

REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1291 of 2010

SIMON MUNGATA & OTHERS.....CLAIMANT

VS

PARBAT SIYAN CONSTRUCTION LTD.....RESPONDENT

JUDGMENT

The Claimants have sued the Respondent, their former employer claiming terminal dues on account of wrongful dismissal and unfair labour practices.

The gist of the claim is that they worked for the Respondent continuously on diverse dates between October 2003 and 15th August, 2010 and were dismissed without notice or benefits. That the dismissal was as a result of the Claimants' demand, through their Advocate, for the respondent to comply with the law and accord them their full employment rights.

The Respondent has opposed the suit and denied ever employing the Claimants during the period pleaded in their claim. Consequently, she denies ever violating their employment rights and denies ever receiving their said claimants' advocate's demand letter.

She however contradicts herself in paragraph 6 and 7 of her defence when she denies that the dismissal was contrary to the Employment Act or the Collective Bargaining Agreement and further avers that the Claimants were fully paid and compensated for all the services they rendered to the Respondent.

In paragraph 9 and 12 of the defence, she avers that the Claimants were recruited every morning at her gate as and when work was available and that they were never dismissed but left on their own volition after each was paid his full terminal dues. Consequently, she prayed for dismissal of the suit with costs.

The suit was heard on 19-9-2012 and 26-9-2012 when the Claimants testified as CW1-7 and the Respondent called Paresh Pandoriya to testify as RW1.

CW1 was the 1st Claimant. He told the Court that he was employed by the Respondent in 2003 and was dismissed in August 2012. His last wage was Kshs.500/- per day which was being paid after every 6 days. He was never given any leave or paid House Allowance. He used to work from 7.30 a.m. upto 7.30 p.m. with only a lunch break of 30-minutes. He knew the rest of the claimants as his colleagues employed by the respondent. They were dismissed in bits after they lodged a complaint through their Advocate. That they were never given any termination letter or given a hearing. They were also denied terminal benefits.

On cross-examination, he confirmed that on recruitment date, the terms were casual employment with daily wages. They did not agree on House Allowance. They worked for 7 days in a week. There was no stopping but a continuous service. That there was no contract letter but they used to sign a payroll.

They were provided with uniform by the Respondent. He could not however, prove by documents the 7 years' service. He however contended that the obligation was on the employer to draw the contract and keep all the employment records. He prayed for the dues as tabulated in the claim.

CW2 was the 2nd Claimant. He told the court that he was employed in 2005 and worked continuously until August 2010 when he was sacked by the foreman. The reason for sacking was their Advocate's demand letter dated 2-6-2010. He was employed as a casual on daily wage basis. There was no agreement that the wage would include House Allowance.

He had no contract letter but he used to sign a payroll. He worked upto Saturday but could also work on Sundays at times.

CW3 was the 3rd Claimant. He said that he was employed on 4-2-2008 as a mason and was dismissed on 15-8-2010 in the morning by the foreman. He did not have any contract letter but he used to sign master roll. His salary was Kshs.500/- per day. He worked continuously until he was told there was no work. He was never paid House Allowance. He believes he was sacked after his Advocate wrote a demand letter asking for his statutory pay.

CW4 was the 4th Claimant. He was employed on 29-12-2009 as a casual labourer to assist masons and was earning Kshs.300/- per day. He worked continuously until 10-5-2010 when he was terminated after writing a complaint through his Advocate. He used to be paid weekly. He was never paid House Allowance.

CW5 was the 5th Claimant. He was employed by the Respondent as a mason. He was earning Kshs.500/- per day. He worked off days and holidays for the same wage.

CW6 was the 6th Claimant. He was employed by the Respondent as a mason since 2007. His salary was Kshs.500 per day. He used to work for six days and paid on Saturdays. The salary was low compared to the Companies nearby.

CW7 was the 7th Claimant. He was paid weekly for only the days worked.

The 8th Claimant was absent and his Advocate closed the case without his evidence.

In defence, RW1 said that he had worked for the Respondent as an Accountant for 6½ years. That the Respondent's business was construction and building. That she had many sites whereat she engaged sub-contractors. RW1 who does not go to the sites did not know the Claimants. He did not have employment records for all the Claimants except the 1st and 3rd Claimants. That he believed they might have been hired by the subcontractors of the Respondent.

That the records for the 1st and 3rd Claimants were for only June, July and August, 2010 the period they were co-opted into the Respondent with the request of Rash Works Ltd, a Labour subcontractor to finish up some little work left by the subcontractors. Their payroll numbers were 614 and 615 respectively according to the payroll and NHIF returns produced by the witness.

The rest of the Claimants did not appear in the payroll and NHIF records. That all the employees in the payroll were unionisable for whom statutory deductions were being done. He produced Compliance Certificates for KRA, NHIF and NSSF.

That as a policy, no employee closed the year without exhausting his leave days. That according to him, the Claimants were strangers and they were not dismissed.

On cross-examination, he confirmed that he was employed by the Respondent in 2006. His duty was keeping financial records and payments. He did not supervise people at the sites. Other staff members did the site supervisions. That he did not know the workers at the sites.

He only got a report from the people who pay workers on the site. That the payroll produced was for August, 2009 – August 2010 and only 1st and 3rd Claimants appear thereon for 3 months.

That they pay workers using payment vouchers and payslip and there was also a master roll where they sign during payment. He denied the amendments in paragraph 7 of the defence which said that the Claimants were fully paid for their services.

He confirmed that the 1st and 3rd Claimants were earning a salary of Kshs.12,000/- per month but paid on weekly basis. That they were not employees of the Respondent but only put on her payroll for purposes of NHIF, NSSF and Income Tax Returns.

After the hearing, the counsel for the two sides filed written submissions urging me to find in favour of their respective clients.

I have carefully perused the pleadings and considered the evidence by the witnesses and the closing submissions by their counsel. The issues for determination are:-

- (1) whether there existed any contracts of service between the respective claimants and the respondent in the suit.
- (2) whether the said claimants were unfairly and wrongfully dismissed from their said contracts of service.
- (3) whether the Claimants are each entitled to the relief sought in the suit.

To answer the first issue, I do not believe the defence evidence that the

Claimants were strangers to her. That evidence contradicts the defence filed which contains amendments in paragraph 6, 7 and 12 to the effect that the Claimants were never dismissed and they were fully paid and compensated for all the services they rendered to the Respondent and that if they left, it was out of their own volition.

I will not ignore that averment in the defence because it corroborates the Claimant's case. The RW1 also corroborated the Claimant's case when he said that the respondent's core business was construction and building. The Claimant's case is that they were employed as either masons or general labourers to assist the masons.

Lastly on this issue I believe the evidence of the 1st Claimant who said that all the other seven claimants were his colleagues at work for the Respondent. The RW1 admitted that CW1 and CW3 were in his payroll. I do not need to say more because I am satisfied that the Claimants were indeed employees of the Respondent. They all testified that they were not given a contract letter but only signed master roll which was left in the custody of the Respondent. The RW1 only produced the record of employees he considered as permanent and for only August, 2009 to August, 2010. He did not produce records of the casual employees for the period 2003 to October, 2010. He also did not deny the amount of the wages allegedly paid to each of the Claimant. He also did not produce any documents or call site supervisors or subcontractors to prove that the Respondent had indeed subcontractors for labour and that the Claimants were employees of the subcontractors.

Consequently, I find that the Claimants were employed for continuous period from their respective commencement dates.

As regards the second issue, I find that all the Claimants who testified proved that they worked for continuous terms of more than one month for the Respondent. That they started as casual workers and worked until they were dismissed for agitating for their labour and employment rights through their lawyers.

The respondent did not call the site supervisors or cashiers or subcontractors to disprove the claimants' allegations. Under Section 37(1)(a) of the Employment Act 2007, a casual employee who 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, the contract of service shall be deemed to be one where, wages are paid monthly and Section 35(1)(c) shall apply to the Contract.

Section 35(1)(c) provides that a contract to pay wages at intervals of one month or more shall be terminable by a written notice of 28 days in advance.

In the present case all the claimants who testified said that they were dismissed summarily by word of mouth by the respondent's site foreman. They were just told that there was no work. That sounds like redundancy. RW1 did testify that CW1 and CW3 were left in his payroll to conclude some little work that remained in the site. That corroborates the evidence of the Claimants. That they were told by the foreman at the site that there was no work.

The RW1 did not wish to pursue the line of redundancy as the ground for termination. He only disowned the claimants entirely alleging that they were strangers to the respondent. Even for CW1 and CW3 he said they were only put on the respondents' payroll for the convenience of making statutory returns to the government.

Whether the respondent declared the claimants redundant or just terminated their employment, it is my finding that the exercise was wrongful and unfair. Section 35 and 40 of the Employment Act 2007 was not complied with. Consequently, the termination was unlawful and unfair within the meaning of Section 45 and 46(h) of the Employment Act 2007.

The evidence of the seven (7) claimants who testified agreed that they were victimized for agitating for their rights at the workplace and more particularly the demand letter from their Advocate to the Respondent.

Lastly, I will now consider the issue of the relief sought. Section 35, 49 and 50 of the Employment Act provides for the following reliefs:-

- (a) salary in Lieu of Notice
- (b) salary arrears plus other entitlements occasioned by termination
- (c) a maximum of twelve (12) months' salary for unfair termination
- (d) service pay for the years served.

The Claimants have prayed for all the above plus accrued leave, public Holidays, underpayments and House Allowance.

In view of my earlier finding that the termination was unlawful and unfair, I will award to the 1st – 7th claimants the following:-

- (a) One month salary in Lieu of Notice.
- (b) Three months' salary for unfair dismissal
- (c) Service pay at the rate of 15-days per year of service
- (d) Cash pay in lieu of accrued leave days per year.

I will not however grant the rest of the prayers sought in the claim. The

reason that there is no clear evidence on the alleged holidays or Sundays worked. I will also treat the salary paid per day to have been gross pay as per the evidence of some of the claimants. I will also not

grant leave pay due to lack of enough evidence.

The following shall be the summary of my award to the 1st – 7th claimants respectively:-

CLAIMANT	NOTICE PAY Kshs.	UNFAIR TERMINATION Kshs.	SERVICE PAY Kshs.	LEAVE PAY Kshs.	TOTAL DUES Kshs.
1st	15,000.00	45,000.00	52,500.00	73,500.00	186,000.00
2nd	15,000.00	45,000.00	37,500.00	52,500.00	150,000.00
3rd	15,000.00	45,000.00	15,000.00	26,250.00	101,250.00
4th	9,000.00	27,000.00	NIL	2,100.00	38,100.00
5th	15,000.00	45,000.00	22,500.00	31,500.00	114,000.00
6th	15,000.00	45,000.00	22,500.00	31,500.00	114,000.00
7th	9,000.00	27,000.00	13,500.00	18,900.00	68,400.00
					771,750.00

In addition, I will award costs and interests. I also direct the Respondent to issue all the claimants who have testified Certificates of Service.

As regards the claim for the 8th Claimant, I will dismiss it for want of prosecution. No good grounds were shown for his non-attendance and I was not requested to excuse his absence or make direction under Rule 9 of this court's Rules of Procedures.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of November, 2012.

Onesmus N. Makau

JUDGE