



**Onchagwa v Coast Bottlers Limited & another (Cause 914 of 2017)
[2024] KEELRC 951 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 951 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 914 OF 2017
M MBARŪ, J
APRIL 11, 2024**

BETWEEN

JOB AYUSA ONCHAGWA CLAIMANT

AND

COAST BOTTLERS LIMITED 1ST RESPONDENT

**SILAS OBARA OSMAN T/A ASEGO WAREHOUSE SERVICES 2ND
RESPONDENT**

JUDGMENT

1. The claimant is a male adult. The 1st respondent is a limited liability company. The 2nd respondent used to receive contracts from the 1st respondent and trading as Asego Warehouse Services.
2. The claim is that the respondents employed the claimant on 1st May 2011 in the position of sorting bottles on a wage of ksh.10, 702 per month. On 1st November 2016, the 2nd respondent issued the claimant with a notice terminating his employment. The 1st respondent had outsourced the labour force of the claimant to the 2nd respondent. the 1st respondent had a CBA with terms and conditions covering the claimant.
3. The claim is that during the exit of the 2nd respondent, there was an agreement between the 1st respondent and the union that all benefits of the employees would remain unchanged and guaranteed by the 1st respondent. But in December 2016, the 1st respondent terminated the employment of the claimant without due process or in accordance with the agreement.

The claimant is seeking the following;

- a. Two months' notice pay Ksh.35,300;
- b. 42 accrued leave days ksh.49,985.20;



- c. 5 years gratuity Ksh.88,250;
 - d. 12 months compensation ksh.211,800;
 - e. Certificate of service;
 - f. Costs.
4. The claimant testified that the 2nd respondent (Asego) was contracted by the 1st respondent and would allocate work and pay him. Asego did not issue him with a letter of employment but would pay his wages and NSSF and NHIF dues. For the period of employment, the claimant did not go on his annual leave. His employment was stopped when Asego stopped his contract with the 1st respondent. The respondents have since failed to pay their terminal dues.
 5. Upon cross-examination, the claimant testified that Asego (2nd respondent) paid all his wages through his bank account. Statutory dues were paid by Asego. On 1st November 2016, Asego issued him with a notice that the contract with the 1st Respondent had ended. It served as a one-month notice but the 30 days did not complete. After the information from Asego, there was no work allocated to him. Smart Human Capital took over and employed the claimant from January 2017 and transitioned the work. After two weeks, his employment was stopped. He filed suit against Smart Human Capital and the Court gave him an award.
 6. The transition from the 2nd respondent to Star Human Capital was two weeks. The claim against Asego and the claim against Smart Human Capital are different and separate.
 7. In response, the respondent's case is that the claimant was not employed by the 1st respondent. The CBA dated 16 February 2005 is not relevant in these proceedings as it is no longer in existence at the time of the alleged termination of employment and only applied to 1st respondent employees. The letter of demand issued by the claimant was only responded to by the 2nd respondent on 21st September 2017 as the employer.
 8. The response is that the 1st respondent contracted the 2nd respondent through a labour outsourcing services contract to hire, supply, control, manage and pay casual employees contracted to do the 1st respondent's work at its bottling plant at Kanamai in Kilifi County. The 2nd respondent admits to having hired the claimant on a one-year contract from 1st January 2016 to 31st December 2016 as a casual employee at a daily wage of Ksh.500 payable after every fortnight.
 9. The 2nd respondent submitted all statutory deductions to the NSSF and NHIF.
 10. Through a letter dated 14 October 2016, the 2nd respondent notified the 1st respondent of its intention to terminate the labour outsourcing services contract effective 15 October 2016 to 15 November 2016. By letter dated 15 October 2016, the 2nd respondent notified the Kenya Union of Commercial Food and Allied Workers of the contract termination. By letter dated 7 November 2016, the 1st respondent accepted the termination notice but requested the 2nd respondent to extend the termination period up to 30 November 2016 to give room for preparation and handover to the incoming labour outsourcing service supplier. The 1st respondent also asked the 2nd respondent to notify its employees and to pay terminal dues before 30 November 2016 and to prepare to hand over to the incoming supplier.
 11. The response is that the 2nd respondent agreed and extended the time to end the contract and issued notices dated 1st November 2016 to all its employees including the claimant. Through a letter dated 9 November 2016, the 2nd respondent notified COTU, NSSF and NHIF of the same position.



12. The 1st respondent put up a memo dated 22 October 2016 to all its staff that the 2nd respondent would terminate its labour management contract and they would engage another company and all employees under the 2nd respondent would continue working under the new company. It also advised the employees who had any issues to put them down in writing but none did including the claimant.
13. On 24 October 2016, a meeting was held between the respondents the incoming labour outsourcing supplier, Stratostaff E.A. Ltd and the union, KUCFAW. It was agreed that there would be a takeover of all the employees of the 2nd respondent including the claimant to the new supplier. The 2nd respondent shared the final dues for its employees through the 1st respondent who paid each directly including the claimant through his bank account. The claimant was hence taken over by Smart Human Capital Ltd as its employee. The claims made are without merit and should be dismissed with costs.
14. In evidence, the respondents called Alice Njoki Karanja the human resources officer of the 1st respondent who testified that there was no employment relationship between the 1st respondent and the claimant. He was an employee of the 2nd respondent. The 1st respondent outsourced casual labour to an independent contract through the 2nd respondent. Through an agreement dated 7 September 2015, the 1st respondent agreed to outsource casual labour to the 2nd respondent at its bottling plant at Kanamai, Kilifi County. Through the 2nd respondent, the claimant was employed and by a letter dated 14 October 2016, the 2nd respondent requested to terminate its contract with the 1st respondent. Several meetings were held and agreed that the termination be done with effect from 30 November 2016 and the 2nd respondent was to pay all terminal dues which were processed through the 1st respondent and paid to the claimant through his bank account. All employees were informed and transitioned to the incoming outsourcing company. The union was informed and the claimant transitioned to Smart Human Capital Limited.
15. At the end of the hearing, the parties agreed and filed written submissions.
16. The claimant submitted that he was employed by the 1st respondent through the 2nd respondent on 1st May 2011. On 1st November 2016, the 2nd respondent issued him with a notice terminating his employment. In December 2016 his employment was terminated unfairly.
17. The claimant submitted that in his evidence in court, he confirmed his employment was by the 2nd respondent but he used to report to work at the 1st respondent's bottling plant. His employment was terminated verbally without any explanation. He then signed a new contract with Smart Human Capital Ltd on 5 January 2017 out of which he filed Kilifi SPMCC ELRC No. 95 of 2019.
18. The claimant submitted that there was an unfair termination of his employment by the respondents. Even though employment was by the 2nd respondent, there was a CBA with the union which the respondents failed to apply with regard to the terms and conditions for termination of employment and payment of terminal dues. The claim for two months' notice pay is justified in terms of Section 15(c) of the CBA. There were accrued 4 leave days as there are no work records produced to confirm the claimant took his annual leave. Service pay is due as held in *Martin Ileri Ndwiwa v Olerai Managements Company* [2017] eKLR. There being unfair termination of employment, compensation is due per Section 49(1) of the *Employment Act* together with a Certificate of Service and costs.
19. The respondent submitted that the claimant was not an employee of the 1st respondent but employed by the 2nd respondent. In the case of *Wachira v Mbote & another* Cause No.821 of 2018, the court established the ingredients of an employment relationship, which is lacking between the 1st respondent and the claimant.



20. Employment did not terminate unfairly as alleged. Under Section 47(5) of the *Employment Act*, 2007 (the Act) an employee who alleges there is unfair termination of employment must prove as held in *Milano Electronics Limited v Dickinson Nyasi Muhaso* [2021] eKLR. The claimant was employed by the 2nd respondent as an independent contractor to the 1st respondent. The 2nd respondent terminated its contract with the 1st respondent and as a result, issued notice to the claimant and paid his terminal dues. The terminal dues were paid through the claimant's bank account and such evidence is submitted through the payment statements submitted in court.
21. The respondent submitted that outsourcing of labour is allowed as held in *Elizabeth Washeke & 62 Others v Airtel Networks (K) Ltd & another* [2013] eKLR. The claimant has no evidence of unfair termination of his employment. He has no prima facie case as held in *Josephine M. Ndungu & Others v Plan International Inc.* [2019] eKLR. The claimant is seeking unjust enrichment after filing Kilifi SPMCC No.95 of 2019 and getting an award. He relies on a CBA that did not apply to him at the time of his employment by the 2nd respondent and hence the claims should be dismissed with costs.

Determination

22. On the pleading, evidence and written submissions, the issues which emerge for determination are who the employer was; whether there was an unfair termination of employment; and whether the remedies sought should be issued.
23. On the question of who the employer was, the claimant submitted that he was employed by the 2nd respondent from 1st May 2011 to 1st November 2016. His case against the 1st respondent arose from the fact that he was working at its bottling plant. Indeed, as submitted by the respondents, outsourcing of labour, although not legislated in Kenya, is an acceptable labour practice. In the case of *Wrigley Company (East Africa) Limited v Attorney General & 2 others & another* [2013] eKLR, the court appreciated the practice of outsourcing and further defined the parameters for a credible outsourcing;
 - a) Ordinarily employers are not expected to outsource their core functions;
 - b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
24. There is agreement among the respondents allowing the 1st respondent to outsource its non-core labour to the 2nd respondent. Under such an agreement, the 2nd respondent is the independent contract. Under the agreement, the claimant was employed by the 2nd respondent. The claimant has admitted to this relationship from 1st May 2011 to 1st November 2016.

Was there an unfair termination of employment?
25. Termination of employment is unfair where the employer fails to comply with provisions of Sections 41, 43 and 45 of the Act. In the case of *H. Young & Company (EA) Limited v Ng'eno* (Appeal 7 of 2020) [2022] KEELRC 14654 (KLR) (6 October 2022) (Judgment) the court held that the employee must demonstrate the facts leading to the assertion that there is unfair termination of employment.



This is reiterated by the Supreme Court in the Case of Kenya Ports Authority v Joseph Munao & Others petition no. E008 of 2023.

26. The claimant's case is that his employment was verbally terminated without being given notice or reasons. In response to the claim, the respondents filed a notice dated 14 October 2016 where the 2nd respondent expressed its intention to terminate the independent contract it held with the 1st respondent. This notice triggered other notices. One dated 1st November 2016 to all 2nd respondent employees. This general notice is not specific to the person of the claimant. Although subsequent notices were issued to COTU and the Union, the claimant was not unionised. The 2nd respondent as the employer had no Recognition agreement or CBA with any union. The CBA in place is related to the 1st respondent only.
27. In his written submissions, the claimant appreciates that his employment was terminated through a verbal notice on 1st November 2016.
28. Under Sections 35 and 41 of the Act, an employee should be issued with a termination notice giving reasons leading to such action. This is to allow the employee the benefit of addressing the notice in terms of Section 47(5) of the Act. The general notice dated 1st November 2016 does not meet this threshold. This resulted in unfair termination of employment and notice pay and compensation is due.
29. The claimant is seeking two months' notice pay. He relied on the CBA provisions but he was not unionised. The payment statements submitted by the respondents do not speak to such a fact of unionisation. He is entitled to one month's notice pay in terms of Section 35 of the Act all at ksh.15, 500 the last gross salary.
30. On the claim for unpaid dues in leave, the claimant received his salaries through his bank account. The respondent submitted records of payment of all tabulated terminal dues to each employee including the claimant as of 18 November 2016. To claim beyond what is paid, the claimant should have submitted his bank statement to challenge the evidence by the respondents that he never received these payments.
31. In any event, the respondents filed the claimant's leave application forms. The last is for taking leave from 22 September 2016. Previously he had applied for leave on 8 August 2016. On 26 April 2016, he applied for more days off. These records are taken into account, the claim for 42 days due for the year 2020 has no justification.
32. On the claim for gratuity, such only accrued under the CBA which is unrelated to the claimant's employment with the 2nd respondent.
33. On the compensation claim, on the finding of lapse in due process and issuance of notice to the claimant, such is due. However, account is taken that the claimant was paid his terminal dues immediately and allowed to transition to a new employer. Compensation at one month's gross wage is hereby found appropriate all at ksh.15, 500.
34. A certificate of Service is a legal requirement under Section 51 of the Act. Such should be issued at the end of employment.
35. On costs, the claimant was paid his terminal dues immediately upon the end of his employment with the 2nd respondent. The findings above addressed, he should bear his costs.
36. Accordingly, judgment is hereby entered for the claimant against the 2nd respondent as the employment for notice pay ksh.15, 500; compensation at ksh.15, 500; issuance of Certificate of Service; and each party to bear its costs.



DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

