



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO. 462 OF 2010

JOWASI AMBUNDO KASINA.....1ST CLAIMANT
FELIX KIMANZI.....2ND CLAIMANT
MARTIN NZEI.....3RD CLAIMANT
MATHEW MUTISO MBITI.....4TH CLAIMANT
PATRICK MURIUKI NJUE.....5TH CLAIMANT
DAVID OCHIENG ONONO.....6TH CLAIMANT

VERSUS

KENAFRIC INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

Namada & Co. Advocates for the Claimants

FKE for the Respondents

1. The issue in dispute is the payment of the claimant's terminal benefits comprising;
 - a. Statutory service for periods worked;
 - b. Payment in lieu of untaken leave;
 - c. Payment of house allowance;
 - d. Notice pay;
 - e. Payment of compensation for wrongful loss of employment; and
 - f. Overtime worked.
2. The claim was filed in April 2010 and the defence filed on 8th July 2010 and a Supplementary Defence

on dated 3rd May 2011. The parties were heard by different courts and thus at the close of the case, it was agreed that written submissions be filed.

3. It is the claimant's case that they were all employed by the respondent company on diverse dates;

1st claimant was employed on the 6th January 1998;

2nd claimant was employed on the 16th June 1997;

3rd claimant was employed on the 28th October 1997;

4th claimant was employed on the 17th January 1998;

5th claimant was employed on the 17th January 1997; and

6th claimant was employed on the 16th March 1998.

4. The claimants were also terminated on diverse dates;

1st claimant on 28th November 2000;

2nd claimant on 20th August 2001;

3rd claimant on 20th October 2000;

4th claimant on 22nd October 2000;

5th claimant on 28th November 2000; and

6th claimant on 2nd November 2001.

5. The claimants were terminated without reason and their terminal dues were not paid. During the course of their employment, the claimants were not paid their dully worked for and earned monies with regard to house allowance, overtime and pay in lieu of untaken leave. Upon their termination, there was no notice or pay in lieu and there was no compensation for the loss of employment. The claimants state that due to their termination they were exposed to great damage in terms of loss of their earned dues and entitlements.

6. The claims are outlined thus;

1st claimant Jowasi Ambundo Kasina

a. Statutory service for 3 years all at kshs.7,394.40

b. Untaken leave for 3 years at kshs.12,324.00

c. Overtime for 140 weeks

a. Day shift all at aKshs.24,885.00

b. Weekends shift all at Kshs. 17,972.50

c. Night shift all at Kshs. 48,510.00

d. Weekends all at Kshs.36,624.00

d. House allowance at kshs.21,576.00

e. Notice pay at kshs.4,108.00

f. Compensation for loss of employment at kshs.49,296.00

Total due kshs.222, 680.00

2nd claimant Felix Kimanzi Kangwe total claim is for Kshs.282, 503.70;

3rd claimant Martin Mweu Nzei total claim is for kshs.179, 602.50;

4th claimant Mathew Mutiso Mbiti total claim is for Kshs.182, 830.20;

5th claimant Patrick Muriuki Njue total claim is for Kshs.192, 510.30; and

6th claimant David Ochieng Onono total claim is for Kshs.228, 870.50.

7. All the claimants seek dues on similar items and state that their cases were brought to the attention of the respondent, labour officers were informed but the respondent remain adamant and has refused to pay. The claimants are seeking Kshs.1, 288,997.20 together with costs herein.

8. The Respondent's case is that the claimants were employed by the respondent on piece work and were paid on a daily basis and all owing dues were paid at the end of week. All terminal dues were paid and nothing owes and termination of work was within the law. All unpaid dues have since been deposited with the Nairobi Labour office since the claimants have refused to collect the same. The Labour officer arbitrated over the matter and the claimants have refused to collect deposited amounts. There is nothing due or owing with regard to terminal dues on special damages.

9. In the supplementary defence, the respondent states that the claimants were employed intermittently after being employed on piece work and paid on daily basis. The claimants were terminated for reasons of absenteeism, desertion and insubordination. A trade dispute was reported to the minister in April 2002 and after deliberations the respondent agreed to pay ex-gratia payments of kshs.3000.00 to each claimant. The Minister conducted an investigation and made findings that termination was due to absenteeism and insubordination; all overtime had been paid and there was no prove that termination was due to the claimants participating in trade union activities. Other findings were that the respondent had complied with the law in terminating the claimants and in paying their dues.

10. The respondent therefore submitted that the claimants are not entitled to notice pay and the applicable law was followed vide section 14 and 5(i) of the Employment Act, Cap 226 (repealed). The terminal dues outlined for each claimant is not justified and has no legal basis and the dispute has been concluded by the Minister and the claim herein should be dismissed.

Submissions

11. In their written submissions the claimants stated that it is admitted they were employees of the respondent and besides each one of them working for the respondent for periods from 3 to 5 years continuously, they were treated as casual. Section 37 of the Employment Act, 2007 automatically converted the employment to full time with benefits. The claimants are owed leave, service and overtime payments. Under section 10(7) and 74 of the Employment Act, the employer has the duty to keep work records and there is no proof that the claims set out have been settled.

12. The claimants also submitted that despite their working continuously, no NSSF or provident fund

payments were made and are thus entitled to severance pay. They never went on leave and were never compensated or their overtime hours paid for. The wages paid were below the minimum, no house allowances were paid and thus entitled to these claims. The terminations were unfair as there were no reasons or notice for the same and should be paid compensation as a result.

13. The respondent on their part submitted that the claimants were casual workers employed intermittently on diverse dates for piece work all with a day wage paid weekly. The issue in dispute is that the claimants are seeking terminal dues but these do not arise as there is no justification or statutory basis for such claims.

14. The respondent also submitted that terminations were effected in 2000 and 2001 and the law applicable then with regard to terminations does not entitle them to the claims as outlined herein. The law then [2000 to 2001] is Employment Act Cap 226, now repealed and not Employment Act, 2007. The claimant offends clear provisions of the law as set out in **Duncan Otieno Waga versus Attorney General, high Court of Kenya Nairobi, Petition No.94 of 2011**, on the grounds that no law can apply retrospectively. The applicable law in this case the repealed Employment Act Cap 226, did not provide for the provision of reasons before termination and only had provisions for notice or payment in lieu of notice. In this case, the conciliator appointment by the Minister made a recommendation that the claimants should be paid one month's salary in lieu of notice and such payments have since been deposited with the Minister.

15. The respondent also submitted that the claims for untaken leave and overtime do not arise as the claimants had a daily wage on their piece work contracts that lapsed at the end of each day as provided under Section 14(5) (i) of the Employment Act Cap 226, now repealed. With regard to the claim for house allowance, the General Wage Orders provides that the daily wage was inclusive of house allowance and based on the claimants employment, such allowances were not separated and not due. All the claimants were paid their one month's notice and to claim such herein is double payment. The suit should be dismissed.

Whether the claim is fatally defective

What law is applicable herein; and

What remedies are available.

16. The suit herein commenced before the Magistrate's Court, Milimani CMCC 403 of 2005 and the suit was transferred to this court when the Labour Laws were passed in Parliament in 2007. On 12th February 2010, the suit before the lower court was thus withdrawn. Subsequently, the claimant filed application to file suit out of time was granted by consent on 21st November 2011.

17. The question of the suit being fatally defective with regard to the 2nd to 6th claimants, I note the memorandum of claim filed in April 2010 is supported by the Verifying Affidavit of the 1st claimant Jowasi Ambundo Kasina and at paragraph (1) on his own behalf and on behalf of the other claimant. The submission by the respondent that the claim by the 2nd to the 6th claimants is fatally defective for the purpose that they have no Verifying Affidavit lacks basis. The merits of the case shall therefore be assessed.

18. In the claim the claimants admit that they were employed by the respondent on diverse dates. They were also terminated on diverse dates thus;

1st claimant on 28th November 2000;

2nd claimant on 20th August 2001;

3rd claimant on 20th October 2000;

4th claimant on 22nd October 2000;

5th claimant on 28th November 2000; and

6th claimant on 2nd November 2001.

19. The last claimant to be terminated is the 6th, on the 2nd of November 2001. All the other claimants were terminated before this date. As of 6th November 2001, the law in force with regard to labour and employment cases on termination, terminal dues or benefits and workplace claims is the Employment Act Cap 226, now repealed. This is so as the Employment Act, 2007 only commenced on 2nd June 2008. The consent to extend time to transfer suit from the lower court to this court on 21st November 2011, though not challenged on its legality based on the law governing filing of suits before this court, the transfer of the suit does not in itself change the applicable law with regard to the nature of claim and when cause of action arose at 6th November 2001. Where the transfer was made on 21st November 2011, the cause of action only arose on diverse dates - 1st claimant on 28th November 2000; 2nd claimant on 20th August 2001; 3rd claimant on 20th October 2000; 4th claimant on 22nd October 2000; 5th claimant on 28th November 2000; and 6th claimant on 2nd November 2001.

20. The termination dates are here relevant, extension of time notwithstanding. I therefore find that the reference, application or claims herein are well removed from the Employment Act, 2007 and only based on the repealed law, Employment Act Cap 226. To claim under Employment Act, 2007 is a misconception.

21. The claim herein is defended. The respondent filed their defence and a supplementary defence. The claims that the claimants were terminated without payment of terminal dues was challenged on the grounds that they were employed on piece work, they were issued with piece work contracts and that their work was remunerated with a daily wage that was paid weekly. There is no response to these defences in the evidence, submissions or records submitted by the claimants. The respondents have attached to the defence, Appendix 1, the *piece work contract of service* which contract detail the terms and conditions of employment issued to the claimants. This evidence is not challenged or controverted in any way.

22. Piece work contracts are regulated under the Employment Act Cap 226. Such contracts end each day and the payments due to an employee at each end of day as paid are all inclusive and cannot attract other work benefits outside the piece work contract as agreed by the parties. To claim overtime, house allowance, leave and underpayments or such benefits due to a full time employee is a right not due to an employee defined under the law and one issued with a piece work contract. I make reference to sections 2 that define 'piece work contract', sections 5(1) of the Employment Act Cap 226 thus;

"Piece work" means any work the pay for which is estimated by the amount of work performed irrespective of the time occupied in its performance;
...

When wages due.

5. (1) *In the case of a contract entered into under which entitled -*

(a) when a task has not been completed, at the option of his employer to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on the completion of the task;

*(b) In the case of **piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed** during the month or on the completion of the work. **Whichever date is the earlier.***

(2) Subject to subsection (1), the times when wages shall be deemed to be due shall be as follows -

(a) In the case of a casual employee, at the end of the day;

(b) In the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

(c) In the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

[Emphasis added]

23. Under the applicable law and the nature of claims being untaken leave and overtime, house allowance and underpayment do not arise. These claims have no legal basis.

24. The claimants are also seeking payment of service payable for each completed year. On the court finding that there is no challenge that the claimants were on piece work contract, such contract where paid for in full do not attack the benefit of service pay that is exclusively exempted to be a benefit for contracts other than that of piece work. This is not one such case. Service pay does not arise.

25. The claim for compensation for loss of employment though outlined under paragraph 5 of the claim, there are no submissions or evidence on the record as to the basis of such a claim. A 'compensation' in its nature in employment relations is a term used to refer the return, reimbursement, reparation or reward given to an employee removed from his work and thus unable to earn his salary or work benefit and by a 'compensation' such an employee is returned to his position as if he had never left his employment or lost any benefit. Such a 'return' though not possible in time, the 'compensation' awarded takes into account the pecuniary loss or damage that has arisen to the employee removed from his employment. On the other hand, a claim for compensation for loss of work, contemplates an employee on full time employment and before the date of lawful termination, the employer removes such an employee from such employment. On a contract for piece work, compensation for loss of work only applies for the time not covered under the piece work. Where work is allocated at the start of day and mid-way an employee is stopped mid-way and paid half or a portion of what was due at end of day, such loss can be paid by an award of the other half or the unpaid portion so as to dully compensate such an employee. For the court to award under such a claim, the claimant must therefore demonstrate the loss incurred not in general terms but the specific payment made or not made for work done or the portion paid the unpaid portion and by setting the basis of such a claim, the court has to assess and award. To thus generally lay a claim for compensation for loss of work and demand 12 months' pay, this I find to be far-fetched and without basis.

26. Dues with regard to notice pay have been admitted. These have since been deposited with the Minister for Labour at the Labour Office, Nairobi. Such notification has since been given to the claimants. This record of notification is attached to the defence. These monies should be collected as claimants have been directed.

In the penultimate, the claims herein must fail and the suit dismissed.

The claimants have a valid order to act as paupers. No orders as to costs.

Delivered in open Court dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

.....

.....