



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 323 OF 2013

BETWEEN

- 1. HARRISON KARANI**
- 2. MAZERA NYAMAI**
- 3. OTIENO OCHOLA**
- 4. MUTIE KIEMA**
- 5. THOMAS MWASI**
- 6. STEVEN KILEI**
- 7. FRANCIS MWAKIO**
- 8. ISSACK GONA**
- 9. FRED MUTINDA**
- 10. MESHACK MONDO**
- 11. EDWARD MWASI**
- 12. BENSON KALAMA**
- 13. SIMON MANYASA**
- 14. JOSEPHAT BARAZA**
- 15. DUNCAN MWAKUNDA**
- 16. ALEX MUNYAO**
- 17. BONIFACE DAVID**
- 18. NELSON KAHINDI**
- 19. JONATHAN ZIRO**
- 20. BENARD OTEE CLAIMANTS**

VERSUS

INSIGHT MANAGEMENT CONSULTANTS LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Asewe Advocate instructed by M/S Nyagaka S.M. & Company Advocates for the Claimant

Mr. Maloba & Mr. Matheka Advocates, instructed by Walker Kontos & Company Advocates for the Respondent

JUDGMENT

1. The Respondent is an Outsourcing Company. It recruited the Claimants as its Employees, through contracts effective 1st February 2013. The Claimants were assigned duty at the Respondent's Client Company, Pwani Oils Limited. They were Packers and Helpers. They testified they performed a multiplicity of other different jobs. Their initial contracts were for a period of 6 months. These ended on 31st July 2013. They earned a gross monthly pay, of Kshs. 9,880. The contracts were renewed for 3 months. They Claimants were dismissed by the Respondent before they could serve the full period of renewal, on the 10th September 2013. They state they were not given reason for the decision. Termination was without notice or just cause. They all seek orders against the Respondent for:-

- a) A declaration that termination was unfair.
 - b) 1 month salary in lieu of notice at Kshs. 9,880.
 - c) 2 months' salary for the unexpired contractual term at Kshs. 19,760.
 - d) 9 days worked in May 2013 at Kshs. 3,924.
 - e) Underpayment of salary from May 2013 to September 2013 at Kshs. 5,152.
 - f) 10 days worked in September 2013 at Kshs. 3,800.
 - g) 12 months' salary in compensation for unfair termination at Kshs. 118,560
- Total per Claimant at Kshs. 165,676
- Total Claim [x 20 Claimants] at Kshs. 3,313,520
- h) Certificates of Service to issue.
 - i) Costs and interest.

Prayer [d] was withdrawn at the time of giving evidence.

2. The Respondent filed its Statement of Response, on the 21st November 2013. It accepts the Claimants were its Employees. The rate of monthly pay is conceded. It is also conceded that the Claimants' contracts were terminated by the Respondent. Termination was in accordance with Section 44 [4] [a] and [c] of the Employment Act and Section 76 [c] of the Labour Relations Act 2007. They engaged in an illegal strike. They were given the opportunity to explain themselves. They did not explain. Their Claim

is without merit. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. Claimant Number 6, Steven Kilei, testified for the Claimants, and rested their case, on the 24th November 2011. Respondent's Operations Manager, Isaiah Mboya Oderah, testified for the Respondent on the 16th March 2016, when the hearing closed. The matter was last mentioned on 30th June 2016 when Parties confirmed the filing of their Closing Submissions, and the decision of the Court slated for delivery on the 14th October 2016.

Evidence

4. Kilei confirmed the presence of the 6 month-contracts and the renewal for a period of 3 months. There was a meeting between the Employees and Management, where issues of common interest were discussed. They discussed among other things, the 14 % wage increment which had been announced by the Government. They were told by their Supervisor Ndolo, that the Manager would explain to the Employees how the wage increment would be implemented. When the Manager at Pwani Oils came, he advised the Employees to move out of Pwani Oils compound, and discuss the issue with the Management of the Respondent. They were advised by the Human Resources Manager to go home, and return the following day. On return, they were locked out. They were advised other Employees had taken up their jobs. They instructed their Advocates who issued demand letter. It is not true that they engaged in a go-slow. They were not heard. They were not paid their terminal benefits. There was no notice of termination. They were underpaid for the period worked. They were not paid terminal dues. Termination was unfair. They did not receive their Certificates of Service.

5. Cross-examined, Kilei stated Employees met on the 9th September 2013. It was a routine workplace meeting. They had informed Management about the effect of the wage increment announced by the Government. They were not represented by a Trade Union. The meeting started at 8.30 a.m. ending 9.00 a.m. They did not go back to work. They were ordered out of the premises. It is not true that they boycotted work. It was not the first time they were asking for implementation of wage increment. They had read their contracts well. The Company would dismiss for acts of gross misconduct. Illegal strike would result in dismissal. Kilei operated the wording machine. He had done so for 7 years. He was initially employed by Pwani Oils directly, before engagement through the Respondent. The Claimants pray the Court to allow their Claim.

6. Oderah told the Court the Claimants staged an illegal strike on 9th September 2013 at their assigned workplace, Pwani Oils. They had insisted on immediate implementation of wage increment announced by the Government in Legal Notice effective 1st May 2013. The Notice was published on 30th August 2013. It came to the attention of the Respondent a week after its publication. The Respondent intended to pay the increments in arrears. The Claimants were issued notices to show cause why they should not face disciplinary action. They declined to acknowledge the notices. The Ministry of Labour was notified by the Respondent about termination. Dismissal was fair. Claimants had worked for 8 months. They engaged in acts of gross misconduct.

7. Questioned by the Advocate for the Claimants, Oderah testified some of the Claimants had been working for Pwani Oils, before being placed under the Respondent. The Claimants were issued notice to show cause on 9th September 2013. They were required to show cause the following day 10th September 2013. The Respondent did not convene disciplinary hearings, because the Claimants refused to engage. The Witness did not recall when terminal dues were paid. In reply to the Claimants' demand letter, the Respondent's position was that terminal dues were being computed. Redirected, the Witness testified once the Claimants refused to work, they were unwelcome at Pwani Oils.

Submissions

8. The Claimants submit the Respondent did not show termination was in accordance with Section 41, 43 and 45 of the Employment Act. Relying on ***Kenya Plantation and Agricultural Workers Union v. Roseto Flowers [2013] e-KLR***, the Claimants submit the Respondent had an obligation to hear each

Employee individually, instead of imposing a sweeping collective punishment. In any case, the Claimants were justified, in demanding to be paid wage increment. Termination was unfair, and the Claimants are entitled to the remedies sought.

9. The Respondent submits the Claimants were engaged in an illegal strike. There was no trade dispute. There was no notice before the strike or go-slow. They were asked to show cause why they should not be disciplined. They declined to do so. They were fairly dismissed. They were on weekly contracts at the time of dismissal. They were paid all their terminal dues, and issued Certificates of Service. The Respondent acted fairly throughout.

The Court Finds:-

10. The 20 Claimants were employed by the Respondent Outsourcing Company. They were placed on 6-month contracts, beginning 1st February 2013 to 31st July 2013. They were offered renewals for a period of 3 months, after the end of the first contracts. They were Packers and Helpers, occasionally assigned to perform general duties. They were dismissed by the Respondent on 10th September 2013, after they allegedly engaged in an illegal strike on the previous day. They all earned Kshs. 9,880 as of the date of dismissal. They worked for the Respondent's Client, Pwani Oils.

11. There was common evidence that some of the Claimant had worked with Pwani Oils for as many as 7 years. Kilei had worked for 7 years. The Respondent entered the scene, and took over the management of the existing labour force, and purported to issue short term contracts, complete with probationary periods. Why would an Employee with 7 years' experience on the same job go through probation?

12. The engagement between the Respondent and its Client should not have been used to alter the nature of the Claimant's terms and conditions of service. The triangular relationship ought not to have resulted in short term contracts, obfuscating the protections afforded to the Claimants as regular Employees, under the Employment Act 2007. The Respondent should not have treated all Employees like new entrants at Pwani Oils.

13. There was a wage increment announced by the Government, at 14%, on the 1st May 2013. The Legal Notice was published on 30th August 2013. The Claimants demanded the increment is implemented immediately when they met at the workplace on the 9th September 2013. The Respondent states it was unaware about the Legal Notice until a week later. It intended to implement the notice, and pay the increments in arrears. The Claimants would hear none of this and downed their tools on 9th September 2013. On returning to work the following day, they found their jobs taken up by other Employees.

14. Kilei confirmed Employees met on 9th September 2013, and discussed implementation of the wage increments. The Employees withdrew their labour, to press for implementation of the wage increment. They were involved in a wildcat strike. They had not issued any strike notice. The Respondent had not refused to implement the wage increment. It intended to do so in arrears. This was not the first wage increment. Implementation had been done in the past, in the mode proposed by the Respondent. The Claimants appear to have become impatient, probably because the Respondent on its part had altered their contracts to 3 month-fixed term, which term was fast approaching its end. There would be apprehension on the part of the Employees that the wage increment would not be implemented in the lifetime of their contracts. In the view of the Court, the Claimants were justified in feeling aggrieved, but went about dealing with the grievance through an unacceptable wildcat strike.

15. The Respondent had valid reason in terminating the Claimants' contracts under Sections 43, 45 of the Employment Act, and Section 80 [1] of the Labour Relations Act 2007.

16. The procedure was appalling. The Respondent states it issued notices to show cause to the Claimants on 9th September 2013. This is the same date the wildcat strike took place. There is no evidence that such notices issued. If they did issue, there was no sufficient time given to the Claimants to respond to them. They claim they were ordered out of the Respondent's premises and advised to report back on 10th

September 2013. There was no form of hearing on 10th September 2013. Instead the Claimants found other Employees had been engaged. Oderah confirmed this when he testified that the Claimants had refused to work, and had no reason to be at Pwani Oils compound. It seems the Respondent decided on 9th September 2013, that it would no longer continue employing the Claimants. While there was valid reason, the decision was not arrived at in a way that satisfied the demands of procedural fairness, under Section 41 and 45 of the Employment Act 2007. The Court agrees that following the decision in the ***Kenya Plantations and Agricultural Workers Union*** cited above, there was need to investigate the role of each Claimant, and make a determination upon a disciplinary process against each individual. There is an inherent danger of victimizing innocent individuals when the procedure adopted, is in the mode of a mass process. The demands of Section 41 and 45 were not met. The Claimants are entitled to compensation for unfair termination. ***They are granted 4 months' salary each in compensation for unfair termination at Kshs. 39,520.***

17. Having been so compensated, there would be no basis to grant any prayer for salary based on the remainder of the alleged contractual periods.

18. ***They are allowed the prayer for notice pay the equivalent of 1 month salary each, at Kshs. 9,880.***

19. They worked for 9 days in September 2013. They should not be denied their salary for days worked. They did not work on 10th September 2013. In their evidence they found other Employees had been engaged on 10th September 2013. They have abandoned the prayer for salary for days worked in May 2013. ***They are granted the prayer for salary for 9 days worked in September 2013, at Kshs. 3,420 each.***

20. The Respondent did not provide any annual leave records, to show Employees had taken their annual leave. ***The prayer for pro-rata annual leave for 7 months for the year 2013 is granted at 12.25 days x daily rate of Kshs. 380 =Kshs. 4,655.***

21. The Claimants left employment in the middle of agitation for implementation of wage increment given under the General Wage [Amendment] Order of 1st May 2013. The Respondent concedes it was in the process of implementation when the industrial action of 9th September 2013 took place. The Claimants had not received the increments by the time they left. They were underpaid for the period May to September 2013. The Respondent did not dispute the computation of what it intended to pay to the Claimants as wage arrears. ***The prayer for underpayment of wages at Kshs. 5,152 per month is allowed for each Claimant.***

22. The Respondent shall release to the Claimants their Certificates of Service forthwith.

23. Both Parties share the responsibility for the circumstances which led into this dispute. The Claimants downed their tools to demand for wage increments. The Respondent mishandled the grievance and the disciplinary process. The dispute would not have occurred had the Parties adhered to the tenets of fair work, and engaged each other constructively. In exercise of its discretion, the Court gives no order on the costs. The sum awarded to attract interest at 14% p.a. from the date of default, if not fully paid within the given period. IN SUM, IT IS ORDERED:-

a) Termination was based on valid reason, but carried out unfairly.

b) The Respondent shall pay to each of the 20 Claimants 4 months' salary in compensation for unfair termination at Kshs. 39,520; 1 month salary in lieu of notice at Kshs.9,880; salary for 9 days worked at Kshs.3,420; unutilized annual leave at Kshs.4,655; and underpayment of wages at Kshs. 5,152 – total Kshs. 62,627 each.

c) In total the Respondent shall pay to the Claimants Kshs. 1,252,540 within 30 days of delivery of this Judgment.

d) The sum to attract an interest at 14% p.a. if not paid within 30 days, computed from the end of

the 30 days.

e) The Respondent shall release the Claimant's Certificates of Service forthwith.

f) No order on the costs.

Dated and delivered at Mombasa this 14th day of October 2016.

James Rika

Judge