



**Baraza & 6 others v Mj Clarke Ltd (Cause 308 of 2014)
[2015] KEELRC 1657 (KLR) (13 November 2015) (Judgment)**

Lawrence Baraza & 6 others v MJ Clarke Ltd [2015] eKLR

Neutral citation: [2015] KEELRC 1657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 308 OF 2014
AN MAKAU, J
NOVEMBER 13, 2015**

BETWEEN

**LAWRENCE BARAZA 1ST CLAIMANT
MAJID SWALEH 2ND CLAIMANT
MWAMBUI MONYE 3RD CLAIMANT
VICTOR OCHIENG 4TH CLAIMANT
PETER MURIOKI 5TH CLAIMANT
MWINYI IDII 6TH CLAIMANT
DOUGLAS NDOMBI 7TH CLAIMANT**

AND

MJ CLARKE LTD RESPONDENT

JUDGMENT

1. The claimants were employed by the respondent under fixed term contracts of between one and three months. After the end of every contract, the claimants were engaged on casual basis as and when there labour was needed. The claimants worked under such arrangement between 2009 and 19th may 2014 when their services were terminated. As at the time of termination they were serving on casual basis after their fixed term contracts lapsed on 5.2.2014 and 10.3.2014 respectively. Aggrieved by the termination of their services, the claimant brought this suit on 10.7.2014 accusing the respondent of unfair termination and urging. The court to reinstate them to their employment and in the alternative order payment of their terminal dues plus compensation for unfair termination.



2. The respondent has denied liability for unfair termination of the claimant's employment and averred that it is the claimants who refused to report to work after they declined to sign one month contract which was to take effect on 1.6.2014. That all previous fixed term contracts signed between her and the claimants were terminated by effluxion of time. She denied that the claimants served on casual basis in a continuous period and averred that they served under distinct fixed term contracts.
3. The suit was heard on 29.10.2014, 11.2.2015 and 23.7.2015 when the first claimant, Mr. Lawrence Baraza testified on behalf of all the claimants as Cw1 while the respondent called Mr Paul Maina Mwaura as Rw1. Thereafter the parties filed written submissions.

Analysis and Determination.

4. There is no dispute that all the 7 claimants herein were employees of the respondent during the period between 2009 and May 2014. There is also no dispute that all the claimants were engaged under short fixed term contracts of between one and three months. There is further no dispute that the claimants were not members of any trade union and they did not know that they were covered by any Collective Bargaining Agreement (CBA) until 31.3.2014 when they reported a dispute at the labour office and they were referred to the Kenya Shipping, Clearing and Warehouse Workers Union. That the claimants last fixed term contract lapsed on 5.2.2014 and 10.3.2014 respectively and they all became casual employees until 19.5.2014 when their services were terminated. The issues for determination are:
 - a) what was the nature of the claimants contract of employment?
 - b) whether the claimants terminated their own services through desertion or they were unfairly dismissed by the respondent
 - c) whether the reliefs sought should be granted.

Nature of the Claimant's employment

5. Cw1 testified that all the claimants were employed, under fixed term contracts of between one and three months. That the contracts did not run consecutively but they were punctuated by periods of engagement on casual basis. According to Cw1 the claimants worked continuously as there was work always. That they only contributed to Social Security when they were serving under the fixed term contracts. That they worked under such arrangement until January 2014 when they started agitating for better terms and conditions of service including higher pay and minimum of 3 months contracts. That the respondent increased the salary and promised further engagement with the claimants and the Trade Union in the industry by June 2014. However on 19.5.2014, the claimants reported to work as usual but the Warehouse Manager Mr Ahmed Twahir terminated their employment. That as at that time the claimant were all serving as casual workers after their fixed term contracts lapsed in February and March 2014. That no notice or warning letter was given to the claimants before the termination. On cross examination cw1 confirmed that the claimants, understood that their work was seasonal depending on work availability. He confirmed that they used to sign an attendance Register daily at the gate.
6. Rw1 is the respondent Assistant Warehouse Supervisor and has worked there for 20 years. He explained that the claimants were employed by the respondent on short fixed terms contracts. That the contracts did not run consecutively but they were separated by periods when the claimants were engaged as casuals on daily basis. That in March and April the claimants raised grievances about their terms and conditions of work in addition to being denied the right to join a trade union. That as at that time all



the claimants fixed term contracts had lapsed and they were now daily casual employees. He produced a daily Attendance Register to prove that the claimants were casual workers between February and May 2014 and that they were not working continuously.

7. After careful considering of the evidence placed before it, the court is satisfied that the parties engaged on short term contracts which lapsed automatically on the agreed dates. The said contracts were distinct from each other and they did not run consecutively. That in between the respective fixed term contracts, the claimants were engaged as casual workers on daily basis. That during such casual employment, the Attendance Register produced by the respondent shows that the claimants did not work every day. The claimants did not contest the validity of such seasonal contracts leading to reasonable inference that the contracts were entered into voluntarily and that the parties intended to be bound. In deed during the cross examination by the defence counsel, Cw1 stated:

“we understood that work was seasonal depending on work availability.”

Consequently, the court finds on a balance of probability that the claimants were seasonal employees engaged under fixed term contracts except when they were serving as daily casual works. That even when they were causal employees, the claimants did not attend work continuously.

Desertion vs Unfair Termination.

8. The evidence by the Cw1 that their services were terminated by the warehouse manage Mr Ahmed Twahir was not rebutted. The court therefore makes a finding in favour of the claimants that on 19.5.2014 they attended work as usual but they were not allowed in by the warehouse manager. They therefore did not desert work. According to the attendance register produced, all the claimants were on duty on Saturday 17.5.2014 but from Monday 19.5.2015 they never attended work again. The court believes the evidence of Cw1 that they were terminated by Mr Ahmed Twahir. Such termination did not require any prior notice. Section 35 (1) (a) states as following concerning casual employment:

“where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice”.

Reliefs

9. In view of the finding above that the claimants were not protected by law from termination without notice, the court declines to make any declarations and the monetary awards sought.

Disposition

10. For the reason stated above, the suit is dismissed. No order as to costs.

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF NOVEMBER 2015.

ONESMUS MAKAU

JUDGE

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:



For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE

