



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 284 OF 2013

CHAI NGALA & 7 OTHERSCLAIMANTS

VERSUS

SMOKY HILL LTDRESPONDENT

J U D G M E N T

INTRODUCTION

The 1st – 8th claimants brought this suit on 25/7/2011 through Rakoro and Co. Advocates. They amended the claim on 25/9/2012 with the leave of the court to add more prayers and the 9th and 10th claimants. The claimants seek to recover employment dues on termination plus compensation for unlawful termination of their employment by the respondent. The claimants were employed on diverse dates between 2002 and 2013 and they worked continuously until they were unlawfully terminated on diverse dates between 2010 and 2011. The said engagement and termination was done orally.

The respondent has admitted that all the claimants were employed by her between 2002 and 2011 either on casual or permanent basis. She has however denied liability for unlawful termination of the claimants. Instead she accused the claimants for deserting work without notice to her. According to the respondent the claimants are not entitled to any terminal benefits or compensation since they are the ones who deserted work.

On 22/4/2014 the 2nd, 3rd, 5th, 7th, and 8th claimants filed a notice to act in person followed by a consent judgment signed between them and the respondent filed on 6/5/2014. The rest of the claimants remained with their advocates and chose to prosecute their suit to the end. The case was heard on 5/6/2014 when Chai Ngala, the first claimant testified on his behalf and that of the 4th, 6th, 9th, and 10th claimants. On the other hand Tom Omolo testified for the defence as RW1. Before the hearing started, the parties agreed to have all the documents filed by both sides be admitted as exhibits.

CLAIMANT'S CASE

CW1 stated that he was employed by the respondent together with the 4th, 6th, 9th, and 10th claimants on the dates stated their respective written statements (page 9-13) of the claim; CW1 for instance was employed on 5/3/2001 as a Machine Operator. He started with a salary of ksh.100 per day which was paid on weekly intervals. CW1 and his colleagues worked every day of the week including Sundays, and they never went for their annual leave. They used to work from 7a.m. to 5p.m.

They were not given employment letters but only an employment identity card. Later in the course of their service, their payment intervals was changed to monthly. On 18/12/2010, the machine CW1 was operating broke down and while it was being repaired, he was asked to hold brief for another machine operator who went for a short call. When CW1 returned to his machine, the Directors of the respondent confronted him bitterly seeking explanation why CW1 was operating another machine. Despite the CW1's explanation that his machine was being repaired and in the meanwhile he went to hold brief for his colleague to answer a call of nature, the Director dismissed CW1.

When CW1 returned to the quarry the following day, the Director send him away with a warning that he should not return to the quarry again. He was not paid his service benefits despite several visits to the respondents office to demand for the same. His co-claimants were also terminated but on diverse dates without any reason as explained in their respective statements aforesaid.

They all reported to the labour office and thereafter sought legal help from Kituo cha Sheria who served a demand notice to the respondent. When no amicable settlement the claimants brought this suit. CW1 prayed for one month salary in lieu of notice, leave days not utilized throughout his whole period of service, overtime and house allowance. He made similar prayer on behalf of the 4th, 6th, 9th, and 10th claimants.

On cross examination, CW1 stated that the interval of payment of salary was changed from weekly to monthly from May 2010. CW1 contended further that he and his colleagues were issued with employment identity cards by the respondent's auditor Mr. Rashid. He maintained that he never deserted work and stated that he was dismissed by the Director of the respondent. He confirmed that in that day the supervisor asked him to operate a machine on behalf of his colleague Mr. Zion who went for a short call and when the Director so it, he was not pleased and he dismissed him summarily.

He confirmed that he did not claim for any overtime by his demand letter but maintained that the attendance and payment sheet did not show that his overtime was paid. CW1 denied ever deserting work to occasionally seek well paying employment in other neighboring quarries and maintained that he served continuously for the respondent alone. He admitted that he was paid salary for all the days worked but not the overtime. CW1 contended that whenever he missed work due to ill health he was never paid any salary.

CW1 maintained that he never went for his annual leave. He further maintained that the other claimants were terminated because the respondent was transferring operations to another site. CW1 confirmed that he was deducted NHIF and NSSF dues starting from 2010.

DEFENCE CASE

RW1 is the General Manager for the respondent. He confirmed that the respondent deals with quarrying of coral building blocks at Kwale and Kilifi. RW1 admitted that all the claimants were employees of the respondent at some point between 2003 and 2010. According to RW1, most of the claimants were casual labourers for clearing the ground and loading blocks but some were trained to become machine operators. He however denied that the claimants were issued with any Employment Identity Cards.

RW1 explained that the claimants started on daily wages which was later changed to weekly pay and eventually monthly salary starting 2010 for CW1 alone. RW 1 further explained that the claimants used to sign attendance register which was also used for payment of salary. Among other things, the said register, according to RW1 indicated the overtime pay earned. The register also allegedly indicated pay in lieu of leave and NSSF deductions. The register is in page 120 to 144 of the response. He denied the claim for accrued house allowance and contended that the salary to the claimant was a consolidated pay and within the minimum statutory wage bracket.

RW 1 contended that CW1 asked for leave of absence before Christmas holiday in 2010 but he never returned to work in January 2011 as scheduled. Nothing was heard again from him until he brought this suit. RW1 contended that the other 4 claimants were given transfer from Kilifi to Likoni when the kilifi

site was temporary closed but they refused the transfer alleging that they did not wish to stay away from their wives.

RW1 denied that the respondent terminated their employment and accused the claimants for deserting work after being given transfer. He further denied that the Director disagreed with the claimants leading to dismissal. RW1 maintained that CW1 deserted work to seek for better paying job in the neighbouring quarries as it was the habit of the claimants during their service. RW1 confirmed that only the machine operators were allowed to operate the machine and not the casuals because of the danger they posed. RW1 contended that all the claimants either went for their leave or they were paid in lieu of the leave. He referred to the records in page 286 to 288 in response. He denied the claim for salary in lieu of notice stating that its the claimants who absconded work.

On cross examination, he denied that the claimants worked continuously. He denied that identity cards produced by the claimants were given to them by the respondent. He however admitted that the ID cards corresponded with the claimants job titles and they bore the correct address for the respondent.

RW1 confirmed that attendance register was written by him the Accounts clerk. He maintained that NSSF deductions were done for the claimants but he could only show evidence in respect of the CW1 in page 144 of the report for October to December 2010. He admitted that there were supervisors in charge of operations at the sites. He also confirmed that he was not present when CW1 was dismissed by the Director. He maintained that all the claimants utilized their leave days earned. He did not however have any records to prove that claimants used to work for other quarries in the same period they allege they were working for the respondent. RW1 concluded by stating that he did not know whether the respondent Managing Director did respond to the claimants demand letter.

After the close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

After carefully perusing the pleadings and considering the evidence and submissions, the following issues arose for determination:

- 1. Whether the claimants deserted work or they were unlawfully terminated.**
- 2. Whether the reliefs sought ought to issue.**

Desertion -VS- Unfair termination

According to the RW1, CW1 went for his leave during Christmas holiday in 2011 but failed to return to work in January 2012 as scheduled. Nothing was heard from him until the suit was filed. As regards the 4th, 6th, 9th, and 10th claimants, RW1 contended that they deserted work protesting transfer from Kilifi to Likoni after the respondent temporarily closed down operations at the Kilifi quarry.

On the other hand, CW1, has contended that he was dismissed by the respondent's Director on 18/12/2011 when he found CW1 operating another machine which was not his usually assigned machine. According to CW1 he was instructed by his supervisor to hold brief for another operator who rushed to answer a call of nature. That happened while CW1's machine was undergoing repairs. When CW1 returned to the quarry the following day, the Director chased away and told him never to return there.

Thereafter CW1 pursued his dues from the respondents office but none was paid and no certificate of service was given to him. As regards the 4th, 6th, and 9th claimants, the respondent terminated their services when she closed down her operations at Kilifi and relocated to Likoni. She allegedly promised the claimants that they were to be called when required. As for the 10th claimants he was dismissed on 8/7/2009 without any reason. All the claimants were never paid their dues and were never given any termination letters and certificates of service. Accordingly, they deemed the termination to be unfair for want of notice and payment of dues.

This court has no difficulties in finding that the claim for the 10th claimant was filed out of time and as such the court has no jurisdiction to entertain it. It is therefore struck out with no order as to costs.

As regards the claim for 1st, 4th, 6th, and 9th claimants, the court is satisfied on a balance of probability that their employment was unfairly terminated by the respondent. Starting with the 1st claimant, his evidence that he was dismissed by the Director was not controverted. The said Director never testified and no other witness present during the alleged dismissal on 18/12/2012 was called to challenge the evidence by CW1. The claimant was lawfully discharging his duties as instructed by his site supervisor when he was dismissed without following any fair procedure as provided by Section 41 of the employment Act. The said provision requires that a disciplinary hearing be accorded to the employee before he is dismissed for any alleged misconduct or poor performance of duty.

Secondly, Section 45(2) requires that an employer must prove that the employee was dismissed for a valid and fair reason. In the present case no valid and fair reason was cited for the dismissal. The RW1 merely alleged that CW1 went for leave in December 2011 and never returned to work as scheduled in January 2012. RW1 did not produce any leave application or other leave records to prove that CW1 indeed went for leave in December 2011 as alleged. Consequently the court finds that his dismissal was procedurally and substantively unfair.

As regards the 4th, 6th, and 9th claimants, their employment came to an end when the respondent closed shop at Kilifi and relocated to Likoni Mombasa. No written evidence was adduced by the defence to prove that the said claimants were given any personal transfer to the new site at Likoni. The said claimants have denied that they were given transfer. The court has seen memorandum dated 23/2/2010 addressed to all workers but there is no evidence that it was served on the respective claimants. It also did not give any details of any transfer allowances and the reporting date of the new station. According to claimants they were terminated without notice and were not paid any dues.

The court finding from the foregoing scenerio is that after the respondent closed shop at Kilifi, the claimants lost their employment. It appears that the respondent laid the claimants redundant without complying with Section 40 of the Employment Act. The court therefore holds the said termination to be unlawful and therefore unfair.

In determining whether the procedure was fair, Section 45(5) (c) of the Employment Act requires that the court is to consider the extent to which the employer complied with any statutory requirements connected to termination including issuing certificate of service under Section 51 and the procedural requirements under Section 41 *supra*. In this case the respondent did not comply with the aforesaid statutory required and the termination of the 1st, 4th, 6th, and 9th employers became unfair within the meaning of Section 45 of the said Act.

Reliefs

Section 49 of the Employment Act entitles an employee who is unfairly terminated to salary in lieu of notice and accrued employment dues plus compensation of upto 12 months gross salary. In the present case all the claimants prayed for one month's salary in lieu of notice and they are awarded. Although RW1 stated that all the claimants, save CW1 were paid on weekly intervals for being casuals, the court has converted their status Under 37 of the Employment Act and awarded them one month in lieu of notice.

They have also prayed for 12 months salary as compensation for unfair termination. 1st and 6th claimants were machine operators and they could not secure alternative employment with much ease as the 4th and 9th claimants who were gate keepers and general labourers respectively. Consequently, 1st and 6th claimants are each awarded 6 months gross salary as compensation for unfair termination which 4th and 9th claimant are each awarded 3 months gross salary for the same.

The claimants were paid overtime according to the attendance and payment sheets produced by the

defence and as such the prayer for the same is dismissed. Likewise the claim for accrued house allowance is dismissed for all the claimants because the salary they were earning was a consolidated pay. All claims for leave made respective of the period of 3 years before the filing of the suit is dismissed for being brought out of time after. It is abuse of the process of the court for employees to work for many years without enforcing their rights under the contract of employment only to sue for them out of time after dismissal. Consequently the claimants are only awarded pay in lieu of leave for the leave days not utilized within the limitation period of 3 years prior to the suit that is to say from 17/8/2008.

In view of the foregoing, CW1 gets pay in lieu of leave days not taken from 2009 to 2011 being $21 \times 3 \times \text{ksh.}11500 / 30 = 24,150$. The 4th claimant was paid in lieu of leave for the year ending 2009. He will therefore get leave of 21 day for the year ending march 2010 being ksh.7350, the same amount paid in 2009. the 6th claimant was also paid cash in lieu of leave ending December 2008 and 2009. He will therefore only get leave for the days earned between January 2010 and March which is 5.25 leave days x daily salary of ksh.250 =ksh.1,210.

As regards the 9th claimant, there is no leave records produced as exhibits. Annexure SHL-25 is not leave forms as alleged in the defence. The 9th claimant will therefore get cash in lie of leave for 2008, 2009 and 2010 which is about $52.5 \text{ days} / 30 \times 7500 = 13125$.

The claimants will in addition get service pay for the years they were not members of NSSF. Cw1 worked between March 2003 and April 2010 without contributing to NSSF. That is $7 \text{ years} \times 15 / 30 \times 11500 = 40250$. The 4th claimant was never a member of NSSF for the whole period of service between March 2003 and March 2010. That was $7 \text{ years} \times 7500 \times 15 / 10 = 26250$. The 6th claimant worked between 31/2/20015 and 23/8/2010 without joining the NSSF. That was $5 \text{ years} \times \text{ksh.}7500 \times 15 / 30 = 18750$. The 9th claimant worked between 4/6/2007 and 23/3/2010 without joining NSSF. That was $3 \text{ years} \times \text{ksh.}7500 \times 15 / 30 = \text{Ks.}11250$.

The summary of the award to the respective claimants is as follows:

CHAI NGALA (1ST CLAIMANT)

- a. One month salary in lieu of notice11500
 - b. 6 months salary for unfair termination..... .69000
 - c. Leave not taken 24150
 - d. Service pay 40250
- 144,900

AMOS CHAI (4TH CLAIMANT)

- a. One month salary in lieu of notice7500
 - b. 3 months salary for unfair termination22500
 - c. leave not taken7000
 - d. service pay26250
- 63600

BAO MWINYI (6TH CLAIMANT)

- a. One month salary in lieu of notice7500
 - b. 6 months salary for unfair termination45000
 - c. leave not taken1310
 - d. service pay18750
- 72560

ALEX MBAJI (9TH CLAIMANT)

- a. One month salary in lieu of notice7500
- b. 3 months salary for unfair termination.....22500
- c. leave not taken 13500
- d. service pay 11250

54750

DISPOSITION

Judgment is entered for 1st, 4th, 6th, and 9th claimants in the following terms:

1. The termination of their employment by the respondent is declared to be unfair and unlawful.
2. Payment of aggregate sum of ksh.335,820 plus interest from the date of termination of each respective claimant.
3. Certificate of service to issue to each of the claimants
4. costs plus interest.

Orders accordingly.

Dated, Signed and delivered this 25th July 2014.

O. N. Makau

Judge