



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 396 OF 2013

JOSEPH OTIENO OGUTU & 24 OTHERS..... CLAIMANT

VS

ALLIED WHARFAGE LTD.....1ST RESPONDENT

ITA MARINE SERVICES LIMITED2ND RESPONDENT

JUDGMENT

Introduction

1. The claimants have brought this suit claiming that they employed by the 1st respondent from divers dates between 1994 and 2010 as casual labourers and their daily wage was kshs.600. In the alternative the claimants have averred that on 16.3.2009, the respondents herein entered into a labour outsourcing agreement secretly in which the 2nd respondent took over the responsibility of paying their daily wages and employees disputes which in the claimants' view amounted to unfair labour practice. Their services were unfairly terminated on 25.11.2010 by the respondents without any prior notice or valid reason being communicated to them. They therefore pray for one month salary in lieu of notice, service pay, compensation for unfair termination and certificate of Service.

2. The first respondent denies ever having employed the claimants but avers that up to March 2009 she used to engage casual labourers through 9 organized gangs 20 to 30 members. Later the gangs were reduced to 5. Each gang had its own leader who was the only contact between her and the gang of labourers for purposes of negotiating work and the payment. The gang leader was the one responsible for choosing the members of his gang who were to do the particular work, then prepare their list for payment and later collect the pay from her to distribute to the gang members who did the work which depended on the amount of work done. She further avers that between 2002 and 2003 the gangs had wrangles which led to some members leaving including some of the claimants herein. Finally she decided to sign a labour outsourcing Agreement with the second respondent on 16.3.2009. The second respondent deployed a supervisor and a cashier to the work place and henceforth provided labour in terms of the said outsourcing agreement.

3. The second respondent admits that she entered into labour outsourcing agreement with the first respondent as stated above but denies that the claimants were employed by her. it is her case that all her clients engage her to supply labour on piece rate terms only and such at all material times hereto, all the labour she hired was also on piece rate basis only. It is her further case that she out sources labour from self help groups (gangs of labourers) which do the hiring and management of the members and pay for

the work done based on a Collective Bargaining Agreement (CBA) in the Shipping Industry. She denied that the claimants were transferred to her under the outsourcing agreement and as such she was incapable of terminating their employment.

4. The suit was heard on 21.5.2014, 17.7.2015, 2.12.2015 and 12.5.2016 when the claimants called Mr. Samson Olweny and Mr. Mzuri Antony Kevongo as Cw1 & 2. On the other hand the first respondent called Cleophas Wamalwa and Hesbon Otieno Nyahone and Winfred Ngati Kyalo as RW1, 2 & 3 while the second respondent called Mr. Samuel Katana Jabiri, and Michael Ouma Osino as RW4 & 5. All documentary evidence filed by both sides were admitted as exhibits by consent and after hearing the counsel filed written submissions.

Claimant's case

5. CW1 stated that he was employed by the first respondent on 4.1.1999 as a casual labourer. That he found some of the claimants still working there having been employed in 1994. That the employer never gave written contracts but employment cards certifying that they were employed by the First respondent and were to be returned on termination of employment. That their work involved loading and off loading cereals and fertilizer at the first respondent's Chagamwe go down. They worked from Monday to Saturday starting work at 6.00 am but their departure depended on the work available. That their daily wage was kshs. 600 but it could be more if they worked overtime. That they used to work in groups according to the instructions from the go down Supervisor (called a Sarangi) who used to supervise the claimants during their work.

6. Cw1 explained that on 25.11.2010, the first respondent's Personnel officer, Mr. Kyalo told the claimants to surrender their employment cards because the company was going to employ people on contract. That when the claimants returned to work the following day, they were not given any work to do but they were chased away by the police. That the termination of their employment was unfair because they were not given any prior notice and were not paid any terminal dues for their long service. He therefore prayed for salary in lieu of notice, service pay and compensation for unfair termination.

7. On cross examination he admitted that his designation in the employment card was gang Labourer. He further admitted that he was a gang member and there were 9 gangs of 30-40 members working in the go down under the Go down Supervisor. That each gang had a leader who was reporting to the Go down supervisor but their pay was done by the Tallying Clerk. That there was work daily except on Sunday. That the claimants herein were members of different gangs and they were terminated by Mr. Kyalo on 25.11.2010 when he told them that another company had been contracted to provide labour and advised them to look for work there.

8. Cw1 further admitted that the Agreement for labour out sourcing was signed on 16.3.2009 but contended that the person who was paying their wages before then continued until the day they were dismissed on 25.11.2010. He also admitted that they never lodged any complaint at the labour office and never served any lawyer to serve demand letter on their employer until 30.8.2013. He however maintained that their daily wage was kshs.600 unless there was overtime work done.

9. CW2 stated that he was employed by the first respondent in 1998 at her go down at Chagamwe. That he was working there with the other claimants and their work involved loading and offloading food stuffs from trucks. That he was never given any appointment letter but only staff Identification card and his pay was kshs.200 per day but which was later increased to kshs. 600 and the kshs.1000 when he became Supervisor. That starting time was 8.00 am but the departure depended on the decision of the Warehouse Managers Mr. Anup Shah and Mr. Ragogo Siwa who were both officers of the first respondent while he was a Supervisor of 10- 20 workers in two Warehouses. That the said officer told him that the second respondent was to bring money to the first respondent and then he (CW2) was to be collecting the same to pay the workers. That before collecting the cash the first respondent's Tallying was supposed to prepare a Tally sheet for payment and forward the same to Mr. Anup Shah to authorize the Cashier to release the money for the payment of workers.

10. CW2 explained that in June 2011, he reported to work as usual and Mr. Anup Shah told him that the 2nd respondent would no longer operate and as such his work as a Supervisor ended. He confirmed that the other claimants left work before him but he was not sure of the date because they not working under his supervision but in another premises. He also prayed for salary in lieu of notice, compensation for unfair termination and service pay against the first respondent and insisted that he was never employed by the second. He maintained that the cash vouchers on record was prove that he used to collect money from the respondent to pay the other workers.

11. On cross examination he confirmed that he became supervisor in June 2009 but denied that he became employee of the second respondent from then. He however admitted that some of the cash vouchers he signed were for payment of workers in the Main complex where the other claimants were working. He further admitted that the vouchers were for payment per piece and it was payment from the second respondent but he contended that it manipulations from the first respondent's office. He maintained that he was employed by the first respondent all through and all his pay came from her cashier who was based at the first respondent's Main complex.

Defence case

First respondent's case

12. Rw1 stated that he is gang leader for gang number 5 that has 40 members. That the gang like other gangs of casual labourers provides casual labour in various warehouses in Mombasa. That since 1998, his gang has been providing casual labour to the respondents Changamwe and Shimanzi premise on piece rate basis. That their work involves loading and offloading and storing goods in the respondent's warehouses. There are 5 gangs that provide labour there, each with a leader. that from 1998 to 2009, the first respondent contact the respective gang leaders who selected labourers from their own gangs to do the agreed task, then prepare a list of the selected labourers and present it to the her personnel manager for record purposes. That at the end of the day the cashier would pay the gang leader based on the work done and in turn the gang leader would pay his gang members.

13. Rw1 contended that the work was not constant and at times they went without work even for 2 or 3 weeks. That also there times the work was less and they earned as little as kshs.50 per day but other times the work was a lot and they earned as high as kshs.800 per day. that in early 2009, Mr. Anup Shah (Warehouse Manager) and Wilfred Ngati Kyalo (Personnel Manager) met all the Gang Leaders and informed them that the first respondent had decided to contract the second respondent to be in charge of piece rate work henceforth. That the rates were negotiated under a CBA. That the second respondent deployed a Cashier to the workplace who would pay the gang leaders at the end of their shifts for the work done by the respective gangs. That currently the same system is ongoing but under another company called Skate ship contractors limited that was later on contracted by the first respondent. He concluded by stating that the claimants were members of different gangs but left their respective gangs in 2003 due to lack of work in the warehouses. That a member of a gang was free to resign from the gang or could be expelled by the other gang members after which the matter was reported to the overall gangs Headman (sarangi) who in turn informed the respondents. He therefore denied that the claimants were dismissed from employment by the respondents on 25.11.2010.

14. On cross examination he admitted that the first respondent gave to the claimants identification cards certifying that they were her employees. He maintained that in 2009, all the gang Leaders were told by Mr. Anup Shah to notify their gang members that the second respondent was going to take over labour provision. The money to pay workers came from the first respondent until the second respondent took over the contract for the provision of labour and deployed her cashier there. That her said contract ended in October 2011 and a new company was contracted to take over from her. He confirmed that the Sarangi (Headman) was the link between the gang leaders and the first respondent until the outsourcing contract was introduced in which case the he became the link between the gang leaders and the contractor.

15. RW2 stated that he is also a gang leader for Gang number 4 that has 40 members. The members are casual labourers who have come together in order to secure labour contracts in various warehouses in

Mombasa. That since the year 2000, the gang has been doing work at the first respondent's Shimanzi and Changamwe warehouses on piece rate basis. That the work they have been doing involves loading and off goods. That from 2000-2009, that first respondent was contacting the gang leaders whenever she needed casual labour and the latter selected labourers from their respective gangs to do the job. The gang leaders then prepared a list of the gang labourers and present it to the respondent for record. Thereafter the gang leader collected the payment for the job done and distributed to the gang labourers. That the gang was independent establishment which dealt with the membership and discipline of its members without involvement of the respondent.

16. Rw2 explained that in early 2009, Mr. Anup Shah and Rw3 told all the gang leaders in a meeting that she was going to contract the second respondent to provide piece rate to her and as such they should look for work there. That the second respondent then deployed her Cashier to the said warehouses to be making payments to the gang leaders at the end of every shift. That the payment rates were negotiated in a CBA by the trade union in the sector. That the majority of the claimants left their respective gangs in 2003 due to lack of work to do in the first respondent's premises. that the 7th claimant left the gang in 2008 due to lack of work while the 15th claimant was expelled by the gang in mid 2010 due to indiscipline. On the other hand the Cw2 left February 2011 protesting against his removal by the gang, from his position of gang leader due to indiscipline. Rw2 therefore denied that any of the claimants were dismissed from employment by the first respondent.

17. RW3 was employed by the first respondent as Personnel manager in 1994 and worked up to February 2011 when his job was declared redundant. He stated that from 1994 to March 2009, the respondent engaged casual labour on piece rate basis from organized gangs. The work was done at Shimanzi and Changamwe warehouses. The gangs were for 20- 30 labourers and their gang leader was the contact person between the gang and the first respondent. The gang leader was the one who selected the members he needed to do a particular task, prepare a list and present it to him (Rw1) for record purpose. Thereafter the gang leader collected the pay at the end of the day based on the work done and share it among the gang labourers.

18. RW3 further explained that On 16.3.2009, the first respondent decided to outsource casual labour from the second respondent as opposed to hiring them through gang leaders but not before notifying them and the sarangi (head of Gang leaders) about the new company policy. Thenceforth the second respondent deployed her supervisor and a Cashier to the workplace and took over his personnel duties in the first respondent's go downs including dealing with gang leaders and payments for the work done. He denied that the claimants were dismissed from employment by the first respondent.

19. On cross examination RW3 admitted that the claimants were casual employees of the first respondent and that he had personally signed their staff identification cards. That he kept all the records of the permanent and casual employees but they were now not within his reach after his redundancy. That the said cards were to be surrendered upon termination of the employment. That from 16.3.2009, the claimants became employees of the second respondent after she was contracted to provide casual labour but no transfer letters were issued to them in that respect. That the first respondents requested the second respondent was not to hire new casual workers but was to retain the old ones.

20. RW1 however confirmed that the second respondent was not party to the meeting between the first respondent, the Sarangi and the gang leaders when they were notified about the decision to outsource labour because the gang leaders protested the new gangs being brought in by the contractor. He also clarified that the claimants were casual employees in the gangs contracted by the first respondent until 16.3.2009 when they were transferred to the second respondent.

Second respondent's case

21. RW4 is the Director for the second respondent since 2006. He stated that the respondent does the business of supplying casual labour to clients on contract basis, that the labour it supplies is hired from registered companies or Self Help Groups otherwise called gangs. That in this case his company was contracted by the first respondent on 16.3.1009 and in furtherance to the said contract he subcontracted

Pambazuko Self Help Group to provide the labourers to work at the first respondent's warehouses despite resistance from the first respondent's employees. He denied that the second respondent took over employees from the first respondent and as such she never dismissed any of claimants.

22. On cross examination RW4 admitted that the outsourcing agreement allowed the contractor to hire any employees of her choice and to deal with them without involving the first respondent. That he used to contact CW2, the gang leader to recruit workers from the gang after which he would sign the cash vouchers and then pay all the casual labourers he had recruited without involving RW4. That for that reason the RW1 never knew the gang members because he never dealt with them directly. He clarified that the people who were fighting Pambazuko gang were other gangs which were serving the first respondent before the contractor was brought on board.

23. Rw5 is the chairman for the Pambazuko Self Help Group which was registered in 2005. He confirmed that his group was hired by the second respondent to provide labour to the first respondent's warehouse after she was contracted by the first respondent to provide labour at her warehouse in Changanwe. The work was done on piece rate basis. That the introduction of his group in the premises was resisted by the first respondent's employees including the 7th, 13th and the 24th claimants on 27.9.2011 for the first time.

Analysis and Determination

24. After considering the pleadings, evidence and submissions filed, it is clear that the claimants worked in the first respondent's warehouses on diverse dates between 1994 and 2011 on casual basis. There is also no dispute that from 16.3.2009 the first respondent contracted the second respondent to provide casual labour in her warehouses vide an Outsourcing Agreement dated the same date. The issues for determination are:

- a) Whether the Claimants were independent contractors or employees of the respondents
- b) Whether the claimants were unfairly dismissed by the respondents.
- c) Whether the reliefs sought by the Claimants should be granted.

Independent contractors or employees.

25. The onus of proving employment under a contract of service lies with the person who alleges that he was so employed. Under section 2 of the Employment Act an employee has been defined as:

“A person employed for wages or salary and includes an apprentice and indentured learner.”

26. At common law an employee is one who:

- (a) is required to comply with the employer's instruction about when, where and how he or she must work.
- (b) has been trained by the employer to gain experience for purposes of working for the employer.
- (c) has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer.
- (d) must render services personally
- (e) has assistants hired, supervised and paid by the employer
- (f) has worked continuously for a long time
- (g) has specific working hours set by the employer

- (h) is working substantially full-time for an employer and is not free to work for other employers
- (i) performs work on the employers premises
- (j) is required to submit regular oral or written report to the employer
- (k) has his business trips or travel expenses paid for by the employer
- (l) has tools, material and other requirements met by the employer
- (m) is easily dismissed at the will of the employer
- (n) has the right to terminate his contract without incurring any liability.

27. After careful consideration of the documentary evidence produced and the witness testimonies, I find that the claimants have failed to prove on a balance of probability that they were employees of either of the two respondents as alleged by them. However I agree with the overwhelming evidence from the 5 defence witnesses who have proved on a balance of probability that all the claimants were independent contractors engaged to do piece work under the umbrella of organized freelance labour gangs. Section 2 of the Employment Act defines piece work as:

“Any work the for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”

28. In this case, although they worked for the respondents for a long time, they never worked full time because they also worked for other clients. That the nature of their services was piece work and not constant daily wages. In addition the gangs under which the claimants worked were the ones responsible for recruiting, supervision, discipline and sharing of the payment to the gang members.

29. It is clear from the evidence presented to the court that the claimants labour was not part of the respondent’s establishment but an outsourced labour from freelance labourers who had organized themselves into some conveniently independent amorphous gangs. That the said gangs roamed and still continue to roam around the warehouses and lurk by the gates waiting for any opportunity for piece work to present itself. That in order to ensure sanity in the sector, the gangs operate under a gang leader who is the contact between them and the contracting clients and as such the gang members never get to meet with the client for any purpose including negotiating their terms of the contract, supervision, discipline or payment. That the gangs in the sector also have a Patron called Headman (*Sarangi*) who provides the good will for the gangs and is involved in serious decision making like expelling of gang members due to misconduct and termination of relationships between clients and the gangs like it happened in early 2009.

Unfair termination

30. In view of the foregoing finding that all the claimants were independent contractors, I agree with the respondents that they were not capable of being dismissed by them. Consequently, I find and hold that all that claimants were never dismissed by the respondents, but their contracts lapsed after completing the last task they had been contracted to do.

Reliefs

31. In view of the finding above that the claimants were not employees of the respondents within the meaning of the Employment Act, I make a further finding that the remedies sought by their sought are farfetched and not availed to them by the law or any proven contract.

Disposition

32. For the reasons stated above the suit is dismissed. Each party shall bear his or her own costs.

Signed, dated and delivered at Mombasa this 18th day of November 2016.

O.N. MAKAU

JUDGE