess work and the Respondent engaged additional Loaders. The Claimant and his group refused to work. Later on the rest of the Loaders resumed work. The Claimant stayed away and never returned to work.

8. The Group Leader confirms in his Witness Statement that the Employees were engaged on piece rate work. Payment records confirm Employees received different rates, depending on the tonnes of salt loaded and off-loaded in a day. He was paid Kshs. 26 for every ton of salt loaded or off-loaded. He was a piece rate Employee. He is not entitled to the prayers sought.

The Court Finds:-

9. Central to this dispute is the question whether the Claimant was a regular Employee of the Respondent, entitled to the protections given to an Employee, under the Employment Act 2007. The Respondent submits he was not. He was engaged as a Piece Worker, whose rate of pay was determined by the tonnes of salt he managed to load and off-load, in and out of the Respondent's Trucks.

10. The Claimant asserts he was employed in April 1998, and having worked for a continuous and uninterrupted period of 15 years and 9 months, ceased to be an irregular Worker. He converted into regular employment under Section 37 of the Employment Act, with access to all guarantees and protections due to an Employee under that law.

11. He submits he earned a daily rate of Kshs. 500, as of the date his contract was terminated.

12. The record suggests the Claimant was employed as Piece Worker. The Employment Act 2007 defines piece work, under Section 2 to comprise any work, the pay for which is determined by the amount of work performed, irrespective of the time occupied in its performance.

13. This was the arrangement under which the Claimant worked. He loaded and off-loaded salt, and was paid an agreed amount of money for every ton loaded or off-loaded. He was not paid hourly, daily, weekly or monthly rate, but paid in accordance with the number of tonnes of salt he was able work on. He could not be said to have been a Casual or Regular Employee, with a definitive time-based rate of pay. He was rather a Piece Worker, who was paid a fixed rate for each unit produced or action performed, regardless of the time taken.

14. Piece Work is not unusual in agricultural and construction industries. It is not uncommon in manufacturing industries such as the salt industry in which the Claimant worked. It is based on a pay-for-performance compensatory system. It has its advantages in that an Employee can earn more in less time, than other time-based compensation systems would allow. This mode of work and work compensation is legally permissible. Employers who adopt Piece Work are nonetheless not exempt from meeting the demands of fair labour practices, and the minimum employment standards found in the Constitution and the relevant Acts of Parliament.

15. The piece rate would for instance have to meet the requirement that an Employee is paid a minimum wage.

16. The nature of the violations the Claimant alleges to have suffered appears to this Court unconvincing, and the remedies sought unbecoming, considering that he was on piece work. He has not shown he was a Casual Employee, or a Regular Employee, earning Kshs. 500 per day on exit. He has not supported his claim that he should be compensated or compensated based on a figure of Kshs. 500 per day. The records exhibited by the Respondent show he was paid a piece rate. It is not clear how the Claimant arrived at the figure of Kshs 500 per day, as his daily wage, while the records show him to earn a piece rate.

17. This conclusion is supported by the Witness Statement of Thomas Karisa Kadenge, who was Group Leader in the Group where the Claimant was a Member, the Group through which the Respondent engaged the Workers. Kadenge states that on the material day, management decided to add the number of Loaders, guided by the increased workload. Kadenge's Group had already loaded salt in 2 Trucks, and this piece work, had already been paid for, when the additional Workers came. The Group boycotted work because the Respondent had engaged additional Piece Workers. Other Workers in Kadenge's Group returned later and went on performing piece work. The Claimant did not go back. The Statement by Kadenge does not show that the Claimant was being paid a rate based on the hours worked; he was paid piece rate.

18. The Claimant has not shown he was at any time a Casual Employee earning Kshs. 500 per day. Had he done so, the Court would be bound to grant his claim that he was converted into regular employment, having worked for over 15 years. He was not a Casual Employee, earning a specified daily wage. He was

not a regular Employee, paid at regular intervals. The Respondent has demonstrated the Claimant was a Piece Worker, not unlike others in the agricultural and construction industry, who are paid respectively, according to the kilos of coffee picked or tea plucked, or the number of wardrobes fitted in an apartment block. There is no evidence even assuming the Claimant was in regular employment, showing his contract was terminated by the Respondent. ***The Claim is rejected with no order on the costs.***

Dated and delivered at Mombasa this 5 day of September, 2016.

James Rika

Judge