IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 79 OF 2015

BETWEEN

KRYSTALLINE SALT LIMITED.....APPELLANT

AND

KWEKWE MWAKELE & 67 OTHERS.....RESPONDENTS

(Being an appeal from the Judgment of the Employment & Labour Relations Court at Mombasa (Makau, J.) dated 19th December, 2014

in

E.& L.R.C. Cause No. 116-162 of 2014 and 175-195 of 2014)

****

JUDGMENT OF THE COURT

The broad determination that was sought before the trial court related to the nature and terms of employment relationship between the appellant and the 68 respondents whose individual claims for unfair termination of employment were consolidated and heard by **Makau, J** of the Employment and Labour Relations Court at Mombasa. In their respective memorandum of claim, which were framed in identical terms, the respondents, prayed that, in view of the period of service, they be declared to have been employed on permanent basis; that the termination of their services be declared to have been unlawful and unfair; and that, as a result, of the termination they were entitled to one month leave for every 12 months worked. Depending on the alleged period of service, the respondents claimed various sums of money under the heads, one month salary *in lieu* of notice, severance pay, leave pay and underpayment.

The appellant denied employing the respondents, but argued that if they were at all employed, they were only to pack refined salt on piece-rate basis from time to time and that for each assignment they were duly paid; that with that arrangement the respondents were not guaranteed to work on a daily basis but their engagement depended on the availability of refined salt to be packed; that the respondents boycotted work on 30th March, 2014 on account of non payment of dues; and that on their own and without being stopped by the appellant the respondents terminated their services.

It is common factor that the respondents worked in the appellant's salt manufacturing plant in Changamwe, Mombasa for diverse periods between 2008 and 2013. It was also not contested, and the

learned Judge equally confirmed this in his judgment, that the respondents in a group of six were all engaged in packing, sealing and baling of salt. That they would be paid Kshs. 2.00 per bale of 40 packets of 500 gram salt. Out of choice, the amount due to each would be paid, not at the end of each day but weekly in arrears.

The contention between the parties was, on the one hand, according to the respondents, on 30th March, 2013, they were all suddenly informed that their services were not required until further notice, while on the other hand the appellant maintained that the respondents and several other workers refused to work and remained outside the factory demanding to be paid. Whatever happened, the respondents brought an action as explained above. While it was the respondents' case that, from their relationship with the appellant, they were employed under a contract of service, the appellant maintained that they were engaged on a piece-work basis and were not entitled to any of the reliefs sought.

From these facts the learned Judge isolated three issues for determination, that is, whether the respondents were employed on regular contracts of service, whether they voluntarily deserted work or were unlawfully declared redundant, and whether they were entitled to the reliefs they had prayed for.

The learned Judge, after noting the paucity of binding authorities regarding employees whose remuneration is based on piece-rate production, nonetheless, in answer to the first question and relying on his own decision in **Mary Kitsao Ngowa & 37 Others V Krystalline Salt Limited**, Cause No.78 of 2014 and that of the Supreme Court of Indian in the case of **Shri Birdhich and Sharma V First Civil Judge Nagpur & Others** (1961) 2FLR 557, found in favour of the respondents. Appreciating that the relationship between the parties was not in writing, he was of the persuasion that the respondents were employed under separate contracts of service because they were recruited, trained, issued with uniform and operated production machines, were supervised and paid by the appellant. In addition he explained that the respondents had no freedom to do any other work outside the appellant's factory and were also subject to disciplinary action by the appellant for reporting late or absenteeism. For these reasons the learned Judge concluded that the appellant exercised full control over the respondents; and that the alleged piece-rate pay was only a formula for calculating the wages intended to motivate high yield, and that;-

> ***"Under section 37 of the Employment Act, this court has the power to vary the terms and conditions of service of workers and declare that employees are employed in terms and conditions consistent with the said Act. In this case, the claimants worked continuously for days, which in the aggregate was more than a month and as such under Section 37(1) (a) they had become protected by Section 35(1) (c) from arbitrary dismissal. Under Section 31(1) (c) an employee cannot be terminated without prior written notice of 28 days. In this case therefore, the respondent was barred from terminating the claimants employment without a prior written notice of 28 days.***
>
> ***On the other hand, if the respondent intended to declare the claimants redundant, she was bound to follow the procedure provided for under Section 40 of the Employment Act. The said provision provides in mandatory terms that before declaring an employee redundant, he shall first serve at least one month written notice on the employee or his trade union and the labour officer. In addition the employer must conduct a fair selection process to identify those affected by the intended redundancy. In this case, the respondent ignored the provision of the Section 40 supra and summarily declared the claimants redundant on the mistaken believe that they were piece-rate workers who were not protected by the law."***

Regarding the second question, the learned Judge concluded that the respondents did not desert work but, as a matter of fact had their services unfairly terminated through unlawful summary redundancy. He ultimately determined that those respondents whose services were within 3 years before the claims were filed would be entitled to leave pay and any leave earned before May, 2011 was lost due to limitation of actions; that 58 of the respondents who had worked for over 3 years before termination would be entitled 63 days of leave pay at Kshs. 20,421.03 as well as one month's salary *in lieu* of notice, based on the minimum statutory wage for a machine attendant at Kshs. 467.20 per day inclusive of house allowance

applicable at the time. That translated to Kshs. 14,016, being one month gross salary *in lieu* of notice for each of the respondents, resulting in an award of Kshs. 34,421.03 (20,421.05+14,016). The other 9 respondents were also awarded Kshs. 14,016 plus Kshs. 6,807.01 based on 21 leave days, total Kshs. 20,832 for each of the respondents in this category. The court awarded in total Kshs. 2,219,191.77 to all the respondents. The learned Judge however dismissed the claim for severance pay arguing that the termination was not after all due to redundancy. The claim for underpayment was likewise dismissed for want of particulars and evidence.

This appeal challenges that award on 8 grounds which we have noted can be condensed into one, whether the respondents were piece-work employees, or as the learned Judge found, employees under a ***"contract of service"***.

To begin with, the words ***"contract of service"*** under the Employment Act have specific meaning. It is defined under **section 2** to mean;

> ***"2….. an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;"***

Whereas the learned Judge may have used the phrase in contradistinction with casual or piece work, by the foregoing definition any contract of employment for a period of time, whether oral, or in writing, express or implied or even a contract of apprenticeship and indentured learnership, all qualify as contracts of service. He ought to have determined in which category of employment the respondents were engaged. Secondly, it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.

The Employment Act recognises four main types of contracts of service; contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.

Piece work form of employment is defined in section 2 to mean;

> ***"…any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance"***

In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.

From the pleadings and the evidence, we reiterate that the respondents were engaged in a piece work form of employment. On a daily basis they packed salt and were paid in accordance with the amount of salt packed. As a general rule, where a contract of service relates to piece work and the work is not completed at the end of the day, the employee, at the option of the employer can either be paid for the task which has been performed at the end of that day, or be permitted to complete the task on the following day. The other alternative is for the employee to be paid at the end of each month in proportion to the amount of work which he will have performed during the month or on completion of the work, whichever date is the earlier. See **section 18** of the Employment Act. It is foreseen that, by the very nature of such form of employment, the engagement may go beyond a day. If it does, then the employee has to be paid the next day and if, for a longer period the payment is on a monthly basis in the proportion of the task performed for that period. In all this the emphasis is not on the days the task is accomplished, but the task itself.

A contract of service, by **section 35** may be terminated upon either party giving notice in the following three circumstances based upon the intervals of payment of salaries or wages. First, a contract of service in which wages are paid **on a daily basis** is terminable by either party at the close of the day **without notice**. Secondly, in those cases where wages are paid periodically at intervals of **less than one month**, the contract would be terminable by a notice of **not less than one month** and, in the third instance, a notice **of 28 days** will apply where wages or salaries are paid periodically at intervals **of or exceeding one month.**

It seems to us that the respondents did the same kind of work on the production line of packing salt for periods ranging from one to five years. It was, however unanimously agreed that, out of choice, they received their wages on a weekly basis and which, by the nature of their engagement, depended on the amount of work completed, varied from person to person.

While the respondents maintained that they worked every day of the week without leave for many years and that their services were unfairly terminated without notice and without terminal dues to which they were entitled, the appellant for their part insisted that, as piece rate workers the respondents were not entitled to notice before termination of their service as their work depended on availability of raw material; that although they worked every day up to, and including Saturday, they had in 10 days, one unpaid day of rest or in 20 days 2 days of rest.

The learned Judge having found that the respondents were piece rate workers went ahead to convert their services in terms of **section 37** of the Employment Act, to term contract, basing that decision on the fact that they were recruited by the appellant, served for long periods of time, supervised and issued with uniform by the appellant, subjected to disciplinary process of the appellant and had no freedom to work elsewhere. He relied, as we have stated, on an Indian Supreme Court decision in the case of **Shri Birdhich** (supra). In that case the appellant employed workmen in his factory who had to work at the factory and were not at liberty to work elsewhere; their attendance were noted in the factory and they had to work within the factory hours, though they were not bound to work for the entire period and could come and go away when they liked; but if they came after midday they were not assigned any work and thus not allowed to work even though the factory closed at 7 p.m.; further they could be removed from service if absent for 8 days. Payment was made on piece rates according to the amount of work done. When a dispute between them arose the appellant's contention that the respondent workmen were not his workmen within the meaning of the Factories Act, was rejected and the claim for payment of wages was allowed. The court, held that a piece rate worker in the circumstances of the case was a worker within the meaning of **section 2 (1)** of Factories Act, but went further to find that although the respondents in that appeal were piece- rate workers, their relationship with the appellants was such that the latter had full control of the former and directed the manner they discharged their work; that the mere fact that a worker was a piece-rate worker would not necessarily take him out of the category of a worker within the meaning of **S. 2(1)** of the Factories Act; that the respondent workmen could not be said to be independent contractors.

Although that decision was based on the provisions of the Factories Act of India, the principles espoused are relevant to the dispute herein which arose from the construction of **sections 2, 18** and **35** of the Employment Act. It may be true that there is no binding authority in this area of law as we ourselves have not come across any decision of this Court on the issues raised in the dispute, but that alone did not tie the hands of the learned Judge, who even in the circumstances still rendered a decision, whose impact is this appeal.

One of the questions that we need to resolve is whether it was proper for the learned Judge to rely on **section 37** to convert the terms of employment of the respondents from piece rate work to term contract. **Section 37** provides that;

> ***"37. (1) 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." (Emphasis supplied).

This provision, as correctly pointed out by learned counsel for the appellant, and as can be seen from its plain language, applies to casual, as opposed to piece work employees. The Act deals differently with these two types of employments. We have already reproduced section 2 in which ***"piece work"*** is defined with emphasis being on the amount of work done and not time taken to do it. On the other hand casual employee is defined to mean-

"…a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time."

The distinction between this form of employment and piece work is therefore not in doubt. Casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day. As a matter of fact the appellant had employees in both categories. Parliament indeed intended to draw this distinction and that is why **section 37** does not make mention of piece work employees. It follows that the learned Judge erred in equating the two forms of employment and converting piece work employees to casual employees.

While we appreciate his concern that the respondents having worked for long as piece rate workers, their terms ought to have reflected this fact, such a course was not foreseen by the makers of that law. If they intended the piece rate workers to benefit from the conversion like casual worker that would not have been such a difficult thing.

We think however that the determination should have been made under **section 18 (1) (b)** as read with **section 35 (1) (c)**. The former deals with the intervals of payment and provides;

"18. (1) Where a contract of service entered into under which a task or piecework is to be performed by an employee, the employee shall be entitled -

(a) …….....……..

(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, which date is the earlier."*(Emphasis)*

On the other hand **section 35(1) (c)** provides for the manner of termination of various forms of employment in the following terms:-

"35(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –

……

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing."

A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service. These are some of the reforms in employment relationship introduced by the Employment Act. Where an employee alleges that the termination was unfair the evidential burden of proof shifts to the employer to demonstrate the existence of any of the circumstances enumerated under **section 45**. Relevant to the matter before us, the appellant was expected to prove that the reason for termination was valid, that the reason was fair in so far as it related to the respondents' conduct, capacity

or compatibility. The appellant was similarly required to show that the termination was done in accordance with fair procedure.

Whereas the respondents argued that their services were terminated without any reason being assigned, the appellant contended they refused to work, demanding to be paid. We are not convinced that this was the true reason for termination. There was no evidence that the respondents had been paid to warrant their refusal to work. The probable cause for termination of their service was the reduced operations at the Changamwe plant. This is clearly borne out in the evidence of two witnesses who testified for the appellant, Andrew Mwajoha and Jacob Makambi. They confirmed that the production in Mombasa had reduced with the establishment of a new plant at Gongoni in Malindi. The new plant had machines that were capable of packing salt. Andrew Mwajoha concluded his testimony stating that since the appellant had reduced its operations in Changamwe he;

> ***"…informed the workers of the new development and advised them to relocate to our new plant in Gongoni if they so wished…..but they refused to continue with the piece rate work and decided to leave".***

The respondents argued that had they been given sufficient notice and details of the transfer to Gongoni they would not have had any objection. But these plans were communicated only when they reported on duty on 30th March 2013 and that before they could reflect on it they were told their services were no longer required. The reason for termination, we are convinced, were not valid and secondly, it was not done in accordance with fair procedure. The termination, it follows was unfair. It did not, however, amount to a declaration of redundancy. Had the respondent and appellant worked out a proper transfer of service programme we believe the former were willing to relocate.

The remedies available for an unfair termination under **section 49** are varied and include the wages which the employee would have earned had the employee been given the period of notice to which he was entitled or the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary at the time of termination.

We bear in mind that being piece rate work, the performance would vary from person to person. There was, however evidence that at the end of each day the respondents would each be paid Kshs. 200, which would be consolidated and paid in lump sum on a Saturday as Kshs.1,400. This in turn translated to Kshs. 5,600 per month.

In terms of **sections 35 (1) (c)** and **49(1) (a) (c)** the respondents were only entitled to be paid their wages for one month in addition to wages equivalent of a number of months not exceeding 12 months based on the gross monthly wage. We also noted earlier that the wages in question must be in tandem with the statutory minimum wage. The source or basis of Kshs. 467.20 per day used by the learned Judge was not disclosed. He, however treated the respondents as machine attendants as there was evidence that they used machines to seal and pack. The minimum wage per day for a machine attendant in Nairobi, Mombasa and Kisumu, according to The Regulation of Wages (General) (Amendment) Order, 2015 (1st May 2015) is Kshs. 596.50. For each respondent the one month gross wage would have translated to Kshs. 17,895. But in the absence of cross-appeal, we shall not disturb the ward based on Kshs. 467.20, as we do not have the rates for the period of the dispute.

The learned Judge did not award any compensation in terms of **section 49(1) (c**). Instead he awarded leave pay. But we think he ought to have awarded compensation, rewarding those with 5 years slightly more than those with fewer years. With respect, we agree with the learned Judge's determination that the claim, not being one of redundancy, severance pay was not available.

From what we have said, this appeal succeeds to the extent that the award for leave days is set aside and in place thereof we substitute an award of 3 months of the gross monthly wage in compensation in respect of the respondents who had served for a period of 5 or more years. We further order pursuant to **section 49 (2)** that the awards be subject to statutory deductions.

Each party to bear own costs.

Dated and delivered at Mombasa this 17th day of February, 2017

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR