



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 265/2013

(Before Hon. Justice Hellen Wasilwa on 17th June, 2014)

KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL
& ALLIED INSTITUTIONS WORKERS UNIONCLAIMANTS

-VERSUS-

GEORGE AERTSSEN1ST RESPONDENT

AGL AGRILINK LTD2ND RESPONDENT

JUDGMENT

The claimants Kenya Scientific Research International Technical and Allied Workers Union hereinafter referred to as the Union filed this claim on behalf of their members Rashid Sadi Khamisi and Joshua Otieno Odhiambo on the 21.10.2011. The alleged issue in dispute is the purported unlawful termination of the two members. It is the claimant's case that their members had been employed by the respondents as night guards. The 1st grievant Joshua Otieno was employed on 1.4.2002 earning a salary of Ksh 4,500/= monthly. The 2nd grievant was employed on 2.4.2002 earning a salary of Ksh 5,000/=. Apparently, both grievants were arrested on 30.6.2009 on theft allegations. Some gate valves had been stolen.

They were taken to the police station and charged with the offences of stealing by servant contrary to Section 281 of the Penal Code and in the alternative, failing to prevent a felony contrary to Section 392 of the Penal Code. At the end of the criminal hearing, the grievants were both found innocent and acquitted under S. 215 of CPC. They now attempted to go back to their work and requested the respondents to allow them back, but the respondents refused. They reported the matter to their union who contacted the respondents. The union also reported a trade dispute to the Minister for Labour. A conciliator was appointed to try and concile the parties. The attempt to concile the parties failed and the case ended up in court.

The grievants claim is for the payment of their terminal benefits as enumerated in their appendix VIII being notice pay, leave pay for 8 years, overtime pay for 8 years, holiday pay, underpayments from 1st May 2007 – 30th April 2009 (24 months) and underpayments from 1st May 2009 to 30th April 2010,

severance pay and 12 months salary compensation for loss of employment to date etc. The grievants also want the court to order them reinstated to work without any conditions. The claimants annexed to their statement of claim the appointment letters for the grievants; copies of proceedings and judgment in respect of the criminal trial the grievants went through, communication between the union, the respondents and the Ministry of Labour on the conciliation process, the conciliator's report and the union's tabulation of the grievants claim supported by the relevant wages guidelines.

The respondents on the other hand filed their memorandum on the 13th of December 2011 through the firm of Menezes & Odhiambo Associates. They also called one witness one of the respondents directors as a witness in their case. It is their case that they had employed the grievants as night guards as per the service agreements. The two however left the company when the theft occurred in 2009. The incident was reported to the police and the grievants were arrested and charged in court. They never reported back after the plea. The respondents further stated that their salary was Ksh 5,000/= in 2009 as per the contract and this included free accommodation. They were also entitled to 21 days leave. The respondents contend that they didn't sack the grievants but they employed other workers when the grievants failed to come back. Their case is that the grievants absconded duty and they are the one who should pay them. They also aver that the grievants are not entitled to payment of service pay nor overtime and that they were not union workers.

I have examined the evidence of both parties and also considered their respective submissions. The issues for determination are as follows:-

- 1. Whether the grievants were employees of respondents and if so on what terms.**
- 2. Whether the respondents unfairly terminated the grievants employment.**
- 3. Whether the grievants are entitled to the prayers they have sought.**

On the 1st issue, the grievants have exhibited their service agreements with the respondents. The 1st set of agreement between Joshua Otieno and respondents are from 1st December 2006 to 1st January 2009. The contract for 1st January 2009, was for a period of one year. The salary for Mr. Otieno was Ksh 4,500 and provision of a free house at the farm. Water and electricity charges were to be deducted from the salary. The 2nd grievant Rashid Sadi also had similar service agreements during the same period of time but his salary for the period of 1 year from 1st January 2009 was Ksh 5,000 per month.

It was part of the terms of the said service agreements that the grievants's services could be terminated upon being given 1 month notice except in cases of gross misconduct. There is therefore proof that the grievants were employees of the respondents on the terms of the service agreement. There is however no mention of the terminal benefits at the expiry of the contract or any evidence of such payments as alluded by the respondents.

On the second issue, it is evident that the grievants were suspects in a criminal incident where certain valves or equipment were stolen from the respondents farm. They were charged with the offence of stealing by servant and alternatively failing to prevent the commission of a felony. They were however acquitted of the charges under S. 215 of the CPC. At the time the criminal case was in progress, they were not served with any termination notices and they assumed they could go back to work. When they tried to go back to work, they were denied access. They sought help from their union and a dispute was reported to the Minister for Labour. Conciliation processes flopped.

It is respondents contention that the claimants absconded duty after they were arrested. The question then is whether the claimant's services were terminated or they absconded duty. The service agreements of the claimants indicate that they served on a one year contract which was renewed from 2006 to 2009, the last being from 1st January 2009 and ending on 31st December 2009. This last contract apparently terminated in June 2009 when the claimants were arrested by police and charged in court. The respondents averred that the claimants absconded duty but I do not find this to be true because evidence of RW1 was that they were replaced after they were charged since the farm could not be without a guard. Hence they were technically terminated. The respondents dismissed them technically without a hearing as being charged in court did not automatically warrant their termination. The right to a hearing as

envisaged under S. 41 of Employment Act was not given to them. Under the contract, they were also entitled to one month's termination notice or 1 month's salary in lieu of notice which they were also denied. In view of the happenings, I find that the claimants were unfairly terminated.

What remedies are they entitled to then? They had claimed for various prayers including reinstatement. However, given the period of time from the time of termination, which is over 3 years as envisaged under S. 12 of Industrial Court Act, the prayer for reinstatement cannot be granted.

I however find they were underpaid during the period they worked according to the Legal Notices referred to being Nos. 38 of 2006 which set the minimum wage at 5796 and Legal Notice No. 70 of 2009 putting the minimum wage at 6839. This sets the underpayment as follows:-

Joshua Otieno:

1st May 2007 - 30th April 2009

(24 months) at Ksh 39,969.60

And for two months in 2009

May to June = 1134.85 X 2 = Ksh 2270

TOTAL= 42,239/=

Rashid Khamisi:

Underpayment

1st May 2007 - 30th April 2009

(24 months) at Ksh 39,969.60

And 2 months in May to June 2009 = Ksh 3,470

TOTAL = 43,439/=

Other entitlements are;

Notice pay for each claimant being = 7,864.85

Severance pay 6130 X 8 = 24,520 for each

2

Leave, overtime and pay on public holidays is not proved and so is not granted.

Each claimant is also entitled to 12 months salary compensation for wrongful termination being;

12 X 7864.85 = 94,387.2

TOTALS:

Joshua Otieno Odhiambo = Ksh 161,146

Rashid Khamisi = Ksh 162,346

The respondents will also meet costs of this suit.

HELLEN WASILWA

JUDGE

17/6/2014

Appearances:-

Oduor for claimants present

Lusweti h/b Menezes for respondents present

CC. Wamache