



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 221 OF 2013

BETWEEN

ERIC ONYANGO OCHELLE.....CLAIMANT

VERSUS

KEEN KLEENERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Obara & Obara Advocates for the Respondent

Mogaka Omwenga & Mabeya Advocates for the Respondent

JUDGMENT

1. The Claimant initiated this Claim at the Industrial Court at Nairobi, registered at the Court as Cause Number 848 of 2012. The Statement of Claim was filed on 23rd May 2012. The Claim was transferred to Mombasa with the consent of the Parties and given its present registration. The Respondent filed its Statement of Response on the 22nd October 2012.

2. The Claimant gave evidence before Hon. Judge Radido at Mombasa, on 25th June 2014. Judge Radido was transferred before he could hear the dispute to completion. The current trial Judge directed on 30th June 2015, that trial proceeds from where the predecessor Judge left off. Claimant's Witness, Joash Otieno, gave evidence on 19th February 2016, bringing Claimant's case to a close. Respondent called 2 Witnesses, Kipngetch Koech Richard and Joseph Njenga Munene, who gave evidence on the 20th June 2016, bringing the hearing to a close.

Claimant's Case

3. He states he was employed by the Respondent as a Loader on 1st May 2005. He subsequently became a Machine Operator. His 1st salary was basic of Kshs. 5,217 and house allowance of Kshs. 782 per month. Sometime in June 2011, the Machine he was operating broke down. He was instructed by the Respondent to perform other task which did not require skilled labour. He protested the task assigned to him was below his qualification. The Respondent through its Chief Operations Officer Koech sent the Claimant to

work at Multiple Company Limited. The Respondent did not pay Claimant his terminal dues and salary from May 2010 to- date. He prays the Court to give the following orders against the Respondent:-

- a) A declaration that the Claimant was a contract Employee, having worked for more than 16 years in continuity.
- b) A declaration that termination was unlawful.
- c) An order directing the Respondent to pay the Claimant his salary from the date of termination to-date.
- d) The Respondent to pay to the Claimant: leave allowance of Kshs. 24,375; unpaid salary from July 2011 to January 2012 at Kshs. 77,763; 1 month salary in lieu of notice at Kshs. 11,109; and severance pay at Kshs. 52,767- total Kshs. 166,014.
- e) Any other suitable relief.
- f) Costs of the Suit.

4. He told the Court he started working for the Respondent as a Casual Employee on 10th November 2002. He was a Loader. He was issued a written contract dated 1st May 2005. Initially he worked without a written contract. He was at the beginning assigned to a site at Bamburi, where he maintained fences and grass. By 2011 he had become a Bobcat Operator. A Bobcat is a machine which scoops materials and loads them onto trucks. He became Bobcat Operator in 2006.

5. He returned from his annual leave on 26th June 2011. He found his Bobcat under repair. The Operations Manager directed the Claimant to join the loading team in the meantime. He declined because he did not have the safety equipment to work in garbage unit, and had been a Bobcat Operator.

6. He was alleged to have declined to work and was asked to explain himself by his Employer. He explained that he would not do unskilled work. He was not provided safety equipment.

7. He was advised to go to the store by the Human Resources Manager. He collected safety equipment and was assigned duty at the garbage unit. He worked there on the 28th, 29th, 30th June 2011. On 4th July 2011 he was advised he would be assigned to another Company to operate a Bobcat. He was sent to Multiple Company Limited. Normally he would be assigned to other companies, but the Respondent continued to pay his salary. He worked for Multiple for 6 months and 1 week, beginning 4th July 2011 to 7th January 2012. He was not paid his salary during the period. He was earning a monthly salary of Kshs. 11,109, house allowance of Kshs. 1,308 and performance allowance of Kshs. 1,076. It is not true that the Claimant absconded. The Respondent knew the Claimant was working at Multiple.

8. Cross-examined, the Claimant testified he was in casual employment prior to the year 2005. He signed contract in 2005. The contract provided that the Respondent had the sole discretion to assign duty, shift and place of work.

9. He objected to being assigned to do unskilled work. He was provided safety equipment and worked until 2nd July 2011. He moved on to Multiple on the instructions of the Respondent, working there for 6 months, 1 week.

10. He realized at the end of July 2011 that his salary was not paid. He went to ask for his salary from the Respondent on 9th January 2012. Between August 2011 and January 2012, he did not go to ask for the salary. He stated he did not return the uniform issued to him by the Respondent. He later conceded he returned the uniform, on 16th August 2011.

12. He seeks annual leave pay from 2003 to 2005 and from 2012. He applied for and was granted unpaid

leave in 2005. His employment before 2005 was also continuous. He also seeks salary from July 2011 to January 2012. He does not wish to pursue the claim for severance pay.

13. He stopped working at Multiple on 7th January 2012 after the job was completed. He reported back to the Respondent on 9th January 2012. It is not true that he was last seen at the Respondent's workplace on 1st July 2011.

14. Joash Otieno testified he is employed by the Respondent. He worked with the Claimant. The Claimant operated a forklift called Bobcat. He was redeployed to work at Multiple Company Limited. Joash did not have any record showing this redeployment. He did not have any record showing the Claimant was paid by the Respondent while at Multiple. He had nothing showing the Claimant returned to the Respondent. The Claimant said work at the Respondent was unsatisfactory. Joash did not know why the Claimant stopped working for the Respondent.

Respondent's Case

15. Koech told the Court he is Respondent's General Manager. The Claimant was employed by the Respondent on 1st May 2005, and left on 1st July 2011. He was not seconded to any other company. The Respondent did not second its staff. The Claimant left voluntarily. He returned to the Respondent's workplace on the 16th August 2011, surrendered the work uniform and left for good.

16. Cross-examined, Koech stated the Claimant just left. Otieno works with the Respondent. Koech did not know if Otieno would know about seconding of staff. The Respondent deals with garbage collection. The Claimant was a Cleaner. At the time of leaving, the Claimant was an Office Cleaner, not a Bobcat Operator. Koech testified he did not know about the contents of the documents exhibited in the name of Muloil Limited [Multiple Oil Limited]. The Claimant was not seconded to Muloil Limited.

17. Munene testified he is a Supervisor working for Multiple Oil Limited. He knows the Claimant. The Claimant attended a job interview with Multiple Oil Limited on 4th July 2011. He was employed as a Bobcat Operator. His name appears in the Wage records of Multiple Oil Limited, contained in Respondent's Bundle of Documents.

18. He vanished from Multiple Oil in January 2012. Munene came to know of the Claimant's desertion, when the Claimant returned the work apparels. He was not seconded to Multiple Oils by the Respondent.

19. The job vacancy at Multiple Oils, Munene testified, was advertised through word of mouth. The Claimant was assigned a Bobcat, and paid weekly by Multiple Oils. Some of the Wage records were handwritten, others printed. Munene hand-wrote some of the records when there was a problem with the Printer. All documents were genuine Multiple Oils employment records.

Submissions

20. The Claimant submits the Wage records showing he was employed and paid by Multiple Oils are valueless. His name was superimposed on the documents by hand. He was an Employee of the Respondent. The Respondent dismissed him without cause or notice contrary to the Employment Act 2007. He submits he is entitled to the prayers sought.

21. The Respondent submits the evidence of Munene is clear that the Claimant was employed by Multiple Oils. The Claimant was employed after he passed an interview. This was after he abandoned his job at the Respondent. He was not seconded. Multiple Oils employed him, and remitted his statutory deductions. The Claim against the Respondent is frivolous and ought to be dismissed with costs to the Respondent.

The Court Finds:-

22. The Claimant was initially employed by the Respondent as a Casual Employee on 10th November

2002. He was a Cleaner. He was eventually absorbed into regular employment and given a written contract dated 1st May 2005. His job title was given as 'Loader.' It is not disputed that he later worked as a Bobcat Machine Operator.

23. His problems with the Respondent appear to have started when he was asked by the Chief Operations Officer to join the loading team in the garbage unit. The Claimant's Bobcat had broken down and was undergoing repair.

24. From the Claimant's evidence, he refused to obey the lawful instructions of his Employer, because he considered working in the garbage unit was an unskilled task. He testified also that he had not been provided with safety equipment.

25. His evidence indicates he was later on, provided with safety equipment, and worked in the garbage unit on 28th, 29th and 30th of June 2011. He was instructed by the General Manager after this to work for Multiple Oils. He remained an Employee of the Respondent. He worked for Multiple Oils from 4th July 2011 to 7th January 2012. He was not paid his salary for the 6 months worked. He wishes the Court to order he is paid salaries for July 2011 to January 2012, and all arrears of salary to-date.

26. The Court is not convinced that the Claimant was instructed by the Respondent to work for Multiple Oils. The evidence of Munene which the Court is persuaded is truthful is that the Claimant was employed by Multiple Oils upon interviewing for the job on 4th July 2011.

27. This is around the same date the Claimant left the Respondent. He was unhappy at the Respondent, having been asked to work in the garbage unit, a unit he considered not to match his skills. He had the reason, sufficient grievance to compel him, to move out

28. His evidence on the return of work uniform was inconsistent. At first he told the Court he did not return his uniform to the Respondent. He later conceded he returned the uniform on 16th August 2011. This would confirm he considered the Respondent as a former Employer, him having secured employment with Multiple Oils.

29. The evidence of the Claimant's Witness, Joash, did little to support the Claim. The Witness did not have anything showing the Claimant was seconded to Multiple Oils by the Respondent. He did not know if the Claimant was paid his salary by the Respondent after July 2011. He did not know why the Claimant stopped working for the Respondent.

30. The Court formed the view that the Claimant and the Respondent ended their relationship in July 2011, and both Parties understood this; there was not going to be a mutuality of rights and duties after 4th July 2011. In fact, the Claimant wrote to the Respondent on 1st August 2011, stating that the Bobcat he operated had broken down and was beyond repair. He requested for his service dues, and a letter of recommendation. It could be that the Directors at the Respondent interceded with the Directors at Multiple Oils as suggested by the Claimant, to ease the Claimant's passage to Multiple Oils, but this cannot be taken as seconding of an Employee, where the intercessor continues to shoulder employment obligations. The Claimant would not be asking for service dues and a letter of recommendation if he remained an Employee of the Respondent. He did not demand for any salary from the Respondent after he left in July 2011, until January 2012.

31. The Claim for arrears of salary from July 2011 to-date has no merit and is declined.

32. He claims leave allowance. It is not clear if this is meant to be annual leave travelling allowance or annual leave pay. There are records in the form of leave schedule, leave forms and leave passes, showing the Claimant utilized his annual leave days. He did not explain away these records. His prayer for leave allowance, or annual leave pay is rejected.

33. The Court does not see what purpose the declaratory orders sought, would serve if allowed. There is

no doubt the Claimant worked for the Respondent as Casual Employee from 2002 to 2005. From 2005 to 2011, he was on contract. He went on annual leave, and a declaration that he was entitled to annual leave, would be meaningless.

34. The Court is of the view that given the circumstances of the Claimant's moveover to Multiple Oils, notice pay is not awardable. The Claimant was aware about the broken down Bobcat, and was unable to adapt to working in the garbage unit. He states the Directors of the Respondent assisted him in securing a Bobcat job with Multiple Oils. Both Parties were aware about termination, and grant of notice pay would not be reasonable either way.

35. Having worked from 10th November 2002 to July 2012, it can be safely concluded the Claimant did 9 complete years of service. These years ought to have been recognized by the Respondent regardless of the manner of the Claimant's departure. He prays for what he terms as severance pay. The Respondent does not agree there was a redundancy situation. In the view of the Court, the unavailability of the Bobcat Machine meant there was no more suitable role for the Claimant, which meant the job peculiar to him, was rendered redundant. He had the incentive to leave, as he felt he could not do unskilled work. The Respondent on its part fell short of dismissing the Claimant for his refusal to work in the garbage unit. Termination was based on a mixture of redundancy elements, dismissal on disciplinary ground, and mutual separation. Whatever the case, nothing disentitled the Claimant from having his years recognized. ***The Court grants him service pay at 15 days' salary for each of the 9 complete years of service, based on the rate of 11,109 per month, amounting to Kshs. 57,681.***

36. No order on the costs.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant service pay at Kshs. 57,681, with no order on the costs.

Dated and delivered at Mombasa this 9th day of December, 2016.

James Rika

Judge