



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 451 OF 2012

(CONSOLIDATED WITH CAUSE NO. 448 OF 2012, 449 OF 2012 AND 450 OF 2012)

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

WILSON ALIVISA MULWANDA1ST CLAIMANT

GERALD KIMEMIA.....2ND CLAIMANT

PATRICK MBIHANE3RD CLAIMANT

CAROLINE IJALUHA MALENGE.....4TH CLAIMANT

VERSUS

ELLAMS PRODUCTS LTDRESPONDENT

JUDGMENT

The claims herein were originally filed separately as Cause No. 448, 449, 450 and 451 of 2012. The cases were subsequently consolidated and heard under this file. Each of the Claimants testified on their own behalf while the Respondent called Francis Otieno Aboge, its Human Resource Officer (hereinafter called RW(1) and Philip Nyangoto Omobe (RW2) who testified on its behalf. The facts of each of the claims are summarised below:-

WILSON ALIVISA MULWANDA - 1ST CLAIMANT

He alleges that he was employed by the Respondent on 2nd June, 2007 as a casual labourer at a daily wage of Shs.364 per day. He worked until 8th August, 2011 when his contract was unlawfully terminated by the Respondent without notice. He seeks the following reliefs:-

- 1. 1 months' salary in lieu of noticeShs. 10,920.00
- 2. LeaveShs. 30,576.00
- 3. House Allowance.....Shs. 78,624.00
- 4. Unremitted NSSFShs. 4,000.00
- 5. CompensationShs.131,040.00
- 6. Costs and interest

GERALD KIMEMIA - 2ND CLAIMANT

He was employed by the Respondent in October, 2007 as a machine Operator at a daily wage of Shs.249 which was later increased to Shs.364 per day. He worked until August, 2011 when his contract was wrongfully and unlawfully terminated by the Respondent who refused to pay his terminal benefits. He seeks the following remedies:-

1. 1 months' salary in lieu of noticeShs. 10,920.00
2. House AllowanceShs. 78,624.00
3. LeaveShs. 30,576.00
4. Compensation of 12 months' salaryShs.131,040.00
5. Costs and interest

PATRICK MBIHANE - 3RD CLAIMANT

He was employed by the Respondent on 1st March, 2007 at a daily wage of Shs.249 which was later changed to Shs.8,434 per month. He worked until 3rd August, 2011 when the Respondent unlawfully and wrongfully terminated his employment without notice. He seeks the following terminal dues:-

1. Unpaid salary for August, 2011.....Shs. 8,434.00
2. One month's salary in lieu of noticeShs. 9,690.00
3. House Allowance.....Shs. 69,768.00
4. LeaveShs. 27,132.00
5. Unremitted NSSFShs. 3,500.00
6. CompensationShs.101,208.00
7. Cost and interest

CAROLINE IJALUHA MALENGE - 4TH CLAIMANT

She was employed by the Respondent as a casual labourer at a daily wage of Shs.223 per day in October, 2005. The wage was later increased to Shs.364 per day. Her employment was terminated wrongfully and unlawfully in August, 2011 and the Respondent refused to pay her terminal benefits as follows:-

1. One month's salary in lieu of noticeShs. 10,920.00
2. House AllowanceShs.117,936.00
3. LeaveShs. 45,864.00
4. CompensationsShs.131,040.00
5. Costs and interest.

Respondents Reply to Memorandum of Claim

In the separate replies to each of the Claimant's Memorandum of Claim, the Respondent admitted employing the Claimants as follows:-

The 1st Claimant was employed on 2nd July, 2007 until 8th August, 2011 as a casual labourer at a daily wage according to the prevailing minimum wage. Following advice from the Ministry of Labour the Respondent phased out casual employment and prepared a contract for the Claimant on 1st June, 2011. The Claimant refused to sign the contract as a result of which his employment was terminated. His terminal dues of Shs.11,221 was deposited at the Ministry of Labour. The terminal dues included 2 days leave (Shs.638) and one month's salary in lieu of notice (Shs.10,583).

For the 2nd Claimant, Gerald Kimemia the Respondent averred that he was employed on 22nd October, 2007 and terminated on 8th August, 2011 following his refusal to sign the employment contract. His terminal benefits of Shs.11,221 composed of one month's salary in lieu of notice (Shs.10,583) and 2 days leave (Shs.639) was deposited at the Labour office.

The 3rd Claimant Patrick Mbihane was employed between 30th May, 2007 and 1st June, 2011. His last salary was Shs.8,434 and a house allowance of 15%. He was transferred by the Respondent to a different

branch within the company but refused to report there by reason of which the Respondent was entitled to dismiss him under Section 44(4) (a) (c) and (e) of the Employment Act. The Claimant therefore constructively terminated his contract of employment for which he is liable to pay the Respondent one month's salary in lieu of notice. The Respondent forwarded his terminal dues of Shs.3,944.40 to the Labour office on 8th February, 2012. Prior to 1st June, 2011 the Claimant was employed as a casual.

The 4th Claimant Caroline Ijaluha Malenge was employed between October 2007 and 8th August 2011 as a casual labourer. Her last wage was Shs.364 per day. Her employment was terminated following her refusal to sign an employment contract issued to her on 1st June, 2011. Her terminal dues of Shs.11,221 consisting of one month's salary in lieu of notice and 2 days leave was deposited at the Labour office.

The Respondent denied owing any of the Claimants house allowance as their daily wage was inclusive of house allowance. The Respondent also denied owing the Claimants any leave other than what was paid to the Labour office as the Respondent paid for all leave every 3 months as a policy. The Respondent further averred that all NSSF and NHIF contributions were remitted to the relevant bodies and it does not owe the 1st, 3rd and 4th Claimants any unremitted funds in respect thereof. The Respondent pleaded that all the terminations are lawful and the Claimants are not entitled to any compensation.

At the hearing, the 1st Claimant testified that he was employed on 2nd June, 2007 as a stores assistant. After one month he was transferred to packing department. After another one month, he was transferred to personalisation department as assistant machine operator. On 28th July, 2011 he was called and given a contract to sign. The contract provided that he was to be employed as a general worker at a salary of Shs.7,643 yet he was working as a machine operator earning more than Shs.11,000 per month. He asked to be given time to read and understand the contract before signing but was not allowed. He was also not told what was happening to his past service. On 1st August, after working the night shift he was told not to go home but wait. He later saw his supervisor who told him that he cannot be allowed to continue working because he had not signed the contract. He was with the 2nd and 4th Claimants. They went to the Provincial Labour Officer at Nyayo House to seek assistance. The Provincial Labour Officer talked to the Respondent then told them to go back to the work place where they would be given the contracts to read and understand and then sign. When they went back to the workplace they were told that since they had taken company issues to an outsider they cannot be allowed to continue working. On 3rd August, 2011 they went to the office of the Kenya Union of Printing Paper Manufacturers and Allied Workers. A union officer accompanied them to the company but they were not allowed in. Only the Union Official was allowed into the workplace. After that the union official told them to go home. They reported to work every day after that until 7th August 2011 but were not allowed into the workplace.

The 1st Claimant testified that after that his father died and he went for the funeral. He came back on 24th August, 2011 ready to sign the contract as it was but was not allowed in to the workplace. He then went to Kitua Cha Sheria who filed the case on his behalf.

He testified that he was not aware about the terminal benefits that were deposited at the Labour office.

The 2nd Claimant Gerald Kimemia testified that he started working for the Respondent around 21st October, 2007 as a general worker before being transferred to work on a printing machine as an assistant operator. After a short while he learnt to clean, use and repair the machine and was made an operator. He worked until 8th October, 2011. His last pay was Shs.364 per day. He worked on the machine with Wilson Alivisa Mulwanda, the 1st Claimant, as his assistant.

On 28th July, 2011 he was called by RW1. He was with the 1st Claimant. RW1 gave them a contract to sign. He told RW1 that he did not understand the contract. RW1 told him that he can go to work and would be called later to get an explanation of the contract. He was not called until 1st August, 2011, when he was told by the guard to wait for RW1 after working a night shift. RW1 called him at around 10.00 a.m. and directed him to sign the contract as there was no other option. He asked for an explanation but was not given. He then asked for a copy to go away with and get someone to explain the contents to him but RW1 told him the contract was confidential company property which cannot leave the gate. He then went home and reported back to work in the evening but was not allowed in. RW 1 left

the work place at about 8 p.m. but did not talk to the 2nd Claimant who was still waiting for him.

The 2nd Claimant accompanied the 1st Claimant to the Labour office on 2nd August, 2011 and to the Union office on 3rd August, 2011. They reported to the office daily until 8th August, 2011 when RW1 told them the company did not wish to work with them.

RW4 testified that she was employed by the Respondent in October, 2005 and worked there until 8th August 2011. Her last salary was Shs.364 per day. Like the 1st and 2nd Claimant's her contract was terminated because she did not sign the employment contract given to her by RW1 on 28th July, 2011 after he failed to explain the contents to her. She was with the 1st and 2nd Claimants when they reported to the Labour office and to the Union and later to Kituo Cha Sheria.

For the Respondent RW1 testified that he was the Respondent's Human Resources Officer from 2005. He testified that the 3rd Claimant was not terminated by the Respondent. He disappeared on 5th August, 2011 after declining to obey company instructions transferring him from Head office which is on Dunga Road in Industrial area to the company's branch on Enterprise Road in the same capacity as a machine attendant. He testified that the 3rd Claimant admitted failing to report to Enterprise Road branch in his statement dated 9th August, 2011. The Respondent decided to terminate his employment after he absconded duty and paid his terminal benefits to the Labour Office.

For the other 1st, 2nd and 4th Claimants, RW1 testified that they refused to sign employment contracts leaving the Respondent with no option but to terminate their employment and pay their terminal dues. He testified that the 3 refused to sign the contracts because they needed further explanation. He denied that the 3 Claimants were going to earn less after signing the contracts as they were to be paid a basic salary of Shs.7643 and of house allowance of Shs.3500.

RW2 Philip Nyangoto Omobe testified that he was an employee of the Respondent and worked with the claimants. He was aware that the 1st Claimant signed his contract of employment. The 2nd, 3rd and 4th Claimants did not sign the contracts. He testified that he was first given the contract in April, 2011 but did not sign until 30th June, 2011. He testified that no employee was penalised for not signing the contract between April, and July, 2011 and further that he was with the Claimants when the contents of the contract was explained in the Respondent's boardroom by Mr. Guyvira Nduma and Mr. Francis Aboge (RW1) both from Human Resource Department. He testified that he was not allowed to take away the contract before he signed. He testified that he read and understood his contract.

Issues for determination

I have considered the pleadings, evidence adduced in court and written submissions. The issues for determination are the following:-

1. Whether or not the Claimants were casual employees,
2. Whether there was valid reason for termination of the Claimants' contracts,
3. Whether the Respondent complied with fair procedure,
4. Whether the Claimants are entitled to the remedies sought.

Were the Claimants casual employees??

The Respondent stated in the Reply to the Memorandum of Claim for all the Claimants that they were all employed intermittently as casual labourers. It is not in dispute that as at August, 2011 the Claimants were all earning Shs.364 per day. The Respondent attached copies of the Regulation of Wages (General) (Amendment) Order 2011 providing the minimum wages of Shs.364.95 for general labourer. According to the evidence adduced in the Respondent's pleadings the claimants worked continuously including on weekends for which they were paid overtime.

Section 37 of the Employment Act provides for conversion of casual employment to term contracts. Sub-sections (1) and (2) provide as follows:-

(1) *Notwithstanding any provisions of this Act, where a casual employee-*

- a. *works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or*
- b. *performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.*

(2) *In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.*

Further, the evidence adduced by 1st, 2nd and 3rd Claimants which was confirmed by RW1 is that they worked as machine operators, not casual labourers. It is only the 4th Claimant who was working as a packer and could therefore be classified as a general labourer.

I therefore find that all the Claimants were not casual labourers as their contracts had by operation of Section 37 (1) been converted to term contracts.

Whether there was valid reason for termination of the Claimants and whether the Respondent complied with fair procedure

According to the Respondent the 3rd claimant Patick Mbihane was not terminated by the Respondent but absconded duty after refusing to go on transfer from the Respondent's head office at Dunga Road to the branch at Enterprise Road. RW1 testified that the Respondent did not know where the Claimant was until it received the letter from Kituo Cha Sheria.

The 3rd Claimant on the other hand testified that he was stopped from working on 3rd August, 2011 and was told to go to Enterprise Road Branch several days later after he had reported to the Union following the verbal termination of his contract. The Respondent did not produce any records to prove that the 3rd Claimant was transferred or the date of the transfer. In the Respondent's supplementary list of documents filed on 7th February, 2013 it attached an apology letter from the 3rd Claimant dated 9th August, 2011 in which he apologised for attending a meeting called by the Union which the Respondent considered illegal.

Where an employee absconds duty or refuses to obey a lawful order, the employer should have a record to that effect. Where such records are missing the employer exposes itself to the consequences set out in Section 10(7) of the Employment Act which provides that-

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

Having failed to prove that the Claimant was posted to Enterprise Road Branch and refused to report there, I can only refer to the evidence on record which points to the fact that the 3rd Claimant's employment was terminated for attending a Union meeting which the Respondent considered illegal. The 3rd Claimant was never taken through any disciplinary process for refusing to go on transfer or for attending an "illegal" union meeting. No evidence has been adduced by the Respondent to prove that the Claimant absconded duty or refused to go on transfer. For these reasons I find the termination of the 3rd Claimant's contract of employment unfair.

For the 1st, 2nd and 4th Claimants, they all stated that the termination of their employment was due to failure to sign the employment contract. They all stated they asked for explanation of the terms and

specifically the fate of their service prior to the date of the contract and apparent reduction in salary. They also raised concerns over the title on the contract. Caroline stated she was a packer but the contract given to her gave her the title of general labourer while the 1st and 2nd Claimants were machine attendants.

The Respondent did not deny that the reason for their termination was refusal to sign the contract. Section 9 of the Employment Act requires an employer to explain to an employee all the terms of a contract and to ensure the employee signs the contract. It is not a valid reason to terminate a contract where the employee has issues with the contract that have not been satisfactorily explained to him. The Claimants were also not taken through any disciplinary process as provided in Section 41 or at all. The termination of their employment was thus both substantively and procedurally unfair.

Remedies

The Claimants are not entitled to house allowance as their wages were pegged on daily rates of pay which are inclusive of house allowance. The Respondent annexed records proving that the Claimants were paid accrued annual leave every 3 to 4 months. For these reasons the Claimants' prayer for house allowance and accrued leave must fail and are dismissed.

On the prayer for unremitted NSSF and NHIF the Respondent has submitted records to show that the said sums were remitted though not always in time.

On the prayer for pay in lieu of notice, the terminations having been unfair, the Claimants are each entitled to one month's salary in lieu of notice. I award each of them one month's salary in lieu of notice.

Taking into account the fact that all the Claimants were subjected to casual terms of employment for the entire period worked ranging between 4 and 6 years and the manner and reasons for their termination, I award each of the Claimants compensation of 12 months' salary. I note that apart from Caroline who was a packer and therefore is classified under general labourer, all the other Claimants were underpaid. From the evidence on record, Wilson Alivisa Muluanda the 1st Claimant and Gerald Kimemia the 2nd Claimant were machine attendants while Patrick Mbihane the 3rd Claimant was a machine operator. The compensation for each of the Claimants and notice is therefore based on a month's salary as follows:-

Wilson Alivisa (413.10 x 30)	Shs.12,393.00
Gerald Kimemia (413.10 x 30)	Shs.12,393.00
Caroline Ijaluha Malenge (364.94 x 30)	Shs.10,948.50
Patrick Mbihane (492.4 x 30)	Shs.14,772.

The total terminal dues for each Claimant are therefore as follows:-

Wilson Alivisa Muluanda

One month's pay in lieu of notice	Shs. 12,393.00
12 months compensation	<u>Shs.148,716.00</u>
Total	Shs.161,109.00

Gerald Kimemia

One month's salary in lieu of notice	Shs. 12,393.00
12 months compensation	<u>Shs.148,716.00</u>

Total **Shs.161,109.00**

Patrick Mbihane

One month's pay in lieu of notice Shs. 14,772.00

12 months compensation Shs.177,264.00

Total **Shs.192,036.00**

Caroline Ijakuha Malenge

One Month's pay in lieu of notice Shs. 10,948.50

12months compensation Shs.131,382.00

Total **Shs.142,330.50**

Although the 1st, 2nd and 3rd Claimants were underpaid they did not pray for underpayments and I make no order in respect thereto.

The Respondent shall pay the Claimants costs for the suit and the decretal sum shall attract interest at court rates from date of judgement.

Dated and signed this day of 2015

MAUREEN ONYANGO

JUDGE.

Delivered at Nairobi this 29th day of October 2015

HELLEN WASILWA

JUDGE