



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 305 OF 2015

BETWEEN

- 1. JOHN MUTISYA**
- 2. SAID MOHAMED GOWE**
- 3. BUDZO NASORO MBWAGIZO..... CLAIMANTS**

VERSUS

RAPID KATE SERVICES LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimants

Martin Tindi & Company Advocates for the Respondent

JUDGMENT

1. The Claimants filed their Statement of Claim, on the 8th of May 2015. They assert they were employed by the Respondent as Loaders. 1st Claimant was employed on casual basis in the year 1996, and was promoted to assist in overseeing Casual Employees in the year 2000. The 2nd Claimant was employed on similar terms with the 1st Claimant, and promoted to a similar position as the 1st Claimant, in 2002. The 3rd Claimant was employed on similar terms as his Co-Claimants and promoted in 2007. All the Claimants assert their contracts were terminated by the Respondent, on the 22nd March 2014. They earned Kshs. 800 per day, as of the date of termination. The Respondent alleged Claimants stole sackers. They were not given notice, and were not heard. They claim from the Respondent:-

1st Claimant

- i. 1 month salary in lieu of notice at Kshs. 20,800

- ii. Annual leave pay for 14 years at Kshs. 235,200
 - iii. 15 days' salary for every completed year of service at Kshs. 168,000.
 - iv. 12 months' salary in compensation for unfair termination at Kshs. 249, 600
- Sub-totalKshs. 673,600

2nd Claimant

- i. 1 month salary in lieu of notice at Kshs. 20,800
 - ii. Annual leave pay for 19 years at Kshs. 319,200
 - iii. Service pay based on 15 days' salary for every year completed in service at Kshs. 228,000.
 - iv. 12 months' salary in compensation for unfair termination at Kshs. 249,600
- Sub-total..... Kshs. 817,600

3rd Claimant

- i. 1 month salary in lieu of notice at Kshs. 20,800
 - ii. Annual leave pay for 15 years at Kshs. 252,000
 - iii. 15 days' salary for every completed year of service at Kshs. 180,000
 - iv. 12 months' salary in compensation for unfair termination at Kshs. 249,600
- Sub-total ...Kshs. 702,400

Grand total..... Kshs. 1,491,200

The Grand Total, in the calculation of the Court, should read Kshs. 2,193,600. The Claimants pray also that termination is declared unfair and wrongful; they are issued Certificates of Service; and are paid costs and interest

2. The Respondent filed its Statement of Response on 18th June 2015. It is a general Statement denying all the averments in the Claim, except the descriptive parts, and except that a demand letter issued before the Claim was filed. The Respondent also adopts the Witness Statements filed by Salim Abdallah and Kassim Mzee on the 16th October 2015. The Witnesses explain that the Claimants were Casual Employees engaged by Mzee to work for the Respondent.

3. Parties agreed to have the Claim considered and determined on the strength of their respective records. They confirmed the filing of their Closing Submissions, at the last mention in Court, on the 11th July 2016.

Claimants' Position

4. The Claimants state they reported for duty as usual, on 22nd March 2014. They worked for a few hours. They were informed by the Respondent's Director Mr. Kamlesh, that their employment with the Respondent had ceased. They were alleged to have stolen sackers.

5. They were not heard. They were not given notice before termination. They did not go on annual leave

and were not paid anything in lieu of annual leave. Although recruited as Casual Employees, they submit they qualified for conversion into regular terms, under Section 37 of the Employment Act 2007. They had worked for a long period of time, and desired to go on working until retired.

6. Relying on this Court's decision in *Francis N. Bwire & 12 others v. Krystalline Salt Limited [2014] e-KLR*, the Claimants urge the Court to find that by dint of Section 37, they were not Casual Employees, but Employees whose contracts were deemed converted into term contracts to be paid monthly wages. The Claimants reject the Witness Statements filed by the Respondent, emphasizing they worked, were regulated, controlled, and paid directly by the Respondent.

7. Notice pay is merited under Section 36 of the Employment Act 2007. The Claimants were denied annual leave entitlement because they were thought by their Employer, to be Casual Employees; they merit annual leave pay under Act, as they were regular Employees. The Respondent did not give records contradicting the Claimants on annual leave, which is a term of employment. Unless an Employer produces such record, the Court adopts the evidence adduced by the Employee as concluded in *Bukachi v. Ready Consultancy Limited [2012] e-KLR*. There was no evidence of Claimants' registration under the N.S.S.F. There was no evidence of contributions made on their account to this Fund. They merit service pay under Section 35 of the Employment Act 2007.

Respondent's Position

8. The Respondent denies to have employed the Claimants. It relies on 2 Witness Statements, one filed by Salim Abdallah and the other by Kassim Mzee.

9. Salim has been Respondent's Senior Operations Coordinator since 2006. He organized loading and off-loading of Respondent's goods, and oversaw payment of casual labour. He knew the Claimants as Casual Labourers, not regular Staff. They were contracted through their gang leader, who was paid by the Respondent, and paid the Claimants their dues, upon completion of the assigned tasks.

10. Kassim Mzee states he was contracted by the Respondent to provide casual labour. He knew the Claimants as some of the Casual Labourers he had engaged for the Respondent. They would wait at Respondent's gate, to be offered casual tasks, whenever these were available. Mzee concludes, " *I had not employed them, and neither were they employed by the Rapid Kate Services...*"

11. The Respondent submits it did not engage the Claimants, but only engages 'gang leaders.' The Claimants were employed by the 'gang leaders' and paid by the 'gang leaders' at the end of the working day. Section 37 of the Act does not apply to them. A Casual Employee's conversion into regular terms under Section 37 happens only where the Employee has worked for a particular Employer; and the period of work is continuous and in aggregate of more than a month. The Claimants have not established their case.

The Court Finds:-

12. At the root of this dispute are the following questions: whether the Claimants were employed at all by the Respondent; whether they were Casual or Regular Employees by whosoever employed; whether if employed by the Respondent, their contracts were unfairly terminated; and whether they merit terminal dues and compensation as claimed.

13. **Mzee Factor.** Mzee is described by the Respondent as a 'gang leader' who provided casual labour to the Respondent. The term 'gang leader' is archaic, and not consonant with modern Kenyan employment and labour relations lexicon. It is hardly used by Kenyan Employers and Employees outside the coastal strip. It is not known to the Industrial Relations Charter or our Employment and Labour Relations Laws. Employers and Employees must move away from archaic terms such as 'gang leaders' 'legmen' and 'straw bosses,' and adopt terms of usage attuned to modern employment and labour relations law. The term 'gang' was initially understood as a '*group of good friends with identifiable leadership and organization.*' (see wikipedia).

14. The conception of the term has evolved, and it can no longer be thought of as a group of friends or ‘a group of workers who do work together.’ The popular understanding of the term ‘gang’ is ‘a group of criminals who work together to commit crimes.’ A less sinister ‘gang’ is, ‘a group of people, especially young people who go around together often, and deliberately cause trouble.’

15. The terms ‘gang leader’ and ‘gang contracts’ may be common features in Countries such as Turkey, but not in Kenya. The world of work is a decent world, so much so, that the International Labour Organization has spent considerable resources, advancing the decent work agenda. Use of the term ‘gang leader’ or ‘gang contract’ considering the criminal conceptualization of the term, does not sit well with the decent work agenda, and Employers in Mombasa and its environs should be encouraged to abandon the use of the term. Workers should not be described as ‘gang’ and their Leaders or Intercissors, as ‘gang leaders’.

16. The ‘gang contract’ between Mzee and the Respondent was made in the year 2014. The 3 Claimants have worked for the Respondent from the years 1996, 2002, and 2000 respectively. They served long before the ‘gang contract’. If the contract between the Respondent and Mzee is at all valid, it would obviously not apply to the Claimants from the past decades.

17. There was no record from the Respondent, showing that indeed the Claimants were some of the Employees who worked for the Respondent, through the ‘gang contracts.’ Not even from the year 2014. Mzee should have been in a position to provide documents showing the Claimants were his Employees or at the very least, associated with him. He startled the Court through his statement that ‘*I had not employed them, neither were they employed by Rapid Kate.*’ Who then employed the Claimants?

18. The Claimants state, and the Court has no reason to disbelieve them, that they were employed, regulated, controlled and remunerated by the Respondent. They were even promoted to supervisory roles, by the Respondent. They did not need ‘gang contracts’ after working for periods of 14, 19 and 15 years respectively. They worked in Respondent’s premises, using Respondent’s tools of trade.

19. If given a contract to engage casual labour, as stated in his Witness Statement, Mzee would have been acting as an Employment Agent. He did provide the Court with his certificate of registration under Section 55 of the Labour Institutions Act No. 12 of 2007. This law does allow persons to provide manpower services to an Employer, without registration. Mzee did not avail to the Court any document showing he operated as an Employment Agent. It is not proper to engage in illegal activities under the guise of independent contracting, and blur an employer-employee relationship through introduction of belated triangular relationships.

20. The Mzee factor is rejected. His role was to obfuscate. The Court is satisfied the Claimants were employed by Rapid Kate Services for the years stated in their Statement of Claim. They were regulated, controlled, and remunerated by the Respondent. They worked for long periods, 14, 19 and 15 years respectively. They worked in aggregate for continuous periods far in excess of the regular employment qualifying period, under Section 37 of the Employment Act. They were entitled to regular terms of employment. The Court has the discretion under Section 37 [4] of the Employment Act, to declare the Claimants were employed on terms and conditions of service consistent with the Employment Act. ***It is declared the Claimants were regular Employees of the Respondent.***

21. ***Fair Termination.*** They would be entitled to fair termination under Section 41, 43, 45 and 47 of the Employment Act. They stated they were alleged by the Respondent, to have stolen sackers. They denied they did so. The Respondent alludes to the reason for termination in its Closing Submissions. It is submitted for the Respondent that, ‘‘ *unfair termination only exists if the reason for termination is, not among those in Section 44 of the Employment Act, and clearly, theft is a valid reason for summary dismissal...*’’ Surreptitiously, the Respondent proffers theft, as the justification for summary dismissal of the Claimants. The Respondent is quick however, to state it did not terminate the Claimants’ contracts unfairly or at all, in keeping with the rest of its Response, to wit: it did not employ the Claimants in the first place.

22. Allusion by the Respondent to theft, agrees with statement by the Claimants, that they were dismissed on the allegation of stealing sackers. The Court is satisfied this allegation was not substantiated by the Respondent under Section 43 and 45 of the Employment Act. The Claimants were not heard on this act of gross misconduct. Termination was unfair for want of validity of reason and procedural fairness. ***They are granted the equivalent of 8 months' salary in compensation for unfair termination at Kshs. 166,400 each.***

23. ***Notice pay.*** This prayer is merited under Section 36 of the Employment Act. ***Notice pay is granted to the Claimants at Kshs. 20,800 each, representing one month salary in lieu of notice.***

24. The Court concurs with the holding in the ***Bukachi*** Authority cited by the Claimants. The Court has an obligation to uphold the evidence of an Employee in event there is dispute on the terms of the contract, unless the Employer can give clear evidence disproving the position advanced by the Employee. This is the law under Section 10[7] of the Employment Act.

25. ***Annual leave.*** The Respondent failed to let the Claimants utilize their annual leave days, or buy these days from the Claimants, based on the Respondent's position that it did not employ the Claimants, or the second position that the Claimants were in any case in casual employment. Having rejected these alternative positions, and there being no records provided by the Respondent on the Claimants' annual leave, the Court has no reason to deny the prayer for annual leave. ***They are granted annual leave pay as particularized in their Claim.***

26. ***Service pay.*** The same reasoning applies to the prayer for service pay. There was no evidence that the Claimants were subscribed to the N.S.S.F or any other Social Security Plan, as contemplated under Section 35 of the Employment Act. They left employment, after years of toil, without social security benefits. ***They are allowed the prayer for service pay, based on 15 days' salary for each completed year of service.***

27. ***Certificate of Service.*** It is the obligation of the Employer to supply an Employee who has served for a period not less than 4 weeks, with a Certificate of Service. ***The Respondent shall release to the Claimants, their Certificates of Service forthwith under Section 51 of the Employment Act.***

28. ***Costs.*** These are in the discretion of the Court to allow or disallow, under Section 12 [4] of the Employment and Labour Relations Court Act. Employment contracts are not commercial contracts and are relational. Employees who lose their jobs can hardly be expected to finance litigation, and reciprocally, should not always expect their Employers to meet their costs when such Employees are successful in their employment claims. Grant of costs should be discouraged, if the relational nature of the employment contract is to be sustained. ***Parties shall meet their costs of this dispute.***

IN SUM, IT IS ORDERED:-

a) ***It is declared the Claimants were regular Employees of the Respondent.***

b) ***The Respondent shall within 30 days of delivery of this Judgment pay-***

1st Claimant

- ***Equivalent of 8 months' gross salary in compensation at Kshs. 166,400***
- ***1 month salary in lieu of notice at Kshs. 20,800***
- ***Annual leave pay at 21 days annually for 14 years at Kshs. 235,200***
- ***Service pay at 15 days' salary for every completed year of service at Kshs. 168,000***

Total... Kshs. 590,400

2nd Claimant

- *Equivalent of 8 months' gross salary in compensation at Kshs. 166,400*
- *1 month salary in lieu of notice at Kshs. 20,800*
- *Annual leave pay at 21 days annually for 19 years at Kshs. 319,200*
- *Service pay at 15 days' salary for every completed year of service at Kshs. 228,000*

Total.....Kshs. 734,400

3rd Claimant

- *Equivalent of 8 months' salary in compensation for unfair termination at Kshs. 166,400.*
- *1 month salary in lieu of notice at Kshs. 20,800.*
- *Annual leave pay at 21 days annually for 15 years at Kshs. 252,000.*
- *Service pay at 15 days' salary for every completed year of service at Kshs. 180,000*

Total.....Kshs. 619,200

In total the Respondent shall pay to the Claimants the sum of Kshs. 1,944,000

c) Certificates of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment, payable in event the whole amount is not paid within the given 30 days.

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

James Rika

Judge