Maundu & 40 others v Beiersdorf EA Limited & another (Cause 2164 of 2016) [2024] KEELRC 1504 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1504 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2164 OF 2016

J RIKA, J

JUNE 14, 2024

BETWEEN

PATRICIA KAMANTHE MAUNDU ..... 1ST CLAIMANT

ALICE HUINI GICHUKI ..... 2ND CLAIMANT

ANN MWONGELI GICHUKI ..... 3RD CLAIMANT

AGNES KANYAA MAINA ..... 4TH CLAIMANT

ALICE DIANA ATIENO ..... 5TH CLAIMANT

BENTA AUMA ONYURO ..... 6TH CLAIMANT

CHRISTINE MUTINDI MWEU ..... 7TH CLAIMANT

CELESTINE MWONGELI SAMMY ..... 8TH CLAIMANT

DINAH WAMUYU MUTUGI ..... 9TH CLAIMANT

DAMARIS MUTUNGA ..... 10TH CLAIMANT

ESTHER MUTWILI NGILA ..... 11TH CLAIMANT

ESTHER NYAWIRA MAINA ..... 12TH CLAIMANT

FAITH MWONGELI KALOKI ..... 13TH CLAIMANT

FRIDAH NTHAMBA MUNYASIA ..... 14TH CLAIMANT

HELEN AMIANDA ..... 15TH CLAIMANT

JOYCE NGONYO KIMURA ..... 16TH CLAIMANT

JANET MBITHE MUNZU ..... 17TH CLAIMANT

JANET CHEPKEMOI ..... 18TH CLAIMANT

JANE WANJIRU MWATHI ..... 19TH CLAIMANT

JEMIMAH MUTHONI KIMANI ..... 20TH CLAIMANT

JACQUELINE NYAGOHA SAMENA ..... 21ST CLAIMANT

KEZIAH NJERI MWANGI ..... 22ND CLAIMANT

LUCY MUTHONI MAINA ..... 23RD CLAIMANT

NELLY LYNN MUMBI ..... 24TH CLAIMANT

NAOMI NDUKU MWEMA ..... 25TH CLAIMANT

MARGARET MUTHONI KARANJA ..... 26TH CLAIMANT

MARY KUTHEA KIOKO ..... 27TH CLAIMANT

MARGARET NDUTA NJOROGE ..... 28TH CLAIMANT

MARTHA WANJIRU WANGARI ..... 29TH CLAIMANT

MARY WANJIRU KIHARA ..... 30TH CLAIMANT

MARTHA WAHITO MAREGWA ..... 31ST CLAIMANT

NICOLE EMILY GATHONI ..... 32ND CLAIMANT

PHOEBE MBULA ..... 33RD CLAIMANT

PHYLLIS MBEKE ..... 34TH CLAIMANT

RUTH NGONYO WANYINGI ..... 35TH CLAIMANT

ROPHENCE JERUTO ROTICH ..... 36TH CLAIMANT

SYLVIA WAIRU NJOROGE ..... 37TH CLAIMANT

SUSAN IKUTWA WANYENZE ..... 38TH CLAIMANT

TERESIA MURUGI MURATHI ..... 39TH CLAIMANT

VERONICA WANZA KIOKO ..... 40TH CLAIMANT

VICTORIA KOKI ..... 41ST CLAIMANT

AND

BEIERSDORF EA LIMITED ..... 1ST RESPONDENT

STAFFING AFRICA LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The Claimants filed a Statement of Claim dated 18th October 2016, and amended on 22nd November 2018.

2. They describe the 1st Respondent as a registered company, in the business of skincare and personal hygiene products.

3. The 2nd Respondent is a registered company, providing manpower services.

4. The 1st Respondent employed the Claimants on diverse dates, from the year 1990 to 2016 as merchandizers. The 1st Claimant was a merchandizer coordinator, earning a monthly salary of Kshs. 93,960. The 24th Claimant earned a monthly salary of Kshs. 33,100. Others earned a monthly salary of Kshs. 28,100 each.

5. Around 2012, the 1st Respondent outsourced its human resource function to a company called Manpower Services. The company rebranded to Staffing Africa Limited, the 2nd Respondent herein, in 2016.

6. The Claimants would be interviewed and trained by the 1st Respondent. The 1st Respondent issued them job identity cards. They were then required to sign contracts drawn on the letterhead of the 2nd Respondent. Their salaries were paid through the 2nd Respondent.

7. Their duties, reporting lines, responsibilities and terms of service remained unchanged.

8. The 1st Respondent continued to issue them its uniforms; conduct their annual appraisal; and used appraisal to gauge their performance. It was wholly responsible for the Claimants' annual leave and transfers. It was responsible for reimbursement to the Claimants of expenses incurred in course of their duties.

9. Incentives such as Christmas vouchers, and subsidized purchase of the 1st Respondent's products, were granted by the 1st Respondent.

10. They were informed by the 1st Respondent in June 2016, that there was a change in merchandizing agency, which required them, to attend job interviews afresh. The information was relayed via WhatsApp.

11. The Claimants sought clarification on the nature of the fresh interviews, and the status of their subsisting contracts, and whether they would be paid terminal benefits before executing fresh contracts.

12. The 1st Respondent instructed the 2nd Respondent to issue the Claimants termination notices, instead of addressing their concerns. The notices were dated 30th June 2016, effective 31st July 2016.

13. There were consultations subsequently between the 1st Respondent and the Claimants on terminal benefits and certificates of service. The consultations did not yield settlement.

14. They worked for periods ranging from 1-26 years.

15. They claim against the Respondents, jointly and severally, outstanding annual leave, severance pay, 12 months' salary in compensation for unfair termination, and salaries for the remainder of their contractual periods, totalled at Kshs. 31,670,244. They pray for declaration that termination was unfair. They ask for certificates of service to issue, costs and interest.

16. Individual details are pleaded at paragraph *16* [1] to [41] of the Amended Statement of Claim.

17. The 1st Respondent filed a Statement of Response dated 28th November 2016, amended on 15th April 2019.

18. It denies having employed the Claimants in 2012. It did not outsource its human resource function to the 2nd Respondent, or at all. It only outsourced some non-core functions to the 2nd Respondent and other organizations.

19. The 1st Respondent did not interview all the Claimants. In 2013 however, the 1st Respondent required a merchandizing coordinator with specific knowledge. The 1st Claimant, among others, was interviewed jointly by the Respondents for this role.

20. All other interviews had over the years, been conducted by the 2nd Respondent.

21. Job cards were issued to Employees who were contracted by the 1st Respondent. These contracts were terminated in December 2011. No outsourced Employee was issued a job card.

22. It is denied that the Claimants' duties, responsibilities, reporting lines and terms of service remained the same, once they executed new contracts. They were supplied with uniforms by the 1st Respondent to facilitate marketing of its products.

23. The 1st Claimant was employed as a Coordinator, serving as the link between the Respondents. Employees of the 2nd Respondent, outsourced to the 1st Respondent, applied for annual leave through the 1st Claimant. The 1st Claimant would consult the 1st Respondent, before giving the final approval.

24. The 1st Respondent denies giving the Claimants Christmas vouchers, and selling to them subsidized products. It explains that it had arrangement with its business partners, including the 2nd Respondent, where the partners were allowed to purchase the 1st Respondent's products at a subsidized price. These were not benefits extended directly to any Claimant.

25. The 1st Respondent informed the 2nd Respondent in May 2016, that it would not require merchandizing services from the 2nd Respondent, with effect from 1st August 2016. This was in accordance with a subsisting agreement between the Respondents.

26. The information leaked to the Claimants, who then made enquiries with the 1st Respondent. The 1st Respondent intended to have merchandizing done by a different company, with better infrastructure. It is not true, that the 1st Respondent instructed the 2nd Respondent to issue the Claimants termination letters.

27. The 1st Respondent employed 20 of the Claimants prior to 2012. By December 2012, the 1st Respondent resolved to have merchandizing done by an independent company. It did away with the 20 Employees, when their contracts expired in December 2020. The other Claimants were never employed by the 1st Respondent.

28. The 1st Respondent states that any claims against the 1st Respondent is statute barred, their alleged relationship with the 1st Respondent, having ended in December 2011.

29. The Claimants' own pleading is that they were employed by the 2nd Respondent, on annual contracts, dating from 4th January 2016 to 31st December 2016.

30. Sometime in 2016, the 1st Respondent engaged another outsourcing company, Marketedge, who supplied merchandizers. The 1st Respondent negotiated with Marketedge, to have all merchandizers including the Claimants, employed on priority basis by Marketedge.

31. Merchandizers from other companies took advantage of the opportunity and were employed by Marketedge. Only 2 previous Employees of the 2nd Respondent, took up the opportunity and were employed by Marketedge.

32. The Claimants were all subscribed to the N.S.S.F., and are not entitled to severance pay. The 1st Respondent was not their Employer, and the prayers for terminal benefits and compensation are misconceived.

33. The 1st Respondent prays for dismissal of the Claim.

34. The 2nd Respondent file its Statement of Response, dated 15th February 2019, amended on 1st July 2019. Its position is that it entered into an outsourcing agreement with the 1st Respondent. The understanding was that the 1st Respondent would exercise full control of Employees recruited by the 2nd Respondent, from the inception to the end.

35. The 1st Respondent proceeded to interview its existing Employees, and forwarded their names to the 2nd Respondent, with instructions that they are employed as merchandizers, on 1-year contracts.

36. The 2nd Respondent concedes that the Claimants worked for the 1st Respondent, at the 1st Respondent's premises, and under the full control of the 1st Respondent. Their salaries and benefits were paid to them by the 1st Respondent, through the 2nd Respondent. The contract between the Respondents, was for management of labour. The 2nd Respondent was paid a management fee by the 1st Respondent. The terms and conditions of service of the Claimants were crafted and implemented entirely, by the 1st Respondent. The 1st Respondent restricted the 2nd Respondent's functions, to transmission of salaries to the Employees. The salaries and other benefits were fully funded by the 1st Respondent.

37. The 2nd Respondent concedes that the terms and conditions of service, the reporting lines, supervision, and performance appraisals remained a preserve of the 1st Respondent. The 1st Respondent issued the Claimants with uniforms, branded with the 1st Respondent's logo.

38. It is true as pleaded by the Claimants, that the 1st Respondent scheduled their annual leave, and offered the Claimants incentives, including Christmas and product vouchers.

39. The 2nd Respondent concedes that on 31st May 2016, the 1st Respondent issued a notice to the 2nd Respondent, stating that it wished to terminate the contracts of all the Claimants, who were referred to as merchandizers. The notice would take effect on 1st August 2016. The Claimants' last day at work, would be 31st July 2016. It was the 1st Respondent who directed the entire termination process.

40. The 2nd Respondent issued the 1st Respondent a letter dated 2nd June 2016, advising that termination was rushed, and that the Claimants needed to be consulted on terminal dues. Some of the Employees were in long service. The 1st Respondent ignored this advice, insisting that termination takes effect as notified.

41. The 2nd Respondent states that the claims before the Court extend to a period when it had no involvement with the 1st Respondent. The 2nd Respondent was contracted by the 1st Respondent on 1st January 2016. Prior to this, the 2nd Respondent was a stranger to the Claimants.

42. The notice of termination issued by the 1st Respondent, was lawful. Some of the Claimants were paid their terminal dues by the 1st Respondent, through Manpower Networks Limited. They acknowledged payments.

43. There were no further payments made through the 2nd Respondent. Negotiations between the 1st Respondent and the Claimants on terminal dues collapsed, and nothing was passed on to the 2nd Respondent, to be paid to the Claimants.

44. The 2nd Respondent denies that it is liable for the claims made by the Claimants, including severance, balance of the contractual period, and compensation for unfair termination.

45. It is the position of the 2nd Respondent that if any amount is payable to the Claimants, liability is on the 1st Respondent, who employed the Claimants.

46. The 2nd Respondent prays the Court to dismiss the Claim with costs.

47. The Claimants filed a Reply to the Statements of Response, on 22nd March 2019. They reiterate the averments of their Statement of Claim, and hold the Respondents to strict proof on their respective Responses. They state that they were not privy to the contract between the Respondents, and urge the Court to uphold their Claim jointly and severally, against the Respondents.

48. The Claimants' case was heard and closed before Hon. Justice B. Ongaya. Patricia Kamanthe [Claimant No. 1] gave evidence for the Claimants on 10th December 2019, closing the Claimants' case.

49. Ongaya J was transferred to Mombasa before completing the hearing. On 11th March 2021, Parties agreed that hearing continues before the undersigned Judge, from the point at which the previous proceedings ended.

50. Martin Arek, 1st Respondent's Business Partner gave evidence for the 1st Respondent, on 1st October 2021 and 10th November 2022 closing the 1st Respondent's case.

51. The 2nd Respondent's Director, James Maina, gave evidence on 21st September 2023, closing the 2nd Respondent's case.

52. The Claim was last mentioned on 23rd November 2023, when the Parties confirmed filing and exchange of their closing submissions.

53. Parties agreed at the commencement of the hearing, to have all their documents as filed, admitted as exhibits.

54. Patricia adopted her witness statement, as her evidence-in-chief. She told the Court that she supervised all the 40 Claimants. They were employed and controlled by the 1st Respondent.

55. Cross-examined by Counsel for the 1st Respondent, she told the Court that her last direct contract with the 1st Respondent, ended in 2010-2011. The statement filed by Martin Arek, lists 20 Claimants. They were the only ones employed by the 1st Respondent, prior to outsourcing in 2011.

56. After the 1st Respondent ceased employing the Claimants directly, they did not complain. Salary payment by the 2nd Respondent, started in January 2012. The 2nd Respondent was then known as Manpower Networks Limited. It rebranded to Africa Staffing Limited later. The 2nd Respondent would pay the Employees, and make statutory deductions.

57. Patricia's contract was terminated in July 2016. The Claimants were told there were changes, and that another company, Marketedge Limited, would hence be employing the merchandizers. They were advised that they could offer themselves for interviews with Marketedge. Majority did not offer themselves. 2 Employees offered themselves and were taken in.

58. Cross-examined by the Counsel for the 2nd Respondent, Patricia reiterated that the Claimants were employed by the 1st Respondent. The 2nd Respondent only managed the payroll. It was an outsourced payment agency. Patricia told the Court that either of the Respondents, can be liable to the Claimants.

59. Martin Arek relied on his witness statement, dated 27th June 2019. Claimants number 3, 4, 5, 7, 8, 12, 18, 19, 20, 21, 25, 28, 29, 30, 32, 33, 34, 36, 38, 39 and 40 were never employed by the 1st Respondent. The other 20, had contracts with the 1st Respondent, which ended in 2011. Their respective claims are time-barred.

60. He told the Court that Africa Staffing and Manpower Networks Limited, were the same business. Patricia was not an Employee of the 1st Respondent. She was supervising merchandizing. The 1st Respondent used her e-mail address, for business communication only. Uniforms were supplied to the merchandizers in the name of the 1st Respondent for marketing purposes. This did not make any Claimant an Employee of the 1st Respondent. They could receive benefits from the 1st Respondent, without being its Employees. The 1st Respondent contracted the 2d Respondent to supply temporary labour.

61. Cross-examined by Counsel for the Claimants, Martin told the Court that some of the Claimants worked for the 1st Respondent, until 2011. Marketedge is not a party to the Claim. Various other service providers mentioned by the 1st Respondent, are not parties. The Claimants were not mentioned in the contracts between the Respondents. The 1st Claimant was the 1st Respondent's supervisor. She made an application for leave. It was addressed to the 1st Respondent's Human Resource Department. It was signed by the Sales Manager. Sales was a core function of the 1st Respondent. The application was not approved by the 2nd Respondent. All leave application forms were on the 1st Respondent's letterhead. Martin explained that the 2nd Respondent retained the 1st Respondent's letterhead. The contract between the Respondents is dated 1st January 2016. It was to expire on 31st December 2016. Renewal depended on business demand. The 1st Respondent did not pay terminal dues. It was depending on the 2nd Respondent, to compute terminal dues. The 1st Respondent was not the primary Employer to the Claimants.

62. Cross-examined by Counsel for the 2nd Respondent, Martin told the Court that an Employer pays salaries to Employees, and retains management control. The contract between the Respondent states that the 1st Respondent required human resource services. It is not true that the 2nd Respondent was solely involved in provision of human resource services. The 2nd Respondent received the Claimants' salaries and benefits from the 1st Respondent.

63. The leave application forms were in the name of the 1st Respondent. Patricia's leave application was approved by Eddy Karisa, Human Resource Manager of the 1st Respondent. He approved in order to ensure that there was business continuity. There were claims for reimbursements made by the Claimants. Reimbursements were made by the 1st Respondent. Martin did not agree that the 2nd Respondent was an agent. The contract between the Respondents referred to agency fees. The 1st Respondent controlled the Employees' hours of work.

64. On redirection, Martin told the Court that Patricia's e-mail was used by the 1st Respondent, for coordination purposes. Annual leave applications were submitted through Patricia as the supervisor. They were to be approved by the 2nd Respondent. The Claimants were employed by the 2nd Respondent, and termination of their contracts was effected by the 2nd Respondent. The uniforms supplied by the 1st Respondent to the Claimants, were purely for marketing purposes. The 1st Respondent did not pay terminal benefits because the Claimants were not its Employees.

65. Director James Maina adopted his witness statement dated 15th February 2019, in his evidence-in-chief. He exhibited documents [1-70].

66. He told the Court that the 2nd Respondent, was an agent of the 1st Respondent. It managed the 1st Respondent's labour. The 1st Respondent provided salaries and benefits and controlled the Employees. The 2nd Respondent dealt with the Employees only in accordance with instructions issued by the 1st Respondent. The 1st Respondent terminated the Employees' contracts and paid terminal dues. By the time the 2nd Respondent entered the scene, most of the Employees were already in employment. It only

managed Employees for about 5 years. It did not employ the Claimants. The 2nd Respondent offered advice to the 1st Respondent on termination of the Claimants' contracts, which advice was declined by the 1st Respondent.

67. James underscored on cross-examination by Counsel for the Claimants, that the Claimants' ultimate Employer, was the 1st Respondent. The 2nd Respondent's role involved custody of personnel records. The records belonged to the 1st Respondent. The 1st Respondent had previously paid benefits to the Claimants, under different contracts. Notice period was 3 months. The 1st Respondent was to pay terminal dues. The Respondents intended to hold a meeting to discuss payment. The meeting did not happen. Computation was a joint responsibility.

68. Cross-examined by Counsel for the 1st Respondent, James told the Court that the 2nd Respondent changed its name, as pleaded by the Parties. The Respondents' relationship started in 2011, and ended in 2016. The contracts between the Respondents were renewed annually. The contract referred to provision of temporary personnel, not human resource functions. The 2nd Respondent issued termination letters, on instruction of the 1st Respondent, indicating that there was operational need. Changes would affect merchandizers. Bids were invited for provision of merchandizing services. The 2nd Respondent is recorded to have reviewed performance of 'our merchandizers.' The term 'our' was used frequently by the 2nd Respondent, in reference to the Claimants.

69. The contract between the Respondents states that Employees would not be regarded as Employees of the company [1st Respondent]. Patricia was in employment for about 15 years, before the 2nd Respondent entered the scene. The 1st Respondent terminated its contract with the 2nd Respondent, confined to merchandizers. There was provision of other cadre of Employees, which continued after the merchandizing aspect was taken away from the 2nd Respondent.

70. Redirected, James told the Court that the 2nd Respondent advised the 1st Respondent against terminating the Claimants' contracts, before the contracted period of 1 year ended. The 2nd Respondent called for a meeting to discuss the legal consequences of such termination. The 1st Respondent declined to discuss. The 2nd Respondent issued notices on the advice of the 1st Respondent, and against the background of the 1st Respondent's refusal to engage on the effect of termination of the contracts. The 2nd Respondent had in the past, given its advice to the 1st Respondent on termination and payment of benefits. Clause 4.1 of the contract between the Respondents did not include merchandizers; they were already in employment. The 2nd Respondent referred to the Claimants as 'our merchandizers,' because it was managing them. The 2nd Respondent could not sue the 1st Respondent for breach of contract, after the merchandizers were taken out of the equation, because the Respondents retained contractual relationship on supply of factory workers.

71. The issues are whether, the Claimants were employed by the 1st Respondent or the 2nd Respondent; whether termination of their contracts was fairly executed and based on valid reason; and whether, they merit the remedies sought, severally and jointly, against the Respondents.

The Court Finds: -

72. The 1st Respondent is a registered company, dealing in various skincare and personal hygiene products. Sale of these products was a core function in the 1st Respondent's business. This was confirmed by Martin Arek, the 1st Respondent's Human Resource Business Partner, who told the Court that, ''sales is one of our core functions.''

73. The Claimants were salespersons, referred to as merchandizers, in these proceedings. They performed a core function in the 1st Respondent's business.

74. The fact that sales was a core business function, did not deter the 1st Respondent, in outsourcing the function, among other functions, to other service providers.

75. The list of documents filed by the 1st Respondent dated 27th June 2019, indicates that the 1st Respondent was in a contract for merchandizing services, with a company called Marketedge Solutions Limited. The contract covered the period 1st August 2016 to 31st July 2017. Marketedge was to recruit merchandizers and supervisors on 1 –year contracts.

76. In the contract, the 1st Respondent states that it retained the right to meet and interview the candidates recruited by Marketedge, while maintaining that, ''the merchandising personnel will at all times be the Employees of Marketedge, and no relationship of employment is intended, between the 1st Respondent and the merchandizers, and none shall be created/entertained.''

77. There were similar agreements entered into between the 1st Respondent and Interactive Marketing Communications Limited, for recruitment of merchandizers to serve in Tanzania; and between the 1st Respondent and Two Five One Communications Limited, covering Ethiopia.

78. There are other contracts exhibited by the 1st Respondent for provision of other services, executed with other entities such as Wells Fargo Limited [Security], Supreme Eatery Limited [catering], and the Irrigation Group Limited [hygiene services]. The 1st Respondent outsourced its core, as well as non-core functions, as shown in the series of service provision contracts, exhibited by the 1st Respondent.

79. The contract with the 2nd Respondent, was made on 1st January 2016. It was to last 31st December 2016. Clause 1.0 of this contract states that the 1st Respondent required the provision of manpower [human resource] services. The 2nd Respondent agreed to provide this service. Unlike the contract between the 1st Respondent and Marketedge which related to provision of merchandizers, the contract with the 2nd Respondent related to the broad provision of human resources.

80. The contract between the 1st Respondent and the 2nd Respondent, does not have any provision, which would conclusively establish that either Respondent was the Claimants' Employer, to the exclusion of the other

81. The business premises and all tools of production, remained the property of the 1st Respondent. ''Goods and information made available by the 1st Respondent to the 2nd Respondent, for purposes of this agreement, shall remain the property of the 1st Respondent,'' the agreement states.

82. It was the 1st Respondent's obligation to identify the skills set, required of every Employee; the 1st Respondent would not allow any Employee to undertake any other work, other than that the Employee was recruited to perform; the 1st Respondent determined, at its sole discretion, what time the Employee begins to work; the 1st Respondent verified the suitability and ability of Employees; it was responsible for obtaining work and other permits for the Employees; the 1st Respondent undertook to comply with all obligations, statutory or otherwise, directly or indirectly connected with the services of the Employees; the 1st Respondent would provide a supervisor or manager for each Employee; such supervisor or manager ensured that the supervisor appointed by the 2nd Respondent, carried out supervisory duties in accordance with the needs of the 1st Respondent; and lastly, the 1st Respondent would pay to the 2nd Respondent, cumulative payments to cover Employees' total emoluments, disbursements and insurance contributions paid on behalf of the Employees, by the 2nd Respondent

83. The obligations of the 2nd Respondent under the contract, no doubt affirms that the 2nd Respondent became a Co-Employer with the 1st Respondent, rather than an innocent bystander, who cannot be called upon to shoulder employment liability.

84. The obligations include: provision of temporary staff to the 1st Respondent; to verify if persons employed as drivers, had the necessary driving licences; ensure all Employees were qualified and suitable; ensure that the Employees were contracted on temporary contracts, reflecting the period contracted between the Respondents; the 2nd Respondent would pay all Employees salaries commensurate with their job grade, ensuring compliance with the minimum wage requirement; the 2nd Respondent would pay Employee allowances and overtime; the 2nd Respondent would make statutory deductions; the 2nd Respondent would make available personnel required by the 1st Respondent for warehousing, sales promotions and merchandizing activities; the 2nd Respondent would ensure all Employees recruited are properly vetted; it would ensure they observe working hours, as advised by the 1st Respondent; the 2nd Respondent would be responsible for termination and hiring of Employees, and indemnify the 1st Respondent in case of claims arising from any default on the part of the 2nd Respondent; the 2nd Respondent would employ supervisors; the 2nd Respondent would ensure compliance with labour laws; where the 1st Respondent was not satisfied with the performance of any Employee, it would communicate to the 2nd Respondent, who would take the necessary remedial action; the 2nd Respondent would conduct performance appraisals; and the 2nd Respondent would ensure all Employees used appropriate Personal Protection Equipment [PPEs], as provided by the 1st Respondent.

85. It was agreed that Employees shall at no time, be regarded as Employees of the 1st Respondent, and that in event of claims made against the 1st Respondent, the 2nd Respondent would do its best to show that the Employee is its Employee, and not an Employee of the 1st Respondent.

86. This is at the heart of this dispute. The 1st Respondent holds it did not employ the Claimants, and expects the 2nd Respondent to convince the Court that the 2nd Respondent, not the 1st Respondent, employed the Claimants.

87. There were shared responsibilities. The 2nd Respondent paid Employees salaries, and would receive cumulative payments from the 1st Respondent. The 1st Respondent undertook to comply with obligations, duties and regulations, statutory and otherwise. The 2nd Respondent was to ensure that all relevant and applicable laws were adhered to, in hiring, maintaining Employees, and in termination of their contracts. Supervision was shared. The 1st Respondent provided a manager or supervisor, who supervised supervisors, appointed by the 2nd Respondent. Other responsibilities such as occupational safety and health, hours of work, performance management and disciplinary control, were shared.

88. The contract executed by the Respondents, as shown above, betrays a relationship of Co-Employers between the Respondents. They both fell within the definition of the term 'Employer' under the *Employment Act*, and within the understanding of the term, in common law.

89. The Parties had executed other contracts annually between the year 2011 and 2016 for provision of manpower [human resources]. The mutual obligations were not different from the contract of 2016, summarized above.

90. The oral evidence presented by the Parties before the Court, supports the conclusion that the Respondents were Co-Employers, and none can escape liability if any, to the Claimants. All the annual leave forms remained on the letterheads of the 1st Respondent. It was common evidence that Employees were paid incentives by the 1st Respondent. All benefits paid to the Employees were repaid by the 1st

Respondent to the 2nd Respondent. Martin told the Court that the 1st Respondent intended to pay terminal benefits to the Claimants, in accordance with computation done by the 2nd Respondent. It was common evidence that the 1st Respondent provided the Claimants with its own branded uniforms. The oral evidence by the respective Parties' witnesses, corroborated the contents of the successive provision of service agreements, concluded between the Respondents.

91. Section 2 of the *Employment Act* defines an Employee to mean, a person employed for wages or a salary, and includes an apprentice and indentured learner.

92. The term Employer, means any person, public body, firm, corporation or company, who or which has entered into a contract of service, to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

93. The 2nd Respondent's Director James Maina told the Court that the 2nd Respondent was an agent of the 1st Respondent. He told the Court that because the 2nd Respondent was an agent of the 1st Respondent, it was not an Employer to the Claimants.

94. The Court would wish to state from the inception, that under Section 2 of the *Employment Act*, and Employer includes an agent of any person, who has entered into a contract of service, to employ any person. The 2nd Respondent was an agent of the 1st Respondent as conceded in its own evidence, and therefore was a Co- Employer of the Claimants.

95. The contracts concluded between the Respondents, gave both parties significant roles, in the implementation of the Claimants' contracts of employment. Although the Respondents are separate legal entities, they co-determined essential terms and conditions of service, of the Claimants.

96. The traditional triangular employment relationship, involves the outsourcing of employment responsibilities, to temporary help agencies. Outsourcing was intended to be a temporary help system. The temporary help agency [2nd Respondent] is meant to supply the user [1st Respondent], temporary workers, for limited duration. This would include supply of Employees to relieve regular Employees of the 1st Respondent, when for instance, such Employees are on annual, sick, or maternity leaves.

97. This was underscored by the E&LRC in decisions such as *Harrison Karani & 19 others v. Insight Management Limited* [2016] e-KLR and *Elizabeth Washeke & 62 others v. Airtel Kenya Networks* [2013] e-KLR. Outsourcing has gradually evolved, and fallen into abuse by unscrupulous players in the temporary help industry,

98. In *Harrison Karani & 19 others*, Employees who had served for as many as 7 years, were required to execute fresh contracts with the agency, and serve probationary periods, while performing the same duties they had been performing, over the past 7 years.

99. Temporary help agencies are now offering all forms of labour services, assisting Employers in evading legal and regulatory burdens. They are no longer confined to supply of temporary labour.

100. In *Wrigley Company [E.A] Limited v. Attorney-General & 2 Others & Another* [2013] e-KLR, the E&LRC found that the agency and the user firm, had entered into a contract for supply and management of labour, which was intended to close out the recognized trade union from collectively bargaining for the Employees. The Court laid down the law on outsourcing in Kenya, including inter alia that: -

    a. Ordinarily, Employers should not outsource their core functions.

    b. Employers are not permitted to use outsourcing as a means to escape contractual obligations.

c. Employers shall not transfer services of their Employees to outsourcing agencies, without the express acceptance of the Employees.

d. Outsourcing is unlawful if it has the effect of introducing discrimination at the workplace.

101. The Court in *Wrigley Company [East Africa] Limited*, however took the position that the contracts concluded between the agency and the Employees, ought not to have been enforced against the user firm. This conclusion appears to have overlooked that the term 'Employer' includes the Employer and his /its agent, foreman, manager or factor. It overlooked that Employees continued to work in the business premises of the user firm, working through the use of tools provided by the user firm, and remained to a significant degree under the control of the user firm. The decision implied that a user firm and an agency, cannot be Co-Employers, for reasons related to the doctrine of privity of contract. In employment law however, an agent such as the 2nd Respondent can be a Co-Employer. One only needs to look at the labour contract between the Respondents, and their obligations in relation to each other, and crucially, in relation to the Employees.

102. The 1st Respondent appears to have outsourced a core function, and done so, to evade the legal and regulatory burdens.

103. Merchandizing was a core function. It issued short term contracts which went on for long periods, for as many as 15 years in some cases.

104. It specifically asked the 2nd Respondent to continue placing Employees on contracts of no more than 1-year. This was grounded on the short term contracts conveniently executed, between the Respondents themselves. The presumption was that the 2nd Respondent was offering temporary labour to the 1st Respondent, in keeping with the character of traditional triangular relationships, as a temporary labour industry. The Employees however, were to discharge a core function of the 1st Respondent. Some had been at it for years on end.

105. Temporary help industry has therefore become a purveyor of violation of employment rights. Long-term or indefinite-term Employees, rendering services in their Employers' core functions, have been turned into temporary labour.

106. The Court is satisfied that the Respondents, were Co-Employers in relation to the Claimants. This is adequately established through the obligations of the Parties, in what the Respondents successively termed as 'contract of temporary employees outsourcing.'

107. The specific claims concern outstanding leave days, severance pay, 12 months' salary in compensation for unfair termination, and salaries for the remainder of the contracts.

108. The Court has encountered difficulties, in understanding the exact date of employment for each of the Claimant.

109. At paragraph 5 of the Amended Statement of Claim, the Claimants pleaded that they were employed by the 1st Respondent on or about the year 2012.

110. There are contracts exhibited by the 1st Respondent, executed between the 1st Respondent and some of the Employees, on 4th January 2010.

111. The date given by the Claimants at paragraph 5 of the Amended Statement of Claim, coincides with the execution of the contract for temporary employees outsourcing, executed between the 1st Respondent and Manpower Network Limited on 1st June 2012.

112. Manpower Network Limited changed its name to Staffing Africa Limited, the 2nd Respondent herein, in 2015. It went on issuing 1-year contracts to the Claimants.

113. In her evidence Patricia for the Claimants, told the Court on 10th December 2019, that the Claimants were employed by the 1st Respondent from 1990. She stated that direct employment by the 1st Respondent, ended in 2010 or 2011.

114. There is no clarity to the periods the Claimants served directly under the 1st Respondent. There are no contracts availed to the Court, predating the year 2010.

115. The Claimants' last contracts were for 1 –year, beginning 4th January 2016, to 31st December 2016. There is evidence that they had been working in the past on repeated 1-year contracts, at least from 2012, and others could have worked from as far back as 1990, according to the evidence of Patricia.

116. James Maina for the 2nd Respondent clarified that by the time the 2nd Respondent was contracted by the 1st Respondent, most of the Claimants were already in employment.

117. There is evidence therefore that some Claimants were employed before the year 2010, but there is no conclusive evidence given by the Claimants, on the specific dates of employment, predating the year 2010.

118. They were notified by the 2nd Respondent on 30th June 2016, upon the instructions of the 1st Respondent, that their contracts would be terminated with effect from 31st July 2016. The reason stated in justifying premature termination, was that the 1st Respondent had decided to effect operational changes.

119. The Claimants in effect were told that their services were no longer needed. The 1st Respondent wrote to the 2nd Respondent on 31st May 2016, notifying that starting 1st August 2016, the 1st Respondent would not need the services of merchandizers. Other labour services relating to other functions would continue to be supplied. The Claimants therefore were suddenly found to be surplus to the business needs of the 1st Respondent.

120. They effectively left employment on redundancy. Their functions were found to be unnecessary to the 1st Respondent. Their contracts were terminated for no fault of their own, but on account of the 1st Respondent's operational requirements.

121. The Respondents ought to have taken the Claimants through the redundancy process, prescribed by Section 40 of the *Employment Act*. They need to consult, between themselves, and with the Claimants, in particular, considering their role as Co-Employers.

122. The 2nd Respondent testified on the need to consult. James Maina told the Court that the 2nd Respondent advised the 1st Respondent on termination. The Respondents were to discuss termination, and agree on terminal benefits payable to the Claimants. Computation of terminal dues, Maina correctly told the Court, was a joint responsibility of the Respondents. The 1st Respondent declined consultations.

123. In the view of the Court, this was perhaps because in the mind of the 1st Respondent, all contractual responsibility to the Employees had been placed on the shoulders of the 2nd Respondent, through the outsourcing agreements.

124. On remedies, the Court declares that termination was unfair and unlawful.

125. It is declared that the Respondents are jointly and severally liable to the Claimants.

126. There was no evidence led by the Claimants, to established the prayer for outstanding annual leave days. The prayer is declined.

127. As pointed out elsewhere the Court was not supplied with conclusive evidence on when each Employee commenced service. It is not possible for the Court, to assess individual compensation based on the years of service, but the Court will accede to compensation based on the standard period remaining to the Claimants' last contracts at 5 months' salary. Section 49 [4] [e] of the *Employment Act* guides the Court to look at the Employee's length of service with the Employer, in awarding remedies for unfair termination. Section 49 [4] [e] guides the Court to also consider the reasonable expectation of the Employee, as to the length of time for which his employment with that Employer might have continued, but for termination. The Claimants as observed above, did not establish the length of service, but there is common evidence that they expected to serve the remaining period of 5 months, in their contracts. The Court adopts their reasonable expectation, as to the length of time for which their employment with the Respondents might have continued, a period of 5 months, in compensating them for unfair termination.

128. Each Claimant is granted compensation for unfair termination, equivalent of 5 months' salary.

129. Again there is no conclusive evidence on the complete years of service. The 2nd Respondent stated it offered the 1st Respondent human resource services for about 5 years, 2011 to 2016. The earliest contracts of employment the Court has seen were executed in 2010. Others are indicated to have served less than 5 years and shall receive severance in accordance with the pleaded number of years served.

130. Each Claimant is granted severance pay equivalent of 15 days' salary to a maximum of 5 years,

131. There is no justification to grant separate award of salaries for the remainder period of the contracts, the Court having compensated the Claimants for unfair termination, equivalent of their 5 months' salary.

In sum, it is ordered: -

a. It is declared that termination of the Claimants' contracts by the Respondents was unfair and unlawful.

b. It is declared that the Respondents are jointly and severally liable to the Claimants.

c. The Respondents shall pay to:

1. Patricia Maundu: severance at Kshs. 271,038 and compensation for unfair termination equivalent of 5 months' salary at Kshs. 469,800 –total Kshs. 740,838.

2. Alice Gichuki: severance at Kshs. 81,057 and compensation at Kshs. 140,500 – total Kshs. 221, 557.

3. Ann Mwanza: severance at Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

4. Agnes Maina: severance at Kshs. 16,211 and compensation at Kshs. 140,500 – total Kshs. 156,711.

5. Alice Atieno: severance at Kshs. 32,423 and compensation at Kshs. 140,500 –total Kshs. 172,923.

6. Benta Onyuro: severance at Kshs. 81,057 and compensation at Kshs. 140,500 - total Kshs. 221,557.

7. Celestine Mwongeli: severance Kshs 16,211 and compensation Kshs. 140,500 – total Kshs. 156,711.

8. Christine Mweu: severance Kshs. 32, 423 and compensation Kshs. 140,500- total Kshs. 172,923.

9. Dinah Mutugi: severance Kshs. 81,057 and compensation Kshs. 140,500- total Kshs. 221,557.

10. Damaris Mutunga: severance Kshs. 81,057 and compensation at Kshs. 140,500 – Kshs. 221,557.

11. Esther Ngila: severance Kshs. 81,057 and compensation at Kshs. 140,500 –total 221,557.

12. Esther Maina: severance at Kshs. 64,846 and compensation at Kshs. 140,500 – total Kshs. 205,346.

13. Faith Kaloki: severance Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

14. Frida Munyasya: severance Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs 221,557.

15. Helen Amianda: severance at Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

16. Joyce Kimura: severance at Kshs. 81,057 and compensation at Kshs. 140,500-total Kshs. 221,557.

17. Janet Munzu: severance at Kshs. 81,057 and compensation at Kshs. 140,500- total Kshs. 221,557.

18. Janet Chepkemoi: severance Kshs. 48,634 and compensation at Kshs. 140,500 –total Kshs. 189,134.

19. Jane Mwathi: severance at Kshs. 32,423 and severance at Kshs. 140,500 –total Kshs. 172,923.

20. Jemimah Kimani: severance Kshs 16,211 and Kshs. 140,500 – total Kshs. 156,711.

21. Jacqueline Semena: severance at Kshs. 16,211 and compensation at Kshs. 140,500 – total Kshs. 156,711.

22. Keziah Mwangi: severance at Kshs. 81,057 and compensation at Kshs. 140,500- total Kshs. 221,557.

23. Lucy Maina: severance at Kshs. 16,211 and compensation at Kshs. 140,500 –total Kshs. 156,711.

24. Nelly Mumbi: severance at Kshs. 95,480 and compensation at Kshs. 165,500 – total Kshs. 260,980.

25. Naomi Mwema: no claim for severance, compensation at Kshs 140,500 –total Kshs. 140,500.

26. Margaret Karanja: severance at Kshs. 81,057 and compensation Kshs. 140,500- total Kshs. 221,557.

27. Mary Kioko: severance Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

28. Margaret Njoroge: severance Kshs. 64,846 and compensation at Kshs. 140,500 – total 205,346.

29. Martha Wangari: severance Kshs. 32,423 and compensation at Kshs. 140,500-total Kshs. 172,923.

30. Mary Kihara: severance Kshs. 32,423 and compensation at Kshs 140,500 –total Kshs. 172,923.

31. Martha Waregwa: severance at Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

32. Nicole Gathoni: severance at Kshs. 32,423 and compensation at Kshs. 140,500 –total Kshs. 172,923.

33. Phoebe Mbula: severance Kshs. 64,846 and compensation at Kshs. 140,500 – total Kshs. 205,346.

34. Phyllis Mbeke: severance at Kshs. 32,423 and compensation at Kshs. 140,500 –total Kshs. 172,923.

35. Ruth Wanyingi: severance 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

36. Rophence Rotich: severance Kshs. 81,057 and compensation at Kshs. 140,500 – total Kshs. 221,557.

37. Sylvia Njoroge: severance Kshs. 81,057 and compensation at Kshs. 140,500 –total Kshs. 221,557.

38. Susan Wanyenze: severance Kshs. 48,634 and compensation at Kshs 140,500 – total Kshs. 189,134.

39. Teresiah Murathi: severance Kshs. 64,846 and compensation at Kshs. 140,500 –total Kshs. 205,346.

40. Veronica Kioko: severance at Kshs. 81,057 and compensation at Kshs. 140,500 – total Kshs. 221,557.

41. Victoria Koki: severance Kshs. 16,211 and compensation Kshs. 140,500 –total Kshs. 156,711.

d. The Respondents shall pay to the Claimants, jointly and severally, the total sum of Kshs. 8,702,280.

e. Certificates of Service to be issued to the Claimants by both Respondents.

f. Costs to be paid by the Respondents to the Claimants.

g. Interest granted at court rate, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE