



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 594 of 2010

JOSEPH OKELO ADHIAMBO.....1ST CLAIMANT

BENARD OUMA OKONGO.....2ND CLAIMANT

VS

Y.J. ELMI AND

Y.M. JAMAL

STAREHE TOTAL SERVICE STATION.....RESPONDENTS

JUDGMENT

The Claimant herein Joseph Okelo Odhiambo and Benard Ouma Okongo filed their Memorandum of claim in this dispute on 28th May, 2010, against the Respondents Y.J. Elmi and Y.M. Jamal, BayCom Express Ltd trading as Starehe Total Service Station seeking orders for payment of terminal dues.

Kenya Petroleum Oil Workers Union later filed their Memorandum of appearance to appear for the Claimants.

The Claimants' case was that between 1st January 2007 to 31st January, 2010 they were employees of the Respondents. However the Respondent terminated their services amid claims that the Claimants cheated the Respondents. The Respondents, the Claimants aver did not pay them their terminal dues as envisaged under Section 35 (1) (c) of the Employment Act.

The Claimants stated that the Respondents never issued them with letters of appointment but they swore an affidavit to the effect that they were employees of the Respondents. Claimants gave oral evidence in court and on cross examination, 1st Claimant denied ever writing a letter dated 13th June 2008. He says he speaks only Kiswahili and Dholuo.

The Respondents filed their replying affidavits in respect of this claim. The 1st Respondent in his affidavit, he stated that the Claimants' assertions are mere allegations. He further averred that he did not know that the Claimants were members of any Union and that he never employed any of them.

The 2nd Respondent on the other hand in his affidavit states that it had not been demonstrated that the Claimants are members of the Kenya Petroleum Oil Workers Union. He further stated that he took over the management of the station as Director in 2009 and so was not involved in its management before then. He says the Claimants presented forged and fake documents to the Respondents (YE-1) and when he interviewed them, he found they lacked the ability to communicate to customers. He found that he could

not employ them. In general, the Respondent denies he even employed the Claimants and asked this court to intervene and strike out this case.

The Respondent's affidavit had annexures which Respondent states were forgeries from Claimants and evidence that Claimant could not communicate with customers.

At close of the oral hearing the parties agreed to file their written submissions which they never filed.

I have considered the evidence of both parties. The issues for determination is whether

1. The Claimants were employees of the Respondents.
2. If so, were the Claimants' services terminated unfairly.
3. If so, what remedies are the Claimants entitled to.

On the 1st issue the Claimants state they were employed by the Respondents but were never issued with any appointment letters. Further, the Claimants evidence is based on their word plus annexure showing salary advances for October, 2007 which shows the names of Claimants as recipients which the Respondents never commended on. The Respondent in his replying affidavit states that he interviewed the Claimants in 2009 July with a view of wanting to employ them but found that they had difficulties communicating with customers and so never employed. He further stated that he took over the management of the Petrol Station as Director in 2009 and so would not have been involved in its management before then. They say they were never involved in any malpractices which required police intervention.

This court is left to infer from the evidence on record and from the exhibits showing salary advances that the Claimants and Respondents' had an employment relationship. Attached to Respondent's replying affidavits are also documents purportedly written by the claimants dated 2008 March and 2009 guarantors undertakings which are in custody of Respondents and Respondents do not explain how they got the documents of people not in their employ. It is from this evidence that I find that the Respondents and Claimants had an employment relationship. It was the duty of the Respondents to issue the Claimants with letters of appointment.

It is true such letters of appointment would have revealed terms and conditions of service. In the absence of such letter, it is apparent that there was unfair labour practice contrary to Article 41(1) of the Constitution. The terms and conditions of engagement and even dismissal are missing.

Having found that the claimants were employees of the Respondent. Were the services of the claimants terminated by the respondents unfairly? The claimants claim that they went to work one morning and were advised to go away as they were suspected to have been involved in cheating.

As indicated above the employer-employee relationship existed but the terms of engagement remain vague. In absence of any tangible contract agreement this court resorts back to the minimum terms of an employment relationship as provided for under the Employment Act 2007.

Under Section 45(2) (c) where employment is terminated without adherence to fair procedure then termination is unfair. The procedure of sending away a worker on suspicion of wrong doing without any hearing is indeed unfair and I find that the claimants were indeed unfairly terminated.

What remedies are available to the claimants then? Again Section 49(1) of Employment Act 2007 lists remedies available to such claimants who are unfairly terminated.

I will therefore find for claimants and enter judgment for them based on minimum wages for 2010 as follows:

1. For each one month salary in lieu of notice = 9120.

2. For each claimant

6 months compensation for wrongful termination

= 9120 x 6

= 54 720

TOTAL = 63,840 for each Claimant

3. Costs will be borne by each party.

Dated and delivered in open Court this 26th day of October, 2012.

LADY JUSTICE HELLEN WASILWA

JUDGE

Appearances

John Obure

Kenya Petroleum Oil Workers Union for Claimants

Isinya holding brief for

Nyaribo & Company Advocates for Respondents

Rachael Gichuki Court Clerk