



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 283 A OF 2015

ERUSTUS KAMBU MWAMBURI.....1ST CLAIMANT

PRIMUS SHUMA MWAKIMA.....2ND CLAIMANT

-VERSUS-

ABERCROMBIE & KENT COAST LTD.....RESPONDENT

JUDGMENT

Introduction

[1] The claimants brought this suit on 5.5.2015 claiming terminal dues plus compensation for unfair termination of their employment contract by the respondent on 10.12.2014. The respondent has however denied that she terminated the claimant's services as alleged by the claimants and averred that the claimants were freelance porters at the Moi international Airport (MIA) Mombasa, who worked further on casual basis and were paid on hourly basis depending on the amount of work available.

[2] The suit came up for hearing on 11.2.2016 but the parties agreed to dispense with oral evidence and instead opted to rely on their pleadings, witness statements and the documentary evidence filed. In addition the parties agreed to file written submissions to sum up their respective cases.

Claimant's Case

[3] The first claimant, Mr Erastus Kambu Mwamburi stated in his witness statement that he was employed by the respondent as a porter within Moi International Airport on 2.8.1999. That his daily wage was Kshs 425 and he was never a member of the NSSF or any pension scheme. That he worked as a casual for 15 years until 10.12.2014 when he was unfairly terminated without any terminal benefits. He therefore prayed for one month salary in lieu of notice, leave for 3 years, and service pay for 15 years and 12 months' salary as compensation for unfair termination of his services.

[4] The second claimant, Mr Primus Shuma Mwakima, stated that he was also employed by the respondent as a porter on 2.8.1999. That his daily wage was Kshs 425 and he worked on casual basis until he was unfairly terminated by Mr Shabir on 10.12.2014. He therefore prays for one month salary in lieu of notice, leave for 3 years, service pay for 15 years and 12 months' salary as compensation of his services.

[5] In addition to the foregoing statements the claimants have submitted that by dint of section 37 of the

Employment Act (EA), their contract of service had converted from casual to permanent employment after serving for 3 consecutive months from the date of their engagement as casual employees. Consequently they urged that the reliefs sought should be awarded because their termination was not grounded on any reason and it was not done after following a fair hearing.

Defence Case

[6] The respondent filed four witness statements to oppose the claimants' suit. Mr Iona Quiterio Lawrence is the Senior Tour Officer in charge of Quality Control and Guests relations at the respondent. He stated that the claimants were freelance porters - loaders based at Moi International Airport and did some part time work for the respondent during specified flight arrivals when they were requested to assist in loading guests' luggage into the respondent's vehicles. That at some point in time, the Kenya Airports Authority (KAA) clamped down on illegal porters and idlers and requested all stake holders to put in place measures to identify the persons allocated tour operator duty as a result of which the respondent issued letters to Kenya Airports Authority to officially introduce the claimants as working with her agent.

[7] Mr Wilson Babu Mwanyika, is the Transport coordinator at the respondent. He stated that he engaged the claimants as porters on casual basis at the Moi International Airport. That during that time the claimants were freelance porters at Moi International Airport and he used to hire them on need basis whenever they had big arrivals. That the claimants used to work for two or three times a week and they were paid according to the number of hours worked during each flight arrival.

[8] Mr Antony Kahiga Chege, is the General Manager for the respondent. He stated that he authorised the hiring of the freelance loaders including the claimants during specified flight arrival dates. That the claimants' duties included assisting in wheeling guests' trolleys from the arrival area to the car park and load onto the respondent's vehicles. That the claimants worked for few hours a day but only three times a week. That on mutual agreement the claimants used to receive their pay on weekly basis. That the respondent stopped hiring the claimants in December 2014 due to how business and directive from KAA that only authorised employees were to be allowed to work at the Moi International Airport.

[9] Mr Bilal Adam, is the Assistant Financial Controller for the respondent. He stated that he used to pay freelance porters who were engaged on casual basis to assist at Moi International Airport during specified arrival clients. That the pay was on hourly basis but for convenience the payment was paid at the end of the month in arrears. There was no pay for the days when the claimants did not work.

[10] In addition to the said evidence, the respondent submitted that the claimants were not employed by her under any contract of service but on piece work basis. That their service was temporary and intermitted and not continuous. That they were only hired on need basis and paid only for the number of hours worked. She relied on the definition of piece work under section 2 of the Employment Act and this Court's decision is **Aoys Obunga Abunje & 5 Others vs Krystaline Salt Ltd [2016] eKLR** to urge that the claimants have failed to prove that they were employees under a contract of service. Consequently the respondent has contended that the claimants have not proved that they were unfairly terminated and as such the relief sought have no basis.

Analysis and Determination

[11] After careful consideration of the pleadings, evidence and submissions filed, the following issues arose for determination:

- (a) What was the nature of the employment relationship between the parties herein.**
- (b) If the relationship was contract of service, whether the same was unfairly terminated by the respondent on 10.12.2014.**
- (c) Whether the reliefs sought ought to issue.**

Nature of the Employment Relationship

[12] There is no dispute that the claimants were not given any written contract of employment. There is also no dispute that they were employed on casual basis for the whole period they served the respondent. The claimants have however contended that their terms of service had converted from casual to permanent employment by dint of section 37 of the Employment Act.

[13] The respondent has however denied that the claimants served continuously and maintained that the claimants served intermittently depending on labour needs. That they worked only two or three days in a week and even on such days, they worked only a couple of hours and not full day. That according to her the claimants were part of freelance porter – loaders based at the Moi International Airport who offered labour on hire and as such they did not form part of her establishment. That the letter she gave to KAA introducing them as their employees did not confer any permanent employment status on them.

[14] I have carefully considered the contentions by the two sides and formed the opinion that although the claimants had a long engagement with the respondent for over 10 years, they were only casual or temporary employees. That the undisputed evidence by the defence witnesses and the employment records produced show that the claimants were only working for less than a week and only for a few hours per day. That their engagement was for a specified work of assisting guests with their loads on arrival from a specified flight. That the flights fully depended on tourism season at Mombasa and as such the work was not constant. That after helping the guests trolley their luggage and load on to the respondent's vehicles, the claimants had no further duty to do and they went to look for other job elsewhere until the next time they were called by the respondent.

[15] On a balance of probability, I find that the evidence adduced by both side and more so the defence support my view that the claimants were temporary employees of the respondent and served on piece work basis as and when the need for labour arose. That the fact that they never served continuously on daily basis, it was impossible for their terms to convert from casual to permanent employment under section 37 of the Employment Act. Such conversion only occurs where the casual employee continues serving for more than one month or where the piece work given cannot reasonably be expected to be completed within a period of 3 months.

[16] In this case the claimants were working intermitted and the piece work given was just for a few hours per day. Under section 2 of the Employment Act, casual employee has been defined as

“A person the term of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”.

Flowing from the foregoing definition, I find and hold that the relationship between the parties herein was that of temporary or casual employment.

Unfair termination

[17] In view of the foregoing finding that the claimants were casual employees, I make a further finding that they were not protected from termination without notice by section 35(1) of the Employment Act. Their engagement was terminated daily after completion of the task they were contracted to perform. The fact that payment was paid in arrears did not render them regular term employees. The reason for the foregoing is that the undisputed evidence by the respondent that the accumulation of the claimants' wages was agreed mutually by the parties for convenience. Consequently, I find on a balance of probability in such circumstances, that the alleged unfair termination could not arise because the claimants being casual employees were not awarded the protection of the law under section 35, 40, 45 and 49 of the Employment Act.

Reliefs

[18] Having found herein above that the claimants were casuals and that they were not unfairly

terminated, I agree with the defence that no basis has been shown to warrant the granting of the reliefs sought. Consequently, I decline to grant any relief to the claimants.

Disposition

[19] For the reasons stated above, I dismiss the claimants' suit with no order as to costs.

Judgment dated, delivered and signed at Mombasa this 7th day of October 2016.

O. MAKAU

JUDGE