



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 327 OF 2012

SEBASTIAN GWANDA OGOT & 51 OTHERS.....CLAIMANTS

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The 52 Claimants filed this suit against the Respondent on 29th February 2012. In their claim, they averred that they were employed by the Respondent on contractual basis in or related to general transmission when termination of their services was done on diverse dates in the years 2010 and 2011. The Claimants averred that the Respondent unfairly and unlawfully terminated their services without issuing a termination notice, failing to render any housing allowance payments. They thus sought one month salary in lieu of notice for the 52 Claimants Kshs. 637,728/-, accumulated leave 2,556,244, house allowance Kshs. 5,329,628/- service gratuity Kshs. 1,494,678/- and damages for the wrongful termination. The Claimants averred that the termination of 19 of the Claimants in November 2010 was without notice and the dismissal of the remaining 33 Claimants through termination notices of 28th July 2011 failed to give any explanations. The Claimants averred that they were not issued with certificates of service.

2. The Respondent filed its Memorandum of Defence on 17th October 2012. In its defence, the Respondent averred that the 52 Claimants were casuals who were employed by the Respondent in energy transmission division on a daily basis to carry out the duties of line patrol, trace maintenance, stringing and assisting technical staff to carry tools from one location to another. The Respondent averred that the Claimants were paid a daily rate based on the work done and the hours. The Respondent averred that in June 2011 it embarked on mechanization in the energy transmission division and due to mechanization the manual jobs were minimized. The Respondent also averred that the construction of new transmission lines was contracted to a new agency Kenya Energy Transmission Company (KERTRACO) and as a result of these factors there was no more work available for the day casuals. The Respondent in a bid to absorb the casuals offered contract jobs to those who were qualified but the Claimants did not qualify for the internal job advertisements on offer on several occasions and as a result with effect of 31st July 2011 their services were no longer required. The Respondent averred that the payments of the Claimants was on consolidated basis as they received a daily wage rate inclusive of house allowance. The Respondent averred that the Claimants case was without basis and should be dismissed with costs.

3. The Claimants testified through Sebastian Gwada Ogot the named Claimant. He was led in his examination in chief by his counsel Mr. Mandala. The Claimant testified on 21st January 2015 and stated that he was presently a farmer in Siaya and previously was employed by the Respondent. he testified that

he started working for the Respondent on 14th January 2002 and his duties were, among others, cutting trees, assisting in shutdown and power outage. He testified that in January 2007 he was sent to do line patrol as team leader and worked in that position until 31st July 2011. He testified that he worked in the line Juja-Lessos-Tinganga area to Kasarani area. He testified that there were many other lines and that others were at the main office on truck maintenance and support. He testified that previously they were paid fortnightly but from 2006 they were paid monthly and that per hour they were paid Kshs. 54.75 and per day Kshs. 438/- depending on the days worked. He referred to the tabulation filed by the 33 and 19 Claimants showing the date of stoppage, date of joining and the amount claimed for each Claimant. He testified that the Claimants were terminated on 31st July 2011 and the letter was dated 28th July 2011 which was only 2 days prior to termination date. He testified that from the letter it was indicated that he did not meet the qualifications. He stated to date he did not know the qualifications he did not meet. He testified that the Claimants met the Chief Human Resource Officer at Stima Club and that the Claimants were promised a fixed term contract without conditions. He testified that he applied but the Claimants were told they would get a response. He testified that they were regular employees and were referred to as regular day workers. He testified that he had seen the defence of the company and wondered how he did not qualify yet he did line patrol from 2007. He testified that he was not called for an interview. He testified that there was no day the Claimants received payment on a daily basis and that they were paid fortnightly then afterwards payment was monthly. He thus sought notice pay for 28 days, accumulated leave allowance, accumulated house allowance, and service.

4. In cross exam by Mr. Molenje for the Respondent the Claimant testified that the calculation he had given was on rate per hour and per day. He testified he worked in line patrol on the line from Tinganga Area to Kasarani. He testified that he had heard of KETRACO but he did not know the job of KETRACO. He testified that he knew KETRACO was Kenya Electrical Transmission Company. He testified in Kenya Power there is an energy transmission department. He testified that he was not told that his work was taken over by KETRACO. He admitted that he did not apply for the jobs advertised by the Respondent. He testified that some of his colleagues were employed on fixed term contracts. He testified that he got 3 days notice. He testified that he never went on leave and that the pay was calculated daily and that he did not know if the wage was below minimum wage.

5. In re-examination by Mr. Mandala he testified that he was one of the 52 who did not get a fixed term contract.

6. The Respondent called Elizabeth Kalei the Chief Human Resource officer of the Respondent. She testified that she has worked for the Respondent for 18 years and that she was aware of the 55 former employees who have come to Court seeking redress. She testified that the Claimants were engaged to do bush clearing along high voltage power transmission lines and were paid a daily wage rate. She testified that the bush clearing and patrolling was at times on daily basis and at times on weekly basis. The workers did not work continuously and were deployed as and when required. She testified that the workers were paid on accumulated periods and for the days worked, and the Respondent found this cumbersome and paid them after a month using the muster roll. She testified that the employment came to an end and it was because when KETRACO was formed it took over the work on high voltage line. The casuals it was hoped would be absorbed but they did not apply for the jobs and therefore they were given notice of termination. She testified that the Respondent had 81 vacancies and thought the Claimants would apply but they did not apply and she later realised that they did not apply because they did not qualify. She testified that the Claimants were given 3 day notice though the notice period was one day. The payments were made monthly as the Claimants were working outside Nairobi and the Respondent found that paying cash was cumbersome as the Claimants had to come to Stima Plaza or Electricity House for payment. The Claimants were still on daily rate even when their services were terminated. She testified that the Claimants were not entitled to leave allowance and the daily rate was sufficient to meet their expenses, the house allowance was part of it. She testified that there is provision for service but that is only for those who worked for one full year and there was no case where any of the Claimants worked for one full year. She testified that the Respondent did not unfairly terminate the Claimants services.

7. In cross examination by Mr. Mandala, she testified that the Claimants were never given appointment letters. She testified that she was not the Chief Human Resources in 2002 but was working in Nyeri in a

different capacity. She testified that she took over in 2004 and she was aware of the issue and that when the termination took place she was in charge. She testified that bush clearing was not work which was done every day. She testified that the Claimants joined on different dates and the muster rolls indicated how many days worked. She testified that she did not know each Claimant personally and that she never worked with them on day to day. She testified that she did not know each persons year of service but if she went through records she could find out. She testified that none of the Claimants worked for 24 hours and that they took time off. She testified that patrol is only done during the day. She testified that KETRACO was an independent entity and it came with its own mandate and procedures. She testified that when KETRACO came the Respondent offered the Claimants to join mainstream Kenya Power. She testified that it was not redundancy and that the Claimants were offered jobs but they did not apply. She stated that they did not qualify as what the Respondent needed was O Level qualification of D plain. She testified that the process of terminating the Claimants contracts was not a one day affair and the Claimants were advised the contracts were coming to an end. She testified that the Claimants were not referred to a regular day workers.

8. In reexamination she testified that the Claimants only worked in some days in the month and that the schedule attached to the Memorandum of Defence showed the days worked. She confirmed that the Claimants did not apply for the jobs advertised. She testified that the Claimants worked for 2 days, 3 days, 4 days or 5 days in a month and they could not be called regular workers. That marked the end of the defence case.

9. Parties agreed to file written submissions with the Claimant required to file first. As of the time of penning this Judgment the Claimants submissions are not on record. The Respondent's submissions were filed on 18th May 2015. In the submissions the Respondent submitted that the Claimants were all casual employees who worked intermittently for the Respondent to clear bushes and to inspect the high voltage electricity transmission lines as and when there was need for such bush clearing and inspections. The Respondent submitted that the Claimants remuneration was computed on a daily rate as admitted by the 1st Claimant Mr. Sebastian Ogwada. The Respondent submitted that the Claimants never worked on a continuous basis and that their contracts of service were terminable at the close of each day in accordance with Section 35(1) of the Employment Act 2007. The Respondent submitted that the Claimants were all issued with the contract employment application form and none of them applied for the contract positions. The Respondent submitted that the Claimants were not entitled to any of the reliefs sought but submitted that in the event the Court found in favour of the Claimants the payment of salary equivalent to one month would suffice. The Respondent relied on the case of **Joseph Kioko Mbithi v African Auto Suppliers Limited [2014] eKLR** and the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited Cause No. 1068 of 2012**. The Respondent submitted that in assessing the award for compensation the Court has to consider the extent to which the employee caused or contributed to the termination. The Respondent submitted that the Claimants were solely responsible for the termination of their contracts of service when they failed to apply for the fixed term contracts.

10. The Claimants were undeniably employees of the Respondent. The Respondent asserts that they were casuals on daily rate and that for convenience the payments were made on fortnightly and later monthly basis. The Respondent further asserts that the Claimants were offered employment if they applied and that none applied. Unfortunately the 1st Claimant in his testimony in chief lied that he had applied for the position but in cross-examination admitted that he did not apply. He also confirmed that the other 51 Co-Claimants did not apply either, fact confirmed by the Respondent's witness who is the Human Resource officer. The Claimants however did not prove that the payment they received each month was below the statutory minimum and that the payment was not inclusive of house allowance. The Respondent gave a 2 day notice of termination through letters dated 28th July 2011. The notice was rather short though the employees were stated to be daily rate workers, they were usually paid at the end of the month. They were therefore entitled to a longer period of notice. The termination amounted to redundancy as their positions were no longer available. In cases of redundancy, the law is clear on the payments the Claimants would have received and the steps the Respondent ought to have put in place.

11. In the premises I will award each of the Claimants a months notice as they were entitled to it. The Respondent thus shall pay to each Claimant the sum of Kshs. 13,140/- for the 52 Claimants named in

Appendix SG 1 of the Claimants bundle of exhibits filed with the Memorandum of Claim. The Claimants will also be each entitled to a further 3 months salary as severance pay. The payments will be subject to statutory deductions in terms of Section 49 of the Employment Act. Each of the Claimants is to receive a certificate of service in terms of Section 51 of the Employment Act. Each party will bear their own costs.

Orders accordingly.

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

Nzioki wa Makau

JUDGE