



**Ochineg & 15 others v Rea Vipingo Plantations & 2 others (Cause 58 of 2018) [2023] KEELRC 1999 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1999 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**  
**CAUSE 58 OF 2018**  
**M MBARŪ, J**  
**JULY 13, 2023**

**BETWEEN**

**FRANCIS OCHINEG & 15 OTHERS ..... CLAIMANT**

**AND**

**REA VIPINGO PLANTATIONS ..... 1<sup>ST</sup> RESPONDENT**

**ESSENTIAL MANAGEMENT CONSULTANCY LIMITED .... 2<sup>ND</sup> RESPONDENT**

**KAZUNGU KALAMA T/A KAZUNGU AGRICULTURAL SUPPLY .... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimants are adults. The 1st and 2nd respondents are limited liability companies. 3rd respondent is a sole proprietorship registered under the Business names Act and rules.
2. The claim is based on facts that the claimants were employees of the respondents working in various sections at the Vipingo plantation. Employment was on causal terms earning a wage of Ksh.5,000 to Ksh.7,000 per month.
3. The claimants were initially employed by the respondents from the year 1992 to 2015 when their employment was terminated. The wages due from 12 to 17 November 2015 by the 1st and 3<sup>rd</sup> respondent was not paid. When they asked about the unpaid salaries, the claimants were informed that these had been given to the supervisors for disbursement. The matter was reported to the labour officer who followed up with the 1st respondent who asked the claimants to return to work and be paid but there was no payment.
4. On 3<sup>rd</sup> December 2015 the claimants held a demonstration to demand their dues. In January, 2016 the 2nd respondent was called in and who introduced piece-rate employment contracts which was



seconded by the 1st respondent but on 19 January 2016 employment was terminated without payment of terminal dues. There was no notice of change of management or payment of terminal dues;

- i. Francis Oduori Ochieng
  - a. Unpaid salary for 12 to 17 November Ksh.7,108;
  - b. 2 months notice Ksh.28,438
  - c. Leave for 8 years Ksh.113,728
  - d. Gratuity for 8 years worked Ksh.56,864
  - e. Compensation for unfair termination Ksh.170,592
- ii. Kanze Charo Shungu
  - a. Unpaid salary for 12 to 17 November Ksh.6,000;
  - b. 2 months notice Ksh.24,000
  - c. Leave for 21st years Ksh.252,000
  - d. Gratuity for 21st years worked Ksh.126,000
  - e. Compensation for unfair termination Ksh.144,000
- iii. Mwaka Mwangamo
  - a. Unpaid salary for 12 to 17 November Ksh.6,000;
  - b. 2 months notice Ksh.24,000
  - c. Leave for 21st years Ksh.252,000
  - d. Gratuity for 21st years worked Ksh.126,000
  - e. Compensation for unfair termination Ksh.144,000
- iv. Kadzo Kenga Katana
  - a. Unpaid salary for 12 to 17 November Ksh.5,000;
  - b. 2 months notice Ksh.20,000
  - c. Leave for 8 years Ksh.80,000
  - d. Gratuity for 8 years worked Ksh.40,000
  - e. Compensation for unfair termination Ksh.120,000
- v. Nyanga Mwalinga Kalume
  - a. Unpaid salary for 12 to 17 November Ksh.6,000;
  - b. 2nd months notice Ksh.24,000
  - c. Leave for 17 years Ksh.204,000
  - d. Gratuity for 17 years worked Ksh.102,000
  - e. Compensation for unfair termination Ksh.144,000



- vi. Mwanarusi Mwatenga
  - a. Unpaid salary for 12 to 17 November Ksh.6,000
  - b. 2 months notice Ksh.24,000
  - c. Leave for 16 years Ksh.192,000
  - d. Gratuity for 16 years worked Ksh.96,000
  - e. Compensation for unfair termination Ksh.1444,000.
- vii. Kanze Charo Mumba
  - a. Unpaid salary for 12 to 17 November Ksh.5,050
  - b. 2 months notice Ksh.20,200
  - c. Leave for 15 years Ksh.151,000
  - d. Gratuity for 15 years worked Ksh.75,750
  - e. Compensation for unfair termination Ksh.121,000.
- viii. Mwangambo Nyale Mrima
  - a. Unpaid salary for 12 to 17 November Ksh.6,000
  - b. 2 months notice Ksh.24,000
  - c. Leave for 24 years Ksh.288,000
  - d. Gratuity for 24 years worked Ksh.144,000
  - e. Compensation for unfair termination Ksh.144,000.
- ix. Sindi Katsuheni Kazungu
  - a. Unpaid salary for 12 to 17 November Ksh.6,000
  - b. 2 months notice Ksh.24,000
  - c. Leave for 18 years Ksh.216,000
  - d. Gratuity for 18 years worked Ksh.108,000
  - e. Compensation for unfair termination Ksh.144,000.
- x. Kache Kadhengi Thiga
  - a. Unpaid salary for 12 to 17 November Ksh.5,000
  - b. 2 months notice Ksh.20,000
  - c. Leave for 12 years Ksh.120,000
  - d. Gratuity for 12 years worked Ksh.60,000
  - e. Compensation for unfair termination Ksh.120,000
- xi. Marstela Kadede Jum



- a. Unpaid salary for 12 to 17 November Ksh.6,000
  - b. 2 months notice Ksh.24,000
  - c. Leave for 15 years Ksh.180,000
  - d. Gratuity for 15 years worked Ksh.90,000
  - e. Compensation for unfair termination Ksh.144,000
- xii. Chadi Charo Kiti
- a. Unpaid salary for 12 to 17 November Ksh.4,500
  - b. Leave for 7 years Ksh.63,000
  - c. Gratuity for 8 years worked Ksh. 32,500
- xiii. Mbuche Muhambi Dzomo
- a. Unpaid salary for 12 to 17 November Ksh.5,000
  - b. 2 months notice Ksh.20,000
  - c. Leave for 13 years Ksh.130,000
  - d. Gratuity for 13 years worked Ksh.65,000
  - e. Compensation for unfair termination Ksh.120,000
- xiv. Sidi Charo Kapanzi
- a. Unpaid salary for 12 to 17 November Ksh.6,500
  - b. 2 months notice Ksh.26,000
  - c. Leave for 13 years Ksh.169,000
  - d. Gratuity for 13 years worked Ksh.84,500
  - e. Compensation for unfair termination Ksh.156,000
- xv. Mary Atieno Onyango
- a. Unpaid salary for 12 to 17 November Ksh.5,000
  - b. 2 months notice Ksh.20,000
  - c. Leave for 13 years Ksh.170,000
  - d. Gratuity for 13 years worked Ksh.85,000
  - e. Compensation for unfair termination Ksh.120,000
- xvi. Kache Charo Mumb
- a. Unpaid salary for 12 to 17 November Ksh.5,000
  - b. 2 months notice Ksh.20,000
  - c. Leave for 13 years Ksh.140,000



- d. Gratuity for 13 years worked Ksh.70,000
  - e. Compensation for unfair termination Ksh.120,000.
5. The claim is that the respondents are in breach of contract and have treated the claimants unfairly following unlawful dismissal from employment and the claims made should issue together with costs.
  6. In evidence, the claimants called the 1st claimant who testified on 25 June 2019 that the claimants were employed by the respondents and paid a wage of Ksh.6,000 after every two weeks. The 3rd respondent would make the payments. He was the supervisor. The payments were in cash for cutting sisal are Rea Vipingo in Kilifi and would report to work from 6AM until 3PM.
  7. The witness testified that he was employed in June 2006 and worked until November 2015 without any annual leave or being registered with NSSF until the year 2014 when the 3rd respondent started paying his NSSF every month.
  8. The employees including the claimants went on strike because of delayed wages. A report was made to the Labour officer in Malindi who visited the plantation and who directed the due wages be paid and a return to work but there was no payment. The 1st respondent stated that a new company had been introduced, the 2nd respondent who issued piece rate contracts for a year but this was followed with termination of employment the wages due and benefits were never paid.
  9. Upon cross-examination by counsel for the 1st respondent, the witness testified that he was employed on 26 June 2006 by the 1st respondent and was issued with a camp pass hosted by John Simiyu who was an employee with a number. The same employee signed in for other employees. His wages would be paid every two weeks. Upon registration with NSSF, in the year 2001, the employer is noted as different and since the year 2014 there are no statutory remittances.
  10. Upon further cross-examination by counsel for the 2nd respondent, the witness testified that the 2nd respondent came in January 2016 and started paying wages and cannot be held liable in these proceedings because the 1st respondent would pay the employees through the 3rd respondent. The 2nd respondent was to issue piece rate contracts for one month without employment numbers.
  11. The 1st respondent case is that there was no employment relationship with the claimants as alleged and have never been in casual employment or in any other capacity. The 1st respondent does not have casual employees in its employment and all employees are on contract with defined roles. The time the claimants claim to have been in employment, none of the 1st respondent employees was earning a wage of Ksh.5,000 or Ksh.7,000 since all were earning above such wages and issued with pay slips and it is not possible that the claimants were denied these records.
  12. The 1st respondent is a member of the Sisal growers and Employers Association (Kenya) and has a recognition Agreement negotiated with several CBAs with Kenya Plantation and Agricultural Workers Union and all unionisable employees are paid in accordance with the CBA. The claimants being unionisable would have been paid in accordance with the CBA had they been employees of the 1st respondent.
  13. The 1st respondent had a valid outsourcing contract with the 3rd respondent who provide various auxiliary support and general agricultural services to the 1st respondent and the contract expired in December 2015.
  14. Upon the expiry of the outsourcing contract between the 1st and 3rd respondent, the 2nd respondent was contracted to provide labour and there was no employment relationship with the claimants save for the 16 claimants who left employment upon expiry of contract in December 2012.



15. In evidence, the 1st respondent called Janet Omulindi the human resource manager who testified that the 1<sup>st</sup> respondent is involved in the business of cultivation, manufacturing and spinning of sisal fibres for export and engages manpower in two forms, direct and indirect employees. The direct employees are engaged on fixed term contracts and are covered under unionisable employees with whom there is a CEB with the union.
16. Cutting of sisal is seasonal and for provision of manpower there is outsourcing of indirect employees which has been provided through the 2nd and 3<sup>rd</sup> respondent who secure their employees and place them with the 1st respondent.
17. The records filed by the claimants show they had access to the 1st respondent through a visitor's pass and the name of the employee being visited as the host stating the employment number, the records produced relate to the year 1997. The claimants do not have an employment relationship with the 1st respondent save for the 16 claimants whose contract was way back in the year 2012 and has since lapsed.
18. On 26 May 2016 the 1st respondent received a Parliamentary Labour committee over alleged issues with the claimants and the response was that these were not employees. The claimants have not produced any document conferring an employment relationship and the claims made should be dismissed with costs.
19. The 2<sup>nd</sup> respondent case is that on 6<sup>th</sup> January 2016 they were contracted by the 1st respondent to provide labour and all casual employees available were recruited under its policies. Each claimant was issued with an employment contract of one month save for 2, 5 and 6 claimants who did not participate in the recruitment process and the claims made are without merit and should be dismissed with costs.
20. In evidence, the 2nd respondent called Willy Mundia Mwangi a former employee who worked at 1st respondent in the year 2015 and who wanted to issue the employees with contracts from January 2016 following an agreement with the 1st respondent to provide workers. Upon giving periodic contracts, the 2nd respondent asked the employees to provide KRA, NHIF and NSSF identification cards. Claimants No. 2, 5 and 6 were not part of those contracts and claimants No.7 and 12 were in service and others left their employment. All owing dues were paid.
21. The contract with 1st respondent took effect on 2 January 2016 and there was no relationship with the 3rd respondent.
22. The 3<sup>rd</sup> respondent did not enter appearance or file a response.

### **Determination**

23. The claimants have filed various documents together with the Memorandum of claim and the Amended Memorandum of Claim.
24. The work attendance lists are general, indicating the employees work registers without an indication as to who the employer is.
25. The NHIF member registrations and employer is noted as self-employed.
26. The NSSF membership, the employer is Essential Management Consultancy Services, the 2nd respondent entity. This is the last employer of the majority of the claimants and no evidence of the history of the entity of employment as claimed from the year 1992 to 2015 as alleged. The NSSF membership statement only reflects the current employer at time the statement issued. This does not define the employment history at all.



27. The 1st claimant testified that wages would be paid in cash by the 3rd respondent. The evidence by the 1st respondent that it had an outsourcing contract with the 3rd respondent for provisions of labour running from 1st November 2014 to December 2015 is given credence by the claimants in this regard.
28. The response that the claimants were paid and supervised by the 3rd respondent is not been challenged. Moreover, the evidence that the 1st respondent employees were covered under a CBA with Kenya Plantation and Agricultural Workers Union for all unionisable employees is not controverted. The existence of a CBA covering unionisable employees in the service of the 1st respondent then is crucial under the claim that there was employment relationship. The best primary evidence ought to have been sourced from the Union covering unionisable employees and the agency thereof which is lacking in this case.
29. Going back to the evidence of the 1st claimant, his assertions that he had a gate pass though an employee of the 1st respondent and who had a work number of the 1st respondent then supports to the 1st respondent's evidence that there was no employment relationship with the claimants.
30. In the circumstances, without an employment relationship between the 1st respondent and the claimants, the claims made cannot hold. Wages were paid by the 3rd respondent. Supervisor was by the 3rd respondent. No leave or gratuity pay can accrue outside the employment relationship.
31. The claimants have removed any liability from the 2nd respondent.
32. Employment then secured between the claimants and the 3rd respondent who had been outsourced by the 1st respondent, the terminal dues for the period of 12 to 17 November to each claimant ought to be paid by the employer, the 3rd respondent.
33. The 16 claimants' contract with the 1st respondent was under a written contract for the period of 1st June to 31st December 2012. Any claims against the 1st respondent ought to have been addressed within the meaning of Section 90 of the *Employment Act*, 2007 on or before the 30<sup>th</sup> December 2015. The claim herein was filed on 27 April 2017 way after the required timeliness expired and hence his claims, if any, against the 1st respondent are time barred.
34. The concept of outsourcing labour is not defined under Kenyan law as held in *Kenya Union of Commercial Food and Allied Workers v Jamii Distributors E.A Limited* [2021] eKLR. However, the practice is not unlawful as held in the case of *Elizabeth Washeke & 62 others v Airtel Networks (K) Ltd & another* [2013] eKLR that outsourcing in a business should not be for the purpose of violating employees rights. The Court of Appeal in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, held that outsourcing services was an accepted business strategy in any business based on its core functions;
35. Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.
36. And in the case of *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR the court held that;

In principle therefore, outsourcing of employees is not illegal or untoward, provided it is carried out in accordance with fair labour practices, and the process adopted is not aimed at rendering an employee redundant.
37. The 1st respondent took the option to outsource seasonal work due to the nature of its business. Such function was outsourced to the 3rd respondent who held a valid business contract with the 1st



respondent under which the claimants secured employment, were supervised and paid their wages by the 3rd respondent.

38. For the responses filed by the 1st respondent upon service of the Memorandum of Claim and the Amended Memorandum of Claim, the Outsourcing Services Agreement with the 3rd respondent has been a prominent feature. The last such agreement covers the period of 1st November 2014 to 31st October 2015.
39. For employees directly employed by the 1st respondent, there is a CBA covering their interests.
40. Within the service provisions the claimants had and placed at the 1st respondent to offer their labours, liability rests with the 3rd respondent to pay for work that was continuous and ending 31st October 2015 when its contract with the 1st respondent lapsed.
41. For work done between the claimants under the 3<sup>rd</sup> respondent employment upon the end of the agreement with the 1st respondent on 31st October 2015, the 1st and 2nd respondents cannot be held liable. Any claim for unpaid wages rests with the 3rd respondent. Indeed the claimants at paragraph (9) of the Amended Memorandum of Claim aver that;
42. The claimants aver that upon inquiries as to the delay in payment they were informed that their salary had been disbursed to the supervisors for onward payment to the claimants.
43. Well addressed, the claimants cannot turn and make claims against the 1st and 2nd respondent. Recourse is against the 3rd respondent.
44. In this regard, the claimants have made general claims against all the respondents. The particulars of engagement under the 3<sup>rd</sup> respondent is not particularised particularity taking into account that under paragraph (6) of the Amended Memorandum of Claim, the claimants confirm that their employment commenced on casual terms on a daily wage, that they were first employed by the respondent without an indication whether this was the 1st or 3rd respondent, and in view of the various outsourcing agreements, it was imperative to give particulars for the purpose of the court assessing the claims made on accrued leave pay, gratuity and compensation. On the records, save for the owed wages under the last phase of employment from 12 to 27 November 2015 other claims being general must fail.
45. Accordingly, claims against the 1st and 2nd respondents are hereby dismissed. Judgment is hereby entered for the claimants against the 3rd respondent in the following terms;
  - a. unpaid salaries for the period of 12 to 27 November 2015; and
  - b. The 3rd respondent shall meet costs due to the claimants and 1st and 2nd respondents.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

