



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 864 OF 2011

1. PETERLIS JUMA

2. RONALD OSIEMO OGEA.....CLAIMANTS

VERSUS

SHREE SAI INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. The Claimants filed this suit against the Respondent on 6th June 2011. In their claim, they averred that they were employed as supervisor and general labourer respectively. The 1st Claimant averred that he was employed from 17th September 1988 till 8th February 2011 and the 2nd Respondent averred that he was employed from 17th January 2011 till 8th February 2011 when both the Claimants were dismissed unlawfully on account of redundancy. The Claimants sought payment of salary from the date of lockout and 12 months compensation as well as terminal benefits of one month pay in lieu of notice, accrued leave, salary underpayment, housing allowance, severance pay all totaling to Kshs. 1,202,438/- and costs of the suit.

2. The Respondent filed a Statement of Response on 24th June 2011. In it, the Respondent denied the 1st Respondent was employed as a supervisor or that the 2nd Respondent was its employee as a general labourer. It averred that the 1st Claimant worked on piecework basis and would charge a certain amount for loading and offloading bags at the Respondent's stores. It was averred that the 1st Claimant did the same at other companies in the vicinity and thus did not work exclusively for the Respondent. It was further averred that the 2nd Claimant was engaged by the 1st Claimant among others to do the loading and offloading and thus was not its employee. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimants testified on 30th June 2012 and an application to reopen the proceedings and the Court rendered a ruling on 31st July 2014. The Ruling bears some errata which was corrected by Court in terms of Rule 33 of the Industrial Court (Procedure) Rules 2010. For some reason the file went off the radar until the mention in May 2015. The judgment date was set for today 11th June 2015.

4. The 1st Claimant testified that he was employed by the Respondent on 17th September 1998 and was paid at the rate of Kshs. 275/- per day and payment was made weekly. The 1st Claimant testified that on 8th February 2011 he was dismissed and at the time was earning Kshs. 9,000/- monthly though he did not have a contract or letter of appointment. He referred to his claim form under the Workmen's

Compensation Act on account of an injury he suffered while working for the Respondent in November 1996. He recalled the incident on 8th February 2011 when he reported to work and testified that a customer came and wanted to buy almonds. He testified that there were 3 boxes of the almonds that had been in the store and two of the boxes had been sent to Kisumu and one was left in the store. He stated that he was assaulted by his boss after he informed the boss that the almonds had been sent to Kisumu. He testified that he was asked to wait outside and he was not called back in. He testified that he reported the assault to the police under OB 84/8/2/2011 and was issued with a P3 form. He thus sought notice pay, payment of arrears and also payment of his severance pay. He also sought compensation and costs.

5. The 2nd Claimant testified that he was employed on 17th February 2007 and at the time earned Kshs. 250/- per day but payment was fortnightly. He testified that he was accused of stealing *padam* (almonds). He testified that 3 boxes of almonds were brought and 2 sent to Kisumu. He testified that the boss knew where he had sent the almonds and yet he claimed they were stolen. He testified he was sent out and he left the 1st Claimant speaking with the boss and he saw the 1st Claimant being assaulted. He stated that he was not employed by the 1st Claimant and that the 1st Claimant had no company. He testified that he was paid by Hitesh Patel. He testified that his ID and that of the 1st Claimant were returned after they reported the matter to the Industrial Area police station. He claimed he was not given notice or paid house allowance he thus sought the help of the Court to recover from the Respondent.

6. The Claimants filed their submissions on 14th July 2014 and in them submitted that the Respondent had admitted a document which demonstrated that the Claimants were working for it. The Claimants submitted that they were terminated from their employment unfairly without adherence to Section 41 of the Employment Act and thus they were entitled to the relief sought. The Claimants submitted that the Respondent placed emphasis on the assertion that the 1st Claimant was on piece rate/contract work with the 2nd Claimant. The Claimants relied on the case of **Tom Ndadema & Another v Club Click Industrial Court Cause No. 1591 of 2010** where Rika J. held that no hearing was shown to have taken place as Section 41 and 45 of the Act demand.

7. The Claimants were from their accounts employees of the Respondent. It was not feasible for a contract worker to be employed by the Respondent and then subcontract another to work for him. If the 1st Claimant was a supervisor it did not mean that the people he supervised were his employees. The 2nd Claimant testified that he was paid by Hitesh Patel and one wonders how the Respondent's director would pay an employee of the 1st Claimant.

8. The Claimants were dismissed for alleged theft of *padam* – almonds. Both Claimants testified that the almonds had been sent by Hitesh to Kisumu and he knew the consignee of the goods he was alleging were stolen. No evidence of criminal nature was led against the Claimants and the allegations remained just that.

9. The Claimants sought payment of the difference between the wages and the statutory minimum on wages. The Claimants failed to prove that they were paid less than the statutory minimum. In any event none of them exhibited a request to the Respondent seeking payment of the proper dues. The Claimants thus failed to prove they were underpaid or even that they did not receive a consolidated salary. In the termination, the provisions of Section 41 were overlooked. Section 41 provides as follows:-

41. (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

10. The Respondent was duty bound to lay the accusations against the Claimants and hear their response in the manner prescribed by law. Failure to do so rendered their dismissal unlawful and unfair in the circumstances. The Claimants did not prove their salary underpayment claims as they did not exhibit any proof of payment. The salary they each earned at the time of termination was not below statutory minimum. In the final analysis I enter judgment for the Claimants against the Respondent as follows.

- a. The 1st Claimant Peterlis Juma Anyonga Kshs. 9,000/- as notice, Kshs. 108,900/- as compensation for unlawful dismissal
- b. The 2nd Claimant Ronald Osiemo Ogega Kshs. 7,500/- as notice and Kshs. 90,000 as compensation for unlawful dismissal
- c. The Claimants to each receive a Certificate of Service
- d. Respondent to pay costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of July 2015

Nzioki wa Makau

JUDGE