



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 109 OF 2012

ANDREW MWANYIKA & 18 OTHERSCLAIMANTS

VERSUS

PAPILLION DIANI LIMITEDRESPONDENT

J U D G M E N T

BACKGROUND

The claimants were employed by the respondent on diverse dates between 2001 and 2012 on renewable temporary and seasonal contracts. They were also members of the trade union which had a Recognition Agreement and a Collective Bargaining Agreement (CBA) with the respondent.

The claimants monthly salary ranged between ksh.6000 and ksh.8000 plus housing allowance.

The claimant brings this case alleging that they were never housed or paid their housing allowance during their tenure of service ranging between ksh.63000 and Ksh.294,000. They are also claiming their service pay which was not paid after the termination of their services. They are seeking declaration that their employment was contract of service for having served for more than 3 months continuously that their said employment contracts were breached by the respondent; that they were entitled to house allowance in lieu of accommodation and that the non- payment of the house allowance was unlawful. In addition, they seek to recover service pay and housing allowance that accrued during their respective tenure of service. Lastly, they pray for certificate of service costs and interest.

In her defence, the respondent has confirmed that she had at all material times a CBA with the claimants' union which bound the claimants in addition to their respective personal contracts with her. The respondent had further contended that all the claimants were on seasonal or temporary contracts which expired and the claimants were paid all their respective dues and signed discharge vouchers to that effect. The respondent further contends that the suit was improperly brought by the claimants in breach of the Recognition Agreement and the CBA which only allowed the union to engage the respondent on all disputes involving unionized employees like the claimants. She prayed for the suit to be struck out or otherwise dismissed with costs.

While the suit was pending trial, the 15th claimant died on 20/3/2013 and no one substituted him. The suit was heard on 26/4/2013, 4/7/2013 and 25/9/2013 when six claimants testified on behalf of the rest while Alois Angila testified on behalf of the respondent following consent directions that all the claimants need not testify.

CLAIMANTS CASE

Andrew Mwanyika (CW1) was employed by the respondent from 1-2-2009 as a cleaner and worked continuously until 30/4/2011. His salary was ksh.5400 plus service charge which ranged between ksh.2000 to ksh.8000 per month. He was not housed by the respondent and was not being paid house allowance.

On 30/4/2011 he was told to go home until 1/7/2011 to allow the respondent to renovate the premises. He was only paid his salary. When he returned to work on 1/7/2011 he was not allowed in and instead new workers were recruited to replace the claimants. When he went to see RW1 he verbally told him that there was no job for him. He asked for certificate of service but he was not given. He reported the matter to the union but his claim for house allowance, service pay and certificate of service was never granted and hence this suit.

On cross examination he admitted that his contract expired on the due date because the contract stated that it would lapse automatically on the stated date. He also contended that he was not aware of the Recognition Agreement and the CBA between the respondent and the union. He further admitted that he knew the status of his contract as that of temporary employee.

He contended that he signed the discharge voucher because he was just a junior officer and he understood it to be for the salary for the days worked. He further contended that the voucher he signed is not a bar to his right to bring this suit. He claimed ksh.3000 as monthly allowances for the period of his service which total to ksh.78,000.

Josiah Wekesa (CW2) was employed by the respondent on 17/8/2008 as kitchen steward and worked upto 12/3/2012. His basic salary was ksh.8000 plus service charge of ksh.4000. He was a member of union. He started with one month contract which kept on being renewed on periods of varying lengths. On 6/3/2012 some of his colleagues in the department fought and they were all dismissed summarily. He denied ever participating in the fight. After the dismissal he appealed and was called back to work. He was however dismissed the following day after demanding for his house allowance. He stated during the dismissal, the Mrs. Korea, the respondent's Director insulted him calling him a monkey of which he reported to his union. He prayed for his accrued house allowance for 3 years at the rate of ksh.3000 per month as provided for under the CBA. He also prayed for his service pay.

On cross examination he contended that he was dismissed before the expiry of his contract. He admitted that he was not forced to leave his job but left after being called an MP and a monkey. He maintained that although his contract provided for his accommodation he was never allocated a house. He further maintained that the discharge voucher he signed while leaving the job was for the days worked and not terminal benefits. He explained that the labour officer and the union verified the houses and found that they were only 75 while the employees were 105.

Juma Nyevu (CW3) was employed as a Glass hand from February 2004 to 25/3/2012. his salary was ksh.6000 per month. His contract lapsed on 25/3/2012 and as usual went for 2 weeks leave. However, unlike the past his contract was not renewed because there was renovation going on. He returned on 25/6/12 as advised but found the renovation still going on and was sent back home. When he reported on 1/7/2012 he found new employees had been recruited. He prayed for house allowance at ksh.3000 per month for the period served. He also prayed for service pay plus certificate of service. In total he prays for Ksh.312,000/.

On cross examination he state that in 2004 there were no contracts given when he started to work but from 2005 he was given contract. The last contract was from 16/11/2011 to 25/3/2012. He maintained that he was never allocated a house or paid house allowance by the employer. He admitted that he signed a discharge voucher saying that he was paid in full but maintained that the present claim is for service and house allowance.

John Mutua (CW4) was employed on 16/8/2008 in the kitchen and worked upto April 2012. His salary

was Ksh,7000 per month. Every year the hotel was closed down for repair from April to July. In April 2012 they went home to allow repair work and were to resume work on 1/7/2012. When he returned on 1/7/2012 he was told to resume work on 15/7/2012. He however was not allowed to resume work on the said date because all the workers who were not housed by the employer were being terminated for demanding house allowance.

He maintained that the house allowance was his right and prayed the court to award him his accrued house allowance and other terminal dues. On cross examination he confirmed that his contract ended on 30/4/12 and was not renewed because he was demanding house allowance. He maintained that since 16/8/2008 his contract was always renewed. He started demanding for his house allowance in 2009.

He confirmed that he was a member of union which was handling issues. He admitted signing a clearance voucher to show that he had been paid ksh.12,779.20 being full payment moneys for the time worked. It also stated that there was no further claims. He however brought this suit to claim service pay and accrued house allowance at the rate of ksh.3000 per month for 3 years all totaling to ksh.142,500/.

Dickson Mwalimu (CW5) was employed on 7/7/2005 as a waiter under renewable short term contract and worked until 10/4/2012 when the last contract lapsed and was never renewed. He was among the workers who had no staff house and who were demanding house allowance. His salary was ksh.6000 plus service charge. He prayed for house allowance and service pay all totaling to ksh261,000.

On cross examination he maintained that his contracts were always renewed for either 3 or 6 months. He expected to work continuously because previously the renewal of contracts was automatic. He admitted signing a voucher as full settlement of his service which meant service charge. He confirmed that he was a member of union. He contended that he was never given a staff house because there were fewer houses than the staff. He prayed for ksh.243,000 being accrued house allowance at the rate of ksh.3000 per month for 6 years 10 months. He also prayed for service pay for ksh.18000.

Nicholas Mbuvi (CW6) was employed on 7/7/2005 and worked until April 2012. His salary was ksh.6000 per month plus service charge. The hotel used to close down from April and resumed in July every year. In July 2012 however he was told that only employees with staff houses were welcome to work. All the previous years his contracts were renewed automatically. He prayed for service pay of ksh.18000 plus house allowance of Ksh.243000. On cross examination, he confirmed that his last contract ended in April 2012 but contended that the renewal should have been automatic. He maintained that he served continuously except the period when the hotel was closed down every year. He denied being a member of any union.

DEFENCE CASE

Alois Angila (RW1) is the CEO of the respondent and he is also in charge of HR. He confirmed that they had employed between 81 and 107 both permanent and casual employees. Majority of the permanent workers are in the maintenance section while waiters are mainly temporary. The respondent has a CBA with KUDHEIHA (union) in respect of her workers. The terms of service for all the respondents employees are governed by the said CBA. There are also contracts for individual employees which deal with the period of service and unless the same is renewed the contract lapses.

He confirmed that most of the claimants contract lapsed on 30/4/2012 but for claimant number 13, he left in December 2008. He admitted that the hotel provided housing and where no space was found, the respondent paid house allowance monthly. He identified claimant number 10 Mr. Juma Kisu juma whose house allowance was ksh.1600 as reflected in his contract of discharge voucher. He maintained that for all the claimants whose contracts did not reflect house allowance, it meant that they were housed by the respondent.

He explained that in 2012 he received a compliant from the union that 64 worker including the claimants were not being paid house allowance. After conciliation failed, the union filed case number 257 of 2013 KUDHEIHA – VS PAPHILLION. He contended that the claimants beached the procedure under the CBA

by filing this suit through the union. He further contended that the claimants were paid all the dues at the end of the contracts and signed discharge vouchers indicating full and final settlement with no further claims in future. He denied ever forcing the claimants to sign the vouchers. He contended that the salary for the 1st and 13th claimants was ksh.5400 and ksh4000 respectively and not ksh.6000. He maintained that the claimants were housed by the respondent and they should not claim house allowance. On the other hand, he contended that since the claimant never served for a complete year but only short contracts, no service gratuities should be payable to them. On cross examination he confirmed he used to travel with the claimants to work but insisted they had been allocated houses by the respondent but could not indicate their room numbers. He confirmed that there were only 76 houses at the staff quarters. He also admitted that the claimants came to see him for amicable settlement on advise from FKE on 18/7/2012 but they were not allowed in by the security because he (RW1) was busy.

He did not have record to disprove that the claimants worked throughout. He confirmed that the respondent provided official motor vehicle transport to non resident workers but the same was withdrawn from July 2012. He further confirmed that there used to be a break of two weeks before renewal after the lapse of every contract. He confirmed that the 13th claimant never signed a discharge voucher but contended that he was paid all his dues through his bank account.

After the close of the evidence both parties filed written submissions which the court has considered while writing this judgment.

ANALYSIS AND DETERMINATION

upon perusing the pleadings and upon considering evidence and the submissions filed, the following issues for determination arise;

- a. **whether the claimants were in continuous service or not.**
- b. **Whether the claimants were entitled to house allowances.**
- c. **whether the claimants are entitled to the reliefs sought.**

WHETHER THE SERVICE WAS CONTINUOUS

The evidence on record show that the claimants were serving short term contracts for periods ranging between 3 and 6 months. The period of service under Section 35 of Employment Act gives protection to the employee regarding termination and benefits. Section 37 of the Act provides for conversion of such contracts to status and benefits for a permanent employee.

In addition the CBA produced by the defence provided that probation period shall not exceed 3 months. The respondent continuously renewed the claimants contracts beyond 3 months. The claimants cannot therefore be described as temporary or seasonal when some had served for years continuously. Consequently the court finds that under Section 35 and 37 of the Employment Act, the claimants were in continuous service and ought to have been accorded the benefits of permanent employees.

WERE THE CLAIMANTS ENTITLED TO HOUSE ALLOWANCE

The evidence on record is that the employees who were not housed by the respondent were entitled to monthly house allowance. According to the defence evidence, the claimants contracts were governed by the CBA between the union and the respondent. Clause 7 of the CBA provided for the right to housing or house allowance. The individual contracts provided also for the right to accommodation for the claimants.

The uncontroverted evidence by the claimants is that they were never allocated houses by the respondent because they were never enough for all. RW1 corroborated that evidence when he admitted that he used to travel with the claimants using the official transport. No evidence was produced to prove that the claimants were housed by the respondents. The RW1 could not name the house members for the respective claimants when he was challenged to do so. Consequently the court finds that the claimants

were entitled to payment of house allowance during their tenure of service.

ARE THE CLAIMANTS ENTITLED TO THE RELIEFS SOUGHT?

In view of the foregoing the claimants are entitled to payment of house allowance as per the CBA covering them. Clause 7 of the CBA produced by the defence provided for a minimum of ksh.2000 per month. The effective date of the CBA was 1/7/2009. There is no evidence of what was the house allowance before the said date. The court will therefore only award the minimum house allowance for the period between 1/7/2009 and termination date in addition to making declaration as per prayer 1,2,and 3 of the memorandum of claim.

As observed above the claimants have failed to prove that they were entitled to ksh.3000 per month as house allowances as prayed and not ksh.2000 provided under the CBA. The claims for the period earlier than the effective date of the CBA (1/7/2009) are also time bared in view of the fact that this suit was filed on 24/10/2012. That locks out the claim for the 13th claimant whose claim is for period before 1/7/2009. The claim for the 15th claimant is also disallowed for want of substitution and prosecution after he died. Consequently the claimants are awarded the following as their lawful arrears in house allowances based on the CBA:

1. Andrew Mwamyika 34 months X 2000 = 68,000
2. Joash Wekesa, 33 months X 2000 = 66,000
3. John Mutua, 33 months x 2000 = 66,000
4. Juma Nyevu, 33 months x 2000 = 66,000
5. Dickson Mwalimu 34 months x 2000 = 68,000
6. Nicholus Mbuvi, 34 months x 2000 = 68,000
7. Mophanes Mogaka, 34 months x2000 = 68,000
8. Vincent Shilano, 34 monthsx2000 = 68,000
9. Danson katana , 27 monthsx2000 = 54,000
- 10.Juma Kisu, 4 months x2000 = 8,000
- 11.Martin Kazungu, 4 monthsx2000 = 8,000
- 12.Ronald Baraza, 35 monthsx2000 = 70,000
- 13.Victor mogire claim time barred and is dismissed
- 14.Benard Shilaho, 34 monthsx2000 = 68,000
- 15.Swaleh Mwakusema died before the case was heard and was never substituted be a legal representative. The claim was never prosecuted and is therefore not granted.
- 16.John Menza, 28 monthsx2000 = 56,000
- 17.Festus Dzombo, 29 monthsx2000 = 58,000
- 18.Samwel Jeffah, 26 monthsx2000 = 52,000

The aggregate award in respect of house allowance is KSH.932,000/-. The said sum will attract interest at courts rate from the date of termination of each of the respective claimant. The claim for service is disallowed in view of Section 35(6) of the Employment Act which disqualifies employees who are members of the NSSF from benefiting from service pay. The court has noted from all the vouchers used for the payment of benefits, that the claimants were members of the NSSF and no evidence to contradict that fact was adduced by the claimants.

DISPOSITION

Based on the reasons stated above, the court enters judgment for all the claimants save the 13th and 15th claimants **for the aggregate sum of ksh.932,000 plus interest as stated above.** The said successful claimant will also have costs and interest thereon.

Dated, signed and delivered this 14th day of February 2014.

O.N. Makau

Judge