



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 537 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

1. ROBERT KITEME MUTISYA

2. JANE NJERI NJUGUNA (suing as legal representative

of the estate of Fredrick Njuguna Mambo)

3. MARGARET MUTHONI WARUI

4. EMMER MUTHONI

5. HANNAH WANJIKU KARANJA

6. PHILOMENA WANGUI NJUGUNA

7. JAMES NGANGA WAWERU

8. SALOME MARY OTEMBA.....CLAIMANTS

VERSUS

MAWARA HOLDINGS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants' herein filed a Statement of Claim dated 1st April, 2014 and filed in Court on 3rd April, 2014. The Claimants herein were employed by the Respondent on diverse dates i.e the 1st, 2nd and 4th Claimants were engaged on 2nd and 25th April, 2009, the 5th, 8th and 3rd Claimants on 4th and 6th June, 2006, the 6th Claimant on 3rd January 2004 and the 7th Claimant on 3rd April, 2010 respectively.

2. The Claimants aver that they had been engaged to work as "GENERAL LABOURERS" except for the 5th Claimant who was "SUPERVISOR" within the meaning of the Employment Act, Laws of Kenya.

3. Further that the Claimants continued to work as such in their position until the date for wrongful dismissal from their employment services.

4. The Claimants further aver that the Respondent paid their wages below the legal requirements as envisaged within the meaning of The Regulation of Wages (General) (Amendment) Order. Further, that the Respondent failed to provide reasonable housing accommodation or sufficient sum as rent contrary to Section 31 of the Employment Act, No. 11 of 2007, Laws of Kenya.

5. The Claimants state they were unfairly terminated and/ wrongfully dismissed from their services on 2nd May, 2013 without notification, a hearing and/or reasons for termination given by the Respondent to them in contravention of Section 41 and 43 of the Employment Act.

6. That they served the Respondent tirelessly and diligently through-out the term of engagement, promoting the interest of the Respondent with trust and acting in the best interest of the Respondent Company.

7. The Claimants aver that they worked extra hours with no rest days and they were not adequately compensated. They further stated that they did not proceed on annual leave as required in the provisions of the Employment Act.

8. The Claimants further aver that despite several meetings and visits to the County Labour Officer, Kiambu, the matter has not been settled amicably within the meaning of Section 49 of the Employment Act thus necessitating filing of the instant claim.

9. In their Statement of Claim the Claimants' prays for Judgment to be entered against the Respondent for:-

i. A declaration that the constructive termination/wrongful dismissal of the employment services of the Claimants by the Respondent was wrongful, unlawful, illegal and unfair termination hence, NULL and VOID.

ii. A declaration that the Respondent "PAYS" the Claimants herein their terminal benefits tabulated in the Statement of Claim.

iii. A declaration the Respondent herein do pay each of the Claimants herein for the lost income at the rate of Kshs. 432.40/- daily rate from 2nd May, 2013, the effective date of the unlawful termination and/or wrongful dismissal, to the date of the Judgment of this suit.

iv. A declaration that the Respondent do remit all the accrued non-paid NSSF Contribution of each of the Claimants to the National Social Security Fund from the date of engagement to date forthwith.

v. A declaration that the Respondent do issue the Claimants with their "CERTIFICATE OF SERVICE" within the meaning of Section 51 of the Employment Act, No. 11 of 2007, Laws of Kenya forthwith.

vi. THAT costs of this Application be provided for by the Respondent

vii. THAT any other relief this Honourable Court may deem fit to be granted.

10. The Claimants pray for their Statement of Claim to be allowed as prayed.

11. The Respondent filed its Statement of Defence wherein they aver that no contract was formalized to establish terms and conditions of employment.

12. The Respondent further avers that the Claimants were casual employees as admitted at paragraph 2.3 of the Statement of Claim. Further that the Legal Notices attached to the Claimants' bundle of documents do not apply to the Claimants'.

13. The Respondent stated that it paid all the Claimants wages as stipulated by the law and further paid the initial terminal benefits at the Labour Office and that as provided by Section 48(4) (2) of the Labour Institutions Act, arrears of wages if any can only be backdated for a period of twelve (12) months.

14. The Respondent prays for Judgment against the Claimants for:

a) A declaration that the Claimants were regularly, justifiably and lawfully dismissed for being casuals and that they would not engaged in work every day.

b) A declaration that the Claimants were casuals and are not entitled to the Orders sought.

c) Costs of the industrial cause, plus interest.

Evidence

15. The Claimants' witness (CW1, Robert Mutisya) testified on 24th July, 2018 on behalf of himself and the other 7 Claimants. He testified that he was employed by the Respondent Company on 2nd April, 2009 and worked diligently until 2nd May, 2013 when his services were terminated.

16. It was his evidence that he worked at the Respondent farm together with the other co Claimants but they were employed on diverse dates as per the individual witness statements filed in Court.

17. CW1 further testified that they reported to work on 2nd May, 2013 and the Manager of the Respondent Company informed them that their services were terminated. They reported the matter on 3rd May, 2013 to the Labour Officer.

18. CW1 stated that he was a member of NSSF and deductions were made on a monthly basis and remitted, however on checking he noted that no remittance had been made. Further CW1 averred that they were not paid house allowance and that he as well as the other Claimants' did not go on leave.

19. CW1 further stated that they were not issued with any notice prior to their termination.

20. On cross-examination CW1 stated that he was terminated in the year 2013 and that none of the Claimants were paid terminal dues as well April 2013 dues.

21. CW1 further stated that he was earning Kshs. 6,000/- per month at the time of termination.

22. CW1 urged the Court to allow their Claim as prayed.

23. The Respondent Witness (**Saul Sitati Wejuli, RW1**) testified on 25th October, 2018. It was his evidence that he was employed by the Respondent Company as Farm Manager since year 2011.

24. He further testified that all the Claimants to this Claim were general workers except **Philomena Wangui Karanja** (5th Claimant) who was a supervisor.

25. RW1 testified that due to the growing wage bill the Respondent Company was forced to reduce its work force to manageable number. He further testified that the Company did talk to the workers and informed them of the decision and they further issued the workers with a letter on 30th April, 2013 notifying them of the intended redundancy with effect from 30th April, 2013.

26. It was RW1's evidence that all affected staff were paid all dues owing them and that the monies were paid into the Claimants' bank account. The 1st Claimant was paid Kshs. 14570/- (being service pay for 4 years) into his Bank account. The cheques for remittance were attached to the Response as Appendix 5 & 6.

27. RW1 further stated that the Respondent made regular contributions (Kshs. 400 per month) for NSSF.

28. RW1 stated that the Respondent Company was in-fact overpaying the Claimants' herein as the minimum wage as at that time was Kshs. 178/- per day. The Minimum wage in 2013 was Kshs 203/- per day. He further stated that the Claimants were offered housing but declined and opted to live at their own houses and that none of them worked overtime.

29. On cross-examination, RW1 stated that he had not produced any document to Court to confirm that there was a meeting with the staff to share the Company's decision to lay off the Claimants. Further, that he did not produce any evidence to show that the Respondent wrote to the Labour Office on the same.

30. On further cross-examination, RW1 confirmed that he had no proof that the Claimants received their terminal dues.

31. RW2 (**Joyce Mugure Maina**) also testified on behalf of the Respondent.

32. She stated that she has been working for the Respondent Company since September 2013 as an accountant further that she joined the company after the Claimants had left employment.

33. RW2 further stated that NSSF deductions were remitted to NSSF and that the Respondent paid the Claimants' leave allowance as they opted not to proceed on leave.

34. RW2 testified that the Claimants' were not paid housing allowance as there was housing provided by the Company.

35. She urged the Court to dismiss the instant Claim.

36. On cross-examination, RW2 confirmed that she had no evidence to confirm that the Claimants were paid leave allowance. She further stated that she had not produced any documentation to Court to show how the Company houses were allocated.

Submissions

37. It is submitted on behalf of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Claimants that they are not casual employees having been engaged by the Respondent for a continuous period of time. CW1 testified that he was particularly engaged by the Respondent on diverse periods from April 2009 to May 2013, a period of 4 years.

38. The Claimants further submit that as per the provisions of Section 37 of the Employment Act their contracts can be converted to term contracts. For emphasis the Claimants' relied on the authorities of **ELRC Cause 24 of 2017 Charles Onchoke Versus Kisii University and Sikuku Nzvi Ngii versus Gacal Merchants Limited (2015) eKLR.**

39. The Claimants further submitted that the decision by the Respondent to lay off the Claimants amounted to the Respondent's declaration of redundancy to the Claimants. It is further submitted that the Respondent failed to follow the provisions of Section 40 of the Employment Act in the process of declaring the Claimants redundant. The Claimants' relied on the cases of: **Elizabeth Onyango Versus Mobile Planet Limited (2014) eKLR and Charles Nyangi Nyamohanga Versu Action Aid International (2015) eKLR** for emphasis.

40. The Claimants further relied on the **ILO Convention No. 158 on termination of employment ratified by Kenya in 1985** which provides that *'the Respondent is required to provide an opportunity for consultation where redundancies or retrenchments are contemplated so as to consider all necessary means to be taken to avert or to minimize the termination and measure to mitigate adverse effects of any termination on the workers concerned such as finding alternative employment.'* The Claimants' submitted that the Respondent's managerial decision to lay them off was un-procedural and contrary to Section 40 (1) (c) of the Employment Act, 2007.

41. The Claimants' further submitted that their termination from employment was wrongful and unlawful as provisions of Section 43(1) and 45 (2) of the Employment Act were not adhered to.

42. The Claimants' submitted that they are entitled to the reliefs as prayed in the Statement of Claim and relied on the authority of **Bernard Khakuli Versus Khilesh Natubhai & Another (2017) eKLR** and **Section 49** of the Employment Act, 2007.

Respondent's submissions

43. The Respondent submitted that their nature of business is growing and managing coffee farming thus did not run continuous

employment for the Claimants herein. It is further submitted that there was no formal contract that established terms and conditions of employment.

44. The Respondent submitted that its actions were in conformity with Section 36 of the Employment Act, 2007.

45. The Respondent further submitted that the Claimants were issued with certificates of service as evidenced by the bundle of documents.

46. The Respondent submitted that the Claimants were informed verbally, in a parade, and in writing of the decision to lay-off workers due to harsh economic conditions.

47. The Respondent further submitted that the Claimants were invited for a hearing at the Labour Office but failed to attend. Further, at termination all terminal dues were paid to the Claimants.

48. The Respondent averred that the Claim for housing lacks basis as the Claimants were offered housing facilities that they declined and opted to stay at their homes that were in close proximity to the Respondent Company.

49. The Respondent prays that the Claim be dismissed with costs.

50. I have examined all evidence and submissions of the parties. From the Claimants' evidence, they served the Respondent for varying periods between 2004 to 2013 when they were terminated.

51. The Respondents aver that the Claimants were casual employees but this position cannot be far from the truth in that the Claimants worked continuously over the period and the Respondents indicated that they deducted their NSSF and NHIF dues from each of them and remitted as expected.

52. Section 37 of Employment Act states as follows:-

“Notwithstanding any provisions 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; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in 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”.

53. It is envisaged here that an employee who serves for over 3 continuous months, becomes a permanent and pensionable employee. All the Claimants served for over 3 months and so they cannot be termed as casual workers.

54. The Respondents have alluded to the fact that they terminated all the Claimants because the work had reduced. They are admitting to the ground of redundancy. They however do not show that they followed the law before terminating the Claimants. The law envisaged is Section 40(1) of Employment Act which states as follows:-

(1) “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour

officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

55. There is no indication that the Claimants were given notice before termination. No consultation was even done. It is my finding that the Claimants were unfairly declared redundant and I award each as follows:-

1. 1 Salary notice pay

2. 15 days salary for each year works

3. 8 months' salary as compensation for unlawful redundancy

These amounts translate as follows:-

1. Robert Mutisya = 149,175

2. Fredrick Mambo = 149,178

3. Margaret Warui = 155,664

4. Emmer Muthoni = 149,178

5. Hama Wanjiku Karanja = 155,664

6. Philomena Njuguna = 175,122

7. James Waweru = 142,692

8. Salome Otemba = 155,664

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

No appearance for parties



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