



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 124 OF 2012

WALTER WANYAMA & 4 OTHERSCLAIMANT

VERSUS

ITA MARINE CO. LIMITEDRESPONDENT

J U D G M E N T

The claimants have sued the respondent claiming employment terminal dues totaling to ksh.4,368,400/- for unfair and wrongful termination of their service. The gravamane of the claim is that they were employed as members of “gang” in September 2009 and worked continuously until they were unjustifiably terminated without notice on 19/4/2012. They seek terminal dues based on their monthly wages of Ksh.30000/ and ksh.15000 for the 1st claimant and 2nd, 3rd 4th and 5th claimants respectively. They are also claiming refund of salary deduction at the rate of ksh.3000/ per month for the 1st claimant and ksh.2100 per month for the other claimants.

The respondent has denied liability and contented that the claimants were not his employees but rather outsourced gang labourers employed by Pampazuko Group Services.

The suit was heard on 12/4/2013 and 16/5/2013 when the 1st claimant testified on behalf of the other claimants as CW1 and Mr. Michael Osino Ouma and Samuel katana Jambiri testified for the defence as RW1 and Rw2 respectively.

CW1 told the court that he was employed by respondent in September 2009 and worked until April 2012 when their services were terminated by the respondent. That he was the 'gang” leader from 2009 to 2010 when he was promoted to a supervisor. The contract remained oral as the respondent did not issue any employment letter. That as a 'gang” leader he was supervising 30 other workers and checking their safety. Their duty was loading and off oading grains at the respondents warehouse. RW1 was the General supervisor for the respondent and he is the one who promoted the CW1.

That RW2 was the Personnel Manager when CW1 was recruited with the entire gang. That the salary was ksh.500 per day but it could double to ksh.1000 depending on the work done. That as a supervisor he was put in charge of two gangs of 60 workers. That he also underwent training on safety and awareness with the sponsorship of the respondent . As a supervisor he ensured safety on behalf of the respondent.

That they started work at 6 am and worked past 7.30 every day with other times working overnight. They were never paid for the over time work. That in April 2012 he and his colleagues reported to work in the morning as usual but they were terminated without any reason. According to him the termination

was unfair as it lacked prior notice to them. He contented that they were members of the Kenya Shipping Clearing and warehouses Workers Union and they paid their union dues through remittances by the respondent.

He further stated that the employer used to deduct part of their salary and retain it for staff welfare needs. The 1st claimant was deducted Ksh.50 per day which was later raised to ksh.100 per day while other were deducted ksh.70 per day. That the welfare money was kept by the RW1 who was the General supervisor. That the welfare group was called Pambazuko and its officials included RW1 as the Chairman, Owino as the Secretary and the CW1 as the Treasurers. That they were the signatories to the welfare account.

That the hierarchy of the respondent's establishment was from the lowest side, gang member, followed by gang leader, then General supervisor, then warehouse supervisor and finally the director who was RW2. He prayed for award the dues as tabulated in the claim.

On cross examination, he maintained that Pambazuko was a welfare group at their work place. That the welfare group was registered in 2011 while still working. That its objective was not to seek jobs because they were already employed but loans. That it was formed on advise of the RW1 to assist during times of need and not for job seeking. He denied any knowledge of a contract to serve for 2 years and denied all the terms of Appendix 2 of the response.

That they did piece work assessed per day of loading and off loading cereals. That the work started at 8.00am and ended at 5.00pm after which it became overtime until the work ended. That he used to assess the cost of the labour and present to the RW1 (General supervisor) who would then give him the money to pay the other gang members.

That the general supervisor was also the Chairman of Pambazuko and is the one who deducted the money for the welfare with the authority from RW2. That the Equity bank account for Pambazuko was not for the welfare deductions.

That they were dismissed from work by the respondent through the General Supervisor (RW1). He said the respondent instructed him to dismiss them. He denied personal differences with the RW1. He also maintained that he was employed by the respondent who even took him for training on Safety and Health. That their union dues were by the respondent. He asserted that the respondent had all the employment records for them including where they used to sign in and out of the work place. He denied being employed by Pambazuko. That in every thing the RW1 was acting as the agent for the respondent.

RW1 stated that he was the Chairman of Pambazuko Group Services a self help group which was registered with the Ministry of Gender on 2009 and renewed in 2012. He produced its certificate as Exhibit d3. That the group provides manuals labour to various companies, sometimes serving many companies simultaneously by dividing the group members into smaller groups. That the group has 19 members and when the work is a lot they outsource labour from non members.

He defended the respondent as one of the groups' clients who calls them whenever work was available. That they had a 2 years contract as per exhibit d2 which bears the stamp for the group and the respondent. That the respondent neither recruited the gang as his staff nor did she give them any instruction or even keep their employment records.

According to him the 1st claimant was a member and the treasurer of Pambazuko but the other claimants were working for the group but were never members of the gang. He maintained that the gang was never employed by the respondent and felt that by suing their clients the groups employment opportunities were prejudiced. According to him the group was employed by the Pambazuko. He agreed that the association was established to take care of welfare needs like sickness and housing had upto ksh.140000/ as savings.

That the same money was used for paying union dues. He also admitted that the gang members

were in the Kenya Shipping Union. He denied claimants claims and advised that they should sue Pambazuko and not the respondent.

On cross examination he confirmed that the certificate of registration indicated that the group was registered on 7/1/2011 after the contract of service dated 2009. He confirmed that whenever the workers were injured they reported to the respondent who gave money to the victim to go to hospital. That the respondent was responsible for workers injuries and had to insure them. He also confirmed that the certificate of registration showed that the Pambazuko group postal address is that of the Respondent. He confirmed that appendix 2 in the claimants reply to response was signed between their union and RW2 for the respondent.

He further stated that there arose some differences with claimants but he still wants them back to resolve the same because they are signatories to the account. He however denied being the employer of the gang but only a group leader. RW2 is the Director and the proprietor of the respondent. He denied being the employer of Pambazuko and contended that he engages them whenever there was work at the rates from the Industrial Court,. The rates are for example ksh.15 and 8 for a bag of 90 and 50 kilograms respectively.

That the respondent had 4 groups including Pambazuko which were subcontracted through the group leader because “that is his company”. He denied any connection with the group because his only contact person in the group is its leader to whom he gives the money after the work is done which to share with his group.

That he started dealing with Pambazuko in 2009 but denied knowledge of the claimants because he only dealt with RW1 and not any other person in the gang. He denied the claim and directed the same to Pambazuko. According to him his work was seasonal sometimes for a week or even a day.

On cross examination he admitted that he has an insurance which covers the employees when they are working. That in case of small injuries, the workers are taken to hospital and the matter ends there. He agreed that he was a member of DATA (employers organization) and that is why he pays wages as advised by the court. He further admitted that initially he engaged Pambazuko without a group and later they registered one.

After the hearing the parties filed closing submissions. I have carefully perused the pleading and considered the evidence adduced plus the closing submissions filed. It is not disputed that the suit before me is related to Employment and Labour Relations. Accordingly I am satisfied that the court has jurisdiction to determine the dispute before it. The issues for determination are:

- 1. whether indeed the claimants were employees of the respondent between September 2009 and April 2012.**
- 2. whether the said employment was wrongfully and unfairly terminated by the respondent.**
- 3. Whether the reliefs sought by the claimants ought to issue.**

In answer to the first issue, I have considered the reasons why the claimants consider themselves as employees of the respondent.

Firstly they were employed by the respondent before they registered Pambazuko self help group. Secondly, the respondent insured them while at work and met the cost of their medication when injured while at work. Thirdly the respondent paid their union dues and had signed a CBA with their union. Fourthly the respondent and Pambazuko shared the same Postal address, lastly the respondent had instructed the RW1 (General Supervisor) to promote CW1 from “gang leader” to “supervisor” and even trained on Safety and Health.

The respondent has however denied the employment relations on various grounds. Firstly, RW1 clarified that the 'gang”, him included, were never employed by the respondent. According to him the respondent was only client for their gang labour based on a service agreement between the gang's

Pambazuko group and the respondent. Secondly, the only link between the respondent and the gang was RW1 who coordinated the work and collected the gang pay for distribution to his members. Thirdly, the respondent did not have records of the gang and he did not pay their union deals which RW1 says the group paid for itself. Fourthly, the RW2 did not know the claimants personally and he denied ever dealing with them personally for instruction or otherwise.

Lastly the respondent contended that his work was seasonal and had four groups of gang labourers who provided labour only on need basis and paid at the piece rate as agreed in the CBA between her employers organization and the claimants Trade Union. That the piece work given only lasted for a day or at most a week.

The courts evaluation of the above arguments leads to the bitter conclusion that the claimants were never employed by the respondent. The claimant have failed on a balance of probability to demonstrate how they entered into the employment contract and the intention of the parties. On the other hand, the court finds the evidence of RW1 and RW2 consistent and highly probable that the claimants were part of a gang of labourers contracted under a service agreement to provide labour for specifically agreed piece work at a payment predetermined under the CBA between their trade union and the respondents' employers organization. In addition the respondent never had contact with the gang and never gave them any instructions, supervision or direct payment.

Consequently the claim before the court is against the wrong defendant as per the testimony of RW1 and 2. The claimant's failure to enjoin Pambazuko or at least RW1 to the suit was fatal. There is also no evidence adduced by CW1 to prove that Respondent sponsored his training nor did the shared postal address prove the gang's employment relationship with the respondent. The court therefore believes the respondent's defence and reaches the finding that the suit lacks merit .

In view of the foregoing finding on the first issue, the court will not waste any effort addressing the second and third issues because the respondent was neither capable of dismissing the claimants nor was she bound to pay any dues to them as prayed. The suit is therefore dismissed with no orders as to costs.

I direct the Deputy Registrar of this court to serve a copy of this judgment on the County Labour Officer Mombasa to investigate whether the use of gang labour in the shipping, warehousing and forwarding industry is a form of unfair labour practice and advise this court within 30 days of today.

Signed dated and delivered this 31st July 2013.

ONESMUS MAKAU

JUDGE