



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 67/2013

(formerly Nrb 1967, 1968, 1969, 1970/2011- consolidated)

(Before Hon. Justice Hellen Wasilwa on 30th September, 2013)

1. LENS CHARLES NDAGO

2. EDWARD ONYANGO ODHIAMBO

3. GEORGE OTIENO OKETCH

4. JULIUS OUMA OWINO CLAIMANTS

-VERSUS-

CHEMILIL OUT-GROWERS LTD RESPONDENT

JUDGMENT

The claimants herein Lens Charles Ndago, Edward Onyango Odhiambo, George Otieno Oketch and Julius Ouma Owino filed their separate memoranda of claim on 21.11.2011 through the firm of Bruce Odeny & Co. Advocates. These separate claims were subsequently consolidated and heard as one. The issue in dispute is the unlawful termination of the claimants services by the respondents.

The claimants aver that they each were employed by the respondents as field clerks manning different areas. The first claimant in his evidence told court that he was employed by the respondent on 26.3.2001, whereas the 2nd, 3rd and 4th were each employed on 14.1.2004, 22.9.2005 and 6.11.2006. According to the claimants, they performed their work diligently in the field. The work entailed writing receipts of tractors transporting sugarcane to the factory, census of the field, and field days for farmers. Each claimant used to be paid Ksh 1,000/= allowance per month for the work done. On 8.9.2009 each claimant was served with a dismissal letter. The dismissal letters stated that an appraisal had been done for each claimant and their performance was found to be below expectation. None of the claimants had been involved in any malpractices before or indiscipline. The claimants aver that they wrote a letter to their employer complaining about their low pay and this is what may had triggered their dismissal. After receiving these dismissal letters they reported to the labour office. The labour officer attempted on several occasions to summon the respondent to discuss the unfair dismissals but the respondent ignored the labour officer's letters. It is the claimants contention that they were each underpaid and they now claim underpayment of salary, three months pay in lieu of notice, unpaid leave allowance, unpaid overtime for

holidays worked, unpaid overtime for weekends worked, and gratuity as itemized in their individual claims.

The respondents on the other hand filed their reply to memorandum of claim on 18.1.2012 through the firm of Anne Omollo and Co. Advocates. The prosecution of this case was later taken over by the firm of P. D. Onyango & Co. Advocates who filed Notice of Change of Advocates. The respondents also called one witness, the Acting General Manager of the respondents. The witness told court that the claimants indeed used to work for the respondent at one time doing clerical work. That they were staying in their homes and used to come to the office occasionally. They were each given letters of appointment and terms of engagement were temporary. They were each being paid Ksh 1,000/= per month and 85 cents per ton for deliveries over 5 tons. The pay was to be adjusted if the work increased. The respondents stated that appraisals were done on each claimant and they were found to be under performing and so they were dismissed. They contend that the law was followed in dismissing the claimants and they were paid as demanded by law.

In cross examination the respondents' witness told court that the company's operations run from 6 am to 8 pm. He said field workers check on cane harvesting and at times tractors ferrying cane reach the factory after 5 pm. There are also tractors that do ploughing and their data is collected in the field. The witness also admitted that the claimants were neither given notice nor paid in lieu of notice. He avers that the claimants were paid the Ksh 1,000/= per month and their salary was never increased all the time they worked. Some of these claimants joined the company before 2003. He admits that he was aware of the minimum wages which currently stand at between Ksh 7,000/= to Ksh 10,000/= and therefore the Ksh 1000/= was way below the minimum wage. He says they did appraisal on claimants in 2003 but he does not know if the claimants were aware of this.

Having heard the evidence of both parties, the issues for determination are as follows:-

1. Whether the respondents decision to terminate the claimants services were justified and fair.
2. What remedies if any, the claimants are entitled to.

On the 1st issue, the respondents admit that the claimants were their employees and were each issued with letters of appointment. Of course the nature of the appointment was temporary and the claimants were each required to reside in their own homes with no payment of a house allowance. The terms of their appointment letters may initially have been acceptable to the claimants but they infringe upon the provisions of the Employment Act 2007.

S. 37(1) of the Employment Act 2007 deals with conversion of casual employment to term contract and states as follows:-

“Notwithstanding any provision of this Act, where a casual employee;

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month

(b) or performs work which can not reasonably be expected to be completed within a period, or a number of working days amounting the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.”

Section 35(1) deals with termination of contract and under S. 35 (1)(c)

“where the contract to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing.”

It is expected here that the claimants ceased to be temporary employees three months after their employment and for their services to be terminated they were entitled to a month's notice. They were

neither given a month's notice nor paid in lieu of notice.

Secondly, the respondents content that they did an appraisal of the claimants and found their performance wanting and therefore terminated their services. This process also infringed the provision of S. 41(1) of Employment Act 2007 which provides that:-

“Subject to Section 42(1), an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

Of course the claimants were never accorded any hearing and therefore their right to be heard was infringed upon. This right is also enshrined in ILO Convention 158, Article 7 which states that ---

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

ILO Termination of Employment Recommendation, 1982 (No 166) at Section (a) provides that;

“A worker should be entitled to be assisted by another person when defending himself in accordance with Article 7 of the Termination of Employment Convention 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment. This right may be specified by the methods of implementation referred to in paragraph 1 of this recommendation.”

Given the manner in which the respondents terminated the claimants services, the termination was unfair and unjustified and I declare it so.

What remedies then are the claimants entitled to? To start off, the respondents have admitted that indeed they underpaid the claimants paying them Ksh 1,000/= per month instead of the required wage as per the minimum wages. 1st claimant was employed in the year 2001. The 1st claimant did not indicate to this court how much the minimum wage was in 2001. However, the minimum wages from 2002, 2003, 2004, 2005, 2006, to 2008, 2009 were Ksh 5420, Ksh 5790, Ksh 6674, Ksh 7145, Ksh 8002, and Ksh 9442 respectively.

1st claimant was underpaid and so was his colleagues in the same period. I therefore find for claimants and order payments of the difference in the pay and underpayment amounting to:-

1st claimant

March 2002 to September 2009 = 605,772

2nd claimant

January 2004 to September 2009 = 469,926

3rd claimant

September 2005 to September 2009 = 352,630

4th claimant

November 2006 to September 2009 = 258,150

I also find that they were not paid any salary in lieu of notice which I find to be;

= **Ksh 9,442/=** for each claimant.

I also award damages of 12 months salary for wrongful termination which;

= Ksh 9,442 X 12 = **Ksh 113,304/=**

Service pay is also awarded for each claimant as prayed being 15 days salary for each year worked coming to;

1st claimant - Ksh 37,768

2nd claimant - Ksh 23,605

3rd claimant - Ksh 18,884

4th claimant - Ksh 14,163

TOTAL for each claimant =

1ST CLAIMANT - **KSH 766,286/=**

2ND CLAIMANT - **KSH 616,277/=**

3RD CLAIMANT - **KSH 494,260/=**

4TH CLAIMANT - **KSH 395,059/=**

Each claimant should also be issued with a certificate of service. Respondents to pay costs of this suit.

HELLEN WASILWA

JUDGE

30.9.2013

Appearances

Odeny Advocate for claimants present

CC. Wamache