



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1752 OF 2014

SIMON MULE MUTUA.....1ST CLAIMANT

CROMWEL MWANGOE MGHANA.....2ND CLAIMANT

VERSUS

CHINA NATIONAL AERO-TECHNOLOGY

INTERNATIONAL ENGINEERING LTD.....RESPONDENT

JUDGMENT

1. The Claimants filed their plaint on 8th October 2014 seeking resolution of twin issues stated to be unlawful dismissal & non-payment of lawful dues and benefits. The Claimants averred that they were employed by the Respondent as pipe fitters and that the 1st Claimant worked from February 2013 until 24th July 2014 when he was unlawfully dismissed while the 2nd Claimant averred that he worked from November 2013 until 24th July 2014 when he was unlawfully dismissed from service. The Claimants claimed house allowance, rest days, service pay, one month salary in lieu of notice, leave days and leave travelling allowance as provided for in the Labour Institutions (Building & Construction Industry (Wages) Order 2012 and the Employment Act. The Claimants averred that the dismissal did not follow the procedure laid out in the Employment Act and that their services were terminated without proof that the reason for termination was valid. The Claimant averred that they were not given a termination notice as required, and that they were not paid house allowance and the termination was effected without them being given their lawful leave days. The 1st Claimant sought Kshs. 344,529.50 comprising of Kshs. 40,986/- for unpaid house allowance for 18 months, unpaid leave allowance Kshs. 20,931.75, leave travelling allowance Kshs. 200, one month salary in lieu of notice Kshs. 17,277/-, service pay at rate of 15 days for each year worked Kshs. 9,967.50, rest days Kshs. 47,844/- and 12 months wages for loss of employment Kshs. 207,324/-. The 2nd Claimant sought Kshs. 279,681/ comprising of Kshs. 20,493/- for unpaid house allowance for 9 months, unpaid leave Kshs. 10,465/-, leave travelling allowance Kshs. 200/-, one month salary in lieu of notice Kshs. 17,277/-, rest days Kshs. 23,922/- and 12 months wages for loss of employment Kshs. 207,324/-. The Claimants also sought interest on the above sums as well as costs of the suit.

2. The Respondent filed a defence on 9th December 2014 and averred that the Claimants were casual labour employees. The Respondent averred that it paid all house allowance and leave allowance due to

the Claimants during the period of employment and that the Claimants were paid in excess of the minimum wage under the Labour Institutions (Building & Construction Industry (Wages) Order 2012. The Respondent averred that during their period of employment the Claimants were difficult to work with, uncooperative and unreliable. The Respondent averred that the Claimants never reported to work consistently and gave no reason for their absence; they did their work erroneously and negligently; they did not adhere to company policies and would sometimes refuse to work; refused to receive letters of warning from the Respondent; and attempted to incite other employees to boycott work. The Respondent averred that the Claimants left employment voluntarily and that it did not terminate their employment. The Respondent averred that its employees receive one rest day a week and that it did not owe the Claimants payment for such days. The Respondent averred that due to the nature of employment the Claimants actions and mode of exit from the company, the Claimants were not entitled to any gratuity or service pay nor were they entitled to a certificate of service. The Respondent filed a List of Documents and witnesses on 22nd July 2015. The list of documents had a temporary workers salary sheet and an acknowledgement letter dated 24th July 2014.

3. The parties consented to resolving the dispute through documentary evidence as permitted under Rule 21 of the Industrial Court (Procedure) Rules 2010. This request was acceded to by the Court on 10th July 2015.

4. The Claimant filed submissions on 23rd July 2015. In the submissions, they submitted that the Respondent terminated their services without notice on 24th July 2014. The Claimants submitted that despite the attempt to justify the dismissal as pleaded in the defence and answer to claim, the Respondent was required to adhere to the provisions of Section 41(1) of the Employment Act 2007. The Claimant submitted that though Section 44(4) permitted the dismissal of an employee for gross misconduct the same section provided that an employee should be given an opportunity to dispute the truthfulness of the accusation. The Claimants submitted that they were not given a chance to dispute the allegations made against them before being dismissed. The Claimants submitted that Section 35(1)(c) of the Employment Act provided that one month notice be given before termination of a contract of service whose wages are payable at the end of the month. The Claimants averred that it was the burden of the Respondent to produce a written contract to prove the nature of employment of the Claimants and relied on the provisions of Section 10(7) of the Employment Act for the proposition that if in any legal proceedings an employer fails to produce a written contract, the burden of proving or disproving an alleged term of the contract shall be on the employer. The Claimants submitted that the temporary workers sheet on the Respondents list of documents does not show the days of the week the Claimants worked. The Claimants submitted that the Respondent denied them their lawful leave days contrary to Section 28(1) of the Employment Act. The Claimants submitted that under Section 74(1)(f) of the Employment Act an employer is compelled to keep a written record of an employees annual leave entitlement, days taken and days due. The Claimant submitted that the temporary workers sheet only shows that the Respondent was deducting NSSF and NHIF dues but that the Respondent had not produced any document to prove it was remitting the NSSF and NHIF deductions on behalf of the Claimants and therefore it was liable for service pay to the Claimants. The Claimants relied on the case of **Peter Okumu Oloo v Simba Pharmaceuticals Ltd [2013] eKLR** and submitted that they were entitled to the prayers sought in their statement of claim.

5. The Respondent filed its submissions on 29th July 2015 and submitted that the main issues for consideration were whether or not the Claimants were employed as stated in their memorandum of claim, how their termination occurred and whether or not the Respondent owes the Claimants any amounts. The Respondent submitted that the Claimants were not its employees and that the Claimants had not shown any form of employee card or gate pass which the Respondent issues to its employees. The Respondent submitted that the Claimants were casual labourers reported to work from time to time and were paid after a period of two weeks, their pay being different each time according to days worked. The Respondent submitted that the Claimants performed odd jobs as given by the supervisor and that the Respondent was unaware of any qualifications bestowed on the Claimants as pipe fitters. The Respondent submitted that the Claimants were poor in the execution of their duties and were frequently absent and contemplated termination of their services summarily in accordance with Section 44(4) but before it could do so the

Claimants chose to leave employment voluntarily and were paid all their dues on 24th July 2014 which they acknowledged. The Respondent submitted that the Claimants were not owed any money as they were paid Kshs. 416/- daily plus daily allowances of Kshs. 160/- for the 1st Claimant and Kshs. 84 for the 2nd Claimant which included house allowance, health allowance and transport allowance. The Respondent relied on the case of **Nelson Onyango Othoo v Wilham Kenya Limited [2012] eKLR** on the issue of termination of casual employee and whether such employee is entitled to redundancy dues or not.

6. The Claimants were employed by the Respondent on 20th March 2013 and 1st November 2013 respectively as per the letter of 24th July 2014 produced by the Respondent. In all the documents availed to Court there is no indication of the nature of employment save for the Temporary Workers Salary Sheets produced. The sheets are for a period that covers the employment of the Claimants. None of the sheets suggest that the Claimants were paid daily. Instead each has an account number to which there is presumption the cash was paid. The Claimants assert that their services were terminated on 24th July 2014. Nothing suggests otherwise. The letter of 24th July by the Respondent confirms the contract was extinguished by the Respondent. The letter would have captured their alleged absconding or purported resignation. It instead acknowledges that the Claimants were paid their dues upon termination of their services. It is the burden of the Respondent to show the manner, the nature of contract and how termination occurred in terms of Section 10(7) of the Employment Act. The Respondent failed to discharge the burden and I find that the termination was therefore as stated by the Claimants – without notice or reason. From the evidence adduced and the record before me, it is clear there was no basis for the termination that has been revealed. The allegations about warning letters were not backed by the actual warning letters, if at all any existed. These would have dispelled any doubts as to the working relationship. The Claimants were registered with NSSF and NHIF but the employer had failed to adduce evidence of payment of NSSF and NHIF dues. Even a simple statement from both these institutions would have sufficed. No evidence was adduced by Claimants that they never went on leave nor was there proof that they worked without a break. In fact, the records availed by the Respondent showed that they had sufficient off days and in the premises would not be entitled to recover anything for rest days and leave days at all.

7. The Claimants claim is therefore partially successful and I award the following for the unlawful termination of the 2 Claimants:-

For 1st Claimant

- a. Notice pay for one month Kshs. 10,620/-
- b. Service pay Kshs. 5,310/-
- c. Compensation for unlawful termination for 3 months Kshs. 31,860/-
- d. Certificate of service.

For 2nd Claimant

- a. Notice pay for one month Kshs. 9,500/-
- b. Compensation for unlawful termination for 3 months Kshs. 28,500/-
- c. Certificate of service.

8. The Claimants will have the costs of the suit and interest on the above sums from date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of **October 2015**

Nzioki wa Makau

Judge