



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1185 OF 2012
RICHARD KIOSI AND SIX OTHERSCLAIMANT
-VERSUS-
ALPHARAMA LIMITEDRESPONDENT

Mr. Onyata for the Claimants.

Mrs. Ligunya for the Respondent

JUDGMENT

The seven (7) Claimants allege that they were employed as casuals in a construction site to assist in building of lagoons on diverse dates and worked continuously for the Respondent until the date of termination as shown below:-

<u>NAME</u>	<u>DATE EMPLOYED</u>	<u>TERMINATION DATE</u>
Richard Kosi	27.09.2010	30.03.2012
Benedict Mulwa	February, 2011	13.02.2012
Julius Mutuku	25.06.2010	03.03.2012
Joseph Muthini	October, 2010	02.04.2012
Titus Ndeto	June, 2010	05.01.2012
Charles Otieno Olga	28.02.2011	20.03.2012
Cosmas Mulwa Muena	July, 2010	13.12.2012

They were all masons at daily rates of Kshs.335/= except **Mr. Benedict Mulwa** who was employed as a carpenter at a daily rate of Ksh.550/=.

They were retrenched on the dates shown above due to reduction of the volume of work primarily because the core work of the Respondent was not construction but was engaged in tanning skins. The Claimants allege that they were hired with others to build lagoons.

The Claimants allege they were unfairly terminated and seek compensation as they had worked continuously for considerable periods and were no longer casuals.

They also claim payment of terminal benefits to wit;

1. Notice pay.
2. Severance pay.
3. Payment in lieu of leave.
4. Over time.
5. House allowance.

According to the Statement of claim and testimony by CW1 and CW2, the Claimants worked seven (7) days a week from 8.00 a.m. to 5.30 p.m. They also worked during public holidays.

The Respondent filed a reply to the claim on the 2nd day of October, 2012. The Respondent admits that the Claimants were its casual labourers contracted on various dates but the Respondent however denies that the Claimants worked for it for periods exceeding 12 months.

The Respondent therefore denies that the Claimants are entitled to payment of one month's salary in lieu of notice; (b) overtime in lieu of accrued leave; severance pay at the rate of 15 days for the completed years of service; house allowance at 15% of the basic salary and 12 months salary and compensation for unlawful and unfair termination of employment.

The Respondent called one *Daniel Kyalo Munyao* to testify in its defence. The summary of his evidence was as follows;

That the six (6) Claimants worked for the Respondent as masons and one (1) as a carpenter. That he worked as a supervisor at the construction site of the Respondent till to-date.

That he recruited casual workers including the Claimants who were re-hired daily at the gate according to the labour needs at the construction site per day. Accordingly, the Claimants did not work for continuous periods. That the Claimants were specifically engaged in the construction of a go-down and were not re-hired when that work was completed.

The witness withstood cross-examination well and his evidence was candid and consistent regarding all the aspects of this case.

Findings

The court's analysis of the evidence before court has led to the conclusion that the Claimants were employed from time to time as casual labourers. That five (5) were engaged as masons and one (1) was a carpenter to build a go-down. That this was not the core work of the Respondent as the Respondent was in the business of tanning skins.

That the work given to the Claimants only lasted the period of building the go-down and were lawfully laid off when the construction work was completed.

The court also finds that the construction of the lagoons was sub-contracted by the Respondent and therefore the Respondent could not have recruited employees for that purpose.

This court was persuaded that the Claimants were given one paid day off for every week worked, and were paid overtime for any hours worked in excess of eight (8) hours. That the core work of the

Respondent was to tan skins but at the material time was constructing a go-down and lagoons. The six (6) Claimants were involved in building the go-down and were not engaged in the building and maintenance of the lagoons.

That the Respondent had sub-contracted the building of the lagoon and traxcavator was used in their construction. This work took six months. The six (6) employees were not required for that job as the sub-contractor had his own employees.

There was no employment contract between the Respondent and the Claimants since they were recruited on a day to day basis depending on the availability of work.

The cards they produced were given to them for identification and security purposes. These cards were given to casual workers. That they were given overalls and boots at work and were hired on a first come first in basis.

The witness produced casual worker's record marked exhibit 'A' which indicated that the five were paid daily rates of Kshs.335/= whereas the sixth one was paid Kshs.550/= per day. The record also shows that the Claimants were paid overtime as and when they worked in excess of eight (8) hours. They were given one (1) day off per week.

The record shows that when the Claimants worked on a holiday, they were paid double rates at 671 and 1100 Kenya shillings respectively. The work force would be reduced from time to time.

The Claimants have failed to establish that they were entitled to any of the reliefs sought in that the evidence before court does not establish that they were continuously in the employment of the Respondent for the alleged periods. **Section 40** of the Employment Act, governing retrenchment is not applicable in the circumstances of this case.

The Respondent was not under any obligation to retain their services once the construction of the go-down was completed.

The reason advanced for the termination of the services of the Claimants is a valid reason in terms of **Section 45** of the Employment Act 2007 and the Wage Order in the construction industry. The Claimants were at liberty to seek work again from the respondent as and when it was available in future and/or seek employment from the sub-contractor who was building the lagoons.

It is trite that he who alleges must prove the facts alleged. The Claimants have failed to achieve the necessary threshold on a balance of probability and their claims must fail in their totality.

The Claimants are persons of meagre means and though the suit has been dismissed, it was brought in good faith, same is not vexatious and has been prosecuted without much delay.

Accordingly the court shall not condemn the Claimants to the costs of the suit.

Dated and delivered at Nairobi this 11th day of February, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE