



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 660 OF 2017

ERASTUS MUNYWOKI MUTUA.....1ST CLAIMANT
KENNETH OCHIENG ORICHO..... 2ND CLAIMANT
ALEXANDER WAMBUA JOHN.....3RD CLAIMANT
ALLAM OTIENO OWINO.....4TH CLAIMANT
WILLIAM KALUME KITHI.....5TH CLAIMANT
RAJAB SIRYA NGALA.....6TH CLAIMANT
RAMA NDURYA MAZERA.....7TH CLAIMANT
TITUS MUTHUSI MUTUKU.....8TH CLAIMANT
PINTO SALIM KHAMIS.....9TH CLAIMANT
RICHARD MUSYOKI KILONZO.....10TH CLAIMANT
STEPHEN ONYANGO ODUOR.....11TH CLAIMANT
SIMON MWATELA MWAHEE.....12TH CLAIMANT
SAMUEL ODHIAMBO.....13TH CLAIMANT
SHADRACK MUSYOKA MWANGANGI.....14TH CLAIMANT
GEORGE KAZEE ONUNGA.....15TH CLAIMANT
SAIDI MAE KAHINDI.....16TH CLAIMANT
VICTOR ONYANGO OTIENO.....17TH CLAIMANT
BENSON KILUI MUTHUI.....18TH CLAIMANT
ALPHONSE ODHIAMBO NYANDIKO.....19TH CLAIMANT
ALEXANDER SHIFWOKO MATE.....20TH CLAIMANT
ABDALLA KASSIM ABDALLA.....21ST CLAIMANT

JOACHIM MUTUA MBILA.....	22 ND CLAIMANT
JOEL DAVID MUTUA.....	23 RD CLAIMANT
DOMINIC KAIYONGI ALBERT.....	24 TH CLAIMANT
FESTUS NYAMAI KATHI	25 TH CLAIMANT
SAMMY KIMANZI MULATYA.....	26 TH CLAIMANT
PATRICK MUKULA KIMWELE.....	27 TH CLAIMANT
JOSEPH PAWA MANTHI.....	28 TH CLAIMANT
ANDREW WANYONYI SIMUYU.....	29 TH CLAIMANT
GILBERT TOKEY.....	30 TH CLAIMANT
PETER MUSAU MULWA.....	31 ST CLAIMANT
DOMINIC ROTICH.....	32 ND CLAIMANT
PROTUS SITATI LYAMBILA.....	33 RD CLAIMANT
PHILLIP BABLY ALEKA.....	34 TH CLAIMANT
MATHEW CHARO KATANA.....	35 TH CLAIMANT
JARED ONKUNDI ASIAGO.....	36 TH CLAIMANT
EDWARD MABISHI MOMBO.....	37 TH CLAIMANT
DAVID OYOO OTIATO.....	38 TH CLAIMANT
CHRISTOPHER KIPROTICH.....	39 TH CLAIMANT
ELIJAH ODHIAMBO DONGE.....	40 TH CLAIMANT
CHRISPIN KATANI MWASHIGHADI.....	41 ST CLAIMANT
MARTIN KINYAMASYO MULATYA.....	42 ND CLAIMANT
MUSYOKI NZILU.....	43 RD CLAIMANT
MUTINDA IKUTHU.....	44 TH CLAIMANT
SLYVESTER MUTUA MWANZIA.....	45 TH CLAIMANT
JONATHAN MBAI SHENGA.....	46 TH CLAIMANT
RAMADHAN JUMA DZUYA.....	47 TH CLAIMANT
JOTHAMA KUSIENYA.....	48 TH CLAIMANT
COLLINS KAPTUM CHEBOR.....	49 TH CLAIMANT
JUSTUS KYALO MWENDW.....	50 TH CLAIMANT
CHRISPIN SAIDI MGHANGHA.....	51 ST CLAIMANT

CHIRSPIN OKOTH JUMA.....	52 ND CLAIMANT
CHRISPINE NYONYI MUNA.....	53 RD CLAIMANT
SAMSON MULE MUTHAMA.....	54 TH CLAIMANT
OROTI NYABARO DAVID.....	55 TH CLAIMANT
DIXON MTUNGU MWANGEJE.....	56 TH CLAIMANT
BERNARD CHERUIYOT.....	57 TH CLAIMANT
IVITA MUSAU.....	58 TH CLAIMANT
ZABLON AKUMU BONDI.....	59 TH CLAIMANT
ANDERSON LUKAS MUTUA.....	60 TH CLAIMANT
MWACHIRO HARO KAI.....	61 ST CLAIMANT
DEXTER KALILI ROBERT.....	62 ND CLAIMANT
CHARLES PETER.....	63 RD CLAIMANT
BONIFACE BULUNYA MULAYI.....	64 TH CLAIMANT
THEOPHILUS MUENDO NZIOKA.....	65 TH CLAIMANT
PATRICK INGAYWA KAMITI.....	66 TH CLAIMANT
ALFRED ONYANGO OOKO.....	67 TH CLAIMANT
OGOLLA JOHNSTONE OCHOLA.....	68 TH CLAIMANT
BENARD MUSYOKA NGUTU.....	69 TH CLAIMANT
JEFFERSON MUTUKU KALI.....	70 TH CLAIMANT
JOHN ONGUKO ONANGO.....	71 ST CLAIMANT
NICHOLAS ODIWOUR OYOYO.....	72 ND CLAIMANT
DAVID MUIA SENG.....	73 RD CLAIMANT
KENNEDY CHILANGO JAMBO.....	74 TH CLAIMANT
EVANS MONYENYE NYAMINA.....	75 TH CLAIMANT
JOHN ROLLINGS WANYAMA.....	76 TH CLAIMANT
BENEDICT KOMBE KATEMA.....	77 TH CLAIMANT
GILBERT KIPLANGAT NGENO.....	78 TH CLAIMANT
JOHN WANJALA MUNYALO.....	79 TH CLAIMANT
DANIEL OGOIJA NYAMUNGA.....	80 TH CLAIMANT
ANTON V. SHALALA.....	81 ST CLAIMANT

AMOS KATUNDU MUNYAO.....	82 ND CLAIMANT
NATHANIEL KARISA KAHINDI.....	83 RD CLAIMANT
CHRISPUS NGANGA MUTUNGA.....	84 TH CLAIMANT
URBANUS MUTUA NZIOKA.....	85 TH CLAIMANT
ANDREW KIMANTHI MUNYALO.....	86 TH CLAIMANT
CHENGO KARISA CHULA.....	87 TH CLAIMANT
SAMUEL MUSEMBI MUTHAMI.....	88 TH CLAIMANT
ALEX CHIDZIDZINGO JUMAA.....	89 TH CLAIMANT
WILFRED KYALO MBINDYO.....	90 TH CLAIMANT
MICHAEL MWADIMA MBALA.....	91 ST CLAIMANT
JOSEPH NJERU PETER.....	92 ND CLAIMANT
ALEX NZUNGI KIINDU.....	93 RD CLAIMANT
EMMANUEL THABU CHENGO.....	94 TH CLAIMANT
MUSEE MUTHUL.....	95 TH CLAIMANT
ELIUD KIPNGETICH KIPKEU.....	96 TH CLAIMANT
CHRISTOPHER ODHIAMBO.....	97 TH CLAIMANT
PHILLIP MARUTI FUNDI.....	98 TH CLAIMANT
KENNEDY Y. MUTHAMI.....	99 TH CLAIMANT
PATRICK MULEI MULONZI.....	100 TH CLAIMANT
VINCENT MWANGONGO MBOGHO.....	101 ST CLAIMANT
MORRIS YAA BAYA.....	102 ND CLAIMANT
BENJAMIN MWIKYA MUSEVE.....	103 RD CLAIMANT
SHIDA ALI MABRUK.....	104 TH CLAIMANT
YUSUFU KITURI WAUDA.....	105 TH CLAIMANT
NEMUEL KEORO BIKUNDO.....	106 TH CLAIMANT
OMARI SALIM GAVUGA.....	107 TH CLAIMANT
CALVIN KHALEVELE MBISHIA.....	108 TH CLAIMANT
FREDRICK NZUKU MAKAU.....	109 TH CLAIMANT
AUGUSTINE NZUKI KAMITU.....	110 TH CLAIMANT
TIMOTHY MUEMA MUNY.....	111 TH CLAIMANT

RAYMOND ANGAYA SIOSO.....	112 TH	CLAIMANT
GEOFREY MALUNDI MAKAU.....	113 TH	CLAIMANT
ALEX WAMBUA NZOMO.....	114 TH	CLAIMANT
JOSIAH KILEI NDINGILA.....	115 TH	CLAIMANT
RUEBEN ONGOSI NYAMBEGERA.....	116 TH	CLAIMANT
WYCLIFFE LUMWAJI LUSALA.....	117 TH	CLAIMANT
KANYASYA MUNYOKI MWANGI.....	118 TH	CLAIMANT
ERICKSON ALUKWE INGANJI.....	119 TH	CLAIMANT
DANIEL MWASINGO MWARAMBE.....	120 TH	CLAIMANT
JUSTUS MALINDA MAWEU.....	121 ST	CLAIMANT
HASSAN KIPKEMBOI BETT.....	122 ND	CLAIMANT
DANIEL MWILE KILONZO.....	123 RD	CLAIMANT
MOSES COLLINS OKUNGA.....	124 TH	CLAIMANT
ERICK MUTIE KILONZI.....	125 TH	CLAIMANT
KEVIN MALENJE.....	126 TH	CLAIMANT
ELIAS KATANA KAZUNGU.....	127 TH	CLAIMANT
MAKAU MALII.....	128 TH	CLAIMANT
PETER NZAKWA.....	129 TH	CLAIMANT
WILLIAM MUTHOKA WAMBUA.....	130 TH	CLAIMANT
SAMMY MUTUA.....	131 ST	CLAIMANT
DAVID MUTUA KATHENGE.....	132 ND	CLAIMANT
NICHODEMUS KAMAU KASINA.....	134 TH	CLAIMANT
NICOLAS KYALO MAITHA.....	135 TH	CLAIMANT
GEORGE KISEMBE MASINDE.....	136 TH	CLAIMANT
DOMINIC ROTICH.....	137 TH	CLAIMANT
KELVIN MUSEMBI KILUNGU.....	138 TH	CLAIMANT
ARNOLD CHAPA KITI.....	139 TH	CLAIMANT
JOB WANYONYI BARASA.....	140 TH	CLAIMANT
ADAMS KATANA RODGERS.....	141 ST	CLAIMANT
KYALO MWANGANGI.....	142 ND	CLAIMANT

DANIEL SHIMBE NEMUELA.....143RD CLAIMANT

AINEA OMUKA MACHENGO.....144TH CLAIMANT

LUDOVICK MICHAEL LAWELA.....145TH CLAIMANT

VERSUS

READY CONSULTANCY COMPANY

LIMITED.....1ST RESPONDENT

PACKAGING MANUFACTURERS (1976)

LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The claimants filed the memorandum of claim on 16.08.2017 through J.A. Abuodha & Company Advocates. The issue in dispute was stated as salary in lieu of notice, compensation for unfair termination under Section 41, 43, 45, 49 of the Employment Act, 2007 and Articles 10, 41, 47 and 236 of the Constitution of Kenya. The claimants' case is that they were employed by the 2nd respondent while the 1st respondent is outsourced by the 2nd respondent for purposes recruiting and employing the claimants to work at the 2nd respondent's enterprise. The claimants earned variously Kshs. 16, 849.00, Kshs. 19, 233.00, or 22, 457.00 as per the payslips and contracts exhibited. Their further case is that they were employed by the 1st respondent and deployed to work at the 2nd respondent's enterprise. They served on term contracts and upon expiry of the contracts, they were re-engaged upon similar terms of service and monthly salary.

The claimants' further case is that on 09.06.2017 the 2nd respondent verbally terminated the claimants' employment and locked the claimants out of the 2nd respondent's premises. The 2nd respondent called police from Changamwe Police Station who ensured that the claimants left the 2nd respondent's premises. On 10.06.2017 the claimants visited the 2nd respondent's premises but were still dismissed verbally. On the same day they visited the 1st respondent who informed them that their employer was the 2nd respondent. The claimants' case is that the dismissal was illegal as laid down procedure as provided under section 41 of the Employment Act, 2007 was not followed. They say the termination was abrupt.

The claimants' further case is they reported their dismissal to the area member of Parliament who referred them to the County Commissioner who convened a meeting with the 1st respondent's director one Mr. Mohamed, the claimants and the Labour Officer. The Director produced a letter of transfer but which was strange to the claimants and the director promised to hold a meeting with the 2nd respondent's director with a view to settling the claimants' terminal dues. Further the respondents have refused or declined to resolve the claimants' grievances for terminal dues. The claimant pleaded that they had no alternative pension or provident fund and they claim service pay at not less than 15 days of every year worked and not paid after the termination. Each claimant has pleaded the effective date of employment and date for termination for all of them was 09.06.2017.

The claimants have pleaded that the respondents' breaches included failure to pay a month's salary in lieu of notice; no hearing prior to the termination; no letter to show cause was issued; no transfer letter or notice of intention to transfer the claimants was ever served upon the claimants; and the termination was devoid of the substantive and procedural fairness. Each of the claimants has claimed and prayed for terminal dues upon the headings of unpaid salary for May 2017; one-month salary in lieu of termination notice; pro rate annual leave; service pay 15 days for each completed year served; and 12 months' damages for unfair termination. The amounts under each heading and the total claim per claimant has been pleaded. The claimants prayed for judgment against the respondents for:

- a) A declaratory order that the termination of the claimants was unlawful and unfair.
- b) Payment of terminal dues or benefits as particularised in the memorandum of claim to the claimants by the respondent.
- c) Costs of the suit.
- d) Interest on (a) (b) and (c) above at Court rates.

The 1st respondent file on 30.10.2017 the response to the memorandum of claim through Marende Necheza & Company Advocates. The 1st respondent admitted that the claimants were employed by the 2nd respondent while the 1st respondent was outsourced by the 2nd respondent for purposes of recruiting and employing the claimants to work at the 2nd respondent earning monthly salary of Kshs. 16, 849.00; Kshs.19, 233.00; and Kshs. 22, 457.00 respectively and as per the national identity cards, payslips and contracts exhibited for the claimants. The 1st respondent denied that it verbally terminated the claimants' contracts of service. Further, the claimants' services were not terminated but the 2nd respondent was forced to close down due to the government ban on plastic bags which was the sole 2nd respondent's business. Further, prior to closure of the 2nd respondent, the 1st respondent issued the claimants herein with transfer letters to another company being Polythene

Bags Limited but the claimants refused to go on transfer and failed to report on duty. Further, after claimants failed to report on duty as transferred, they were issued with a notice to show cause which they refused to receive and to reply. Thus the claimants' services were not terminated but they declined to report to work after being transferred and they have failed to do so up to date. The 1st respondent admitted that the County Commissioner convened a meeting as pleaded for the claimants but it was not on that date that the 1st respondent's emerged with the transfer letters for the first time – the transfer letters having been issued on 07.06.2017 and the claimants having refused to accept them and the letters were being given to them for the 2nd time at that meeting. The 1st respondent denied the allegations of unfair and unlawful termination and pleaded that the claimants were therefore not entitled to the claims and prayers made. The 1st respondent claimed and prayed for one-month salary in lieu of notice against each claimant and for dismissal of the claimants' suit with costs.

The 2nd respondent filed on 11.09.2017 the memorandum of reply to the memorandum of claim and did so through Daly & Inamdar Advocates. The 2nd respondent denied that the claimants were its employees but they were employees of the 1st respondent. They were employees of the 1st respondent and the 2nd respondent never re-engaged them at expiry of their term contracts as alleged. Thus, if at all they were terminated it must be that they were terminated by the 1st respondent. Further the 2nd respondent pleaded that it was for the 1st respondent to register the claimants with NSSF or to pay them service pay if any was due. The 2nd respondent's case was that it was not liable for the claims and prayers made for the claimants and it received the demand letter but was not liable at all.

The 2nd respondent further pleaded that on 05.05.2012 it entered into a contract of service with the 1st respondent to provide staff to work at the second respondent's premises and the agreement was exhibited. Under that contract it was for the 1st respondent to solely be employer of the staff and to discharge all employer obligations per the Employment Act, 2007. The 2nd respondent prayed that the claimants' claim be dismissed with costs.

The witness for the claimants and duly authorised by all the claimants in writing was the 3rd claimant Alexander Wambua John (CW); for the 1st respondent was the Managing Director Mohamed Isaa Ducal (1RW) and for the 2nd respondent (2RW) was Adams Oloo Olweny, the 2nd respondent's Human Resource Manager at the material time. Final submissions were filed for the parties. The court has considered all the material on record and makes pertinent findings as follows.

To answer the 1st issue for determination, the pleadings and the evidence are consistent that the 2nd respondent outsourced the 1st respondent to provide employees. The 1st respondent employed the claimants and deployed them to work for the 2nd respondent as per the out sourcing agreement and which is exhibited by the 2nd respondent as made on 05.05.2012 between the respondents. The 1st respondent provided workers as required by the 2nd respondent. CW in cross-examination testified thus, **"I was employed by the 1st respondent to work for 2nd respondent..."** The Court finds that the 1st respondent was the sole employer of the claimants and the claimants' case against the 2nd respondent is found unjustified as is baseless.

The 2nd issue for determination is whether the 1st respondent terminated the claimants' employment or upon closure of the 2nd respondent's enterprise, the 1st respondent transferred the claimants but who decided not to take up the transfer and absconded duty thereafter. The claimants have pleaded that at the meeting with the labour officer, they were shown letters of transfer. In his testimony during the cross-examination, CW stated, **"... We had several meetings. We were not offered transfer to other employer. We reported to Labour Office. We learned there would be offer to work elsewhere. We were to work in a similar company, in the same position. We did not know if the other company was compliant with regard to the new Government Regulation. We were not declared redundant..."** Further in re-examination, CW testified thus, **"... We were not issued transfer letters. We were to move to Polythene Bags. Even if there was transfer, we ought to have received our benefit."** On the other hand, 1RW testified and confirmed that the 1st respondent was the claimants' employer. He testified that after the 2nd respondent's enterprise closed due to new government regulations banning gunny bags, the 1st respondent gave each claimant a letter of transfer but each refused to sign and they refused to cooperate. They were to be transferred to Polythene Bags who were not affected by the new government regulations because they manufactured primary bags and only a small section handled the material that had been banned. 1RW testified that they were open to the claimants and would still employ them if they applied and, and such employment would be upon the same terms of service. Further the transfer was seamless effective immediately the 2nd respondent shut down the business around 07.06.2017.

The Court has considered the pleadings and evidence and returns that on a balance of probability, the 1st respondent offered the claimants a transfer upon the same terms of service but the claimants refused to take up the transfer and to continue in employment. As per CW's testimony, despite the transfer, the claimants demanded terminal dues and the Court finds that the demand was misguided because the 1st respondent had not terminated their respective contracts of service. To answer the 2nd issue for determination, the Court returns that the 1st respondent never terminated the claimant's contracts of employment. Thus the allegations of unfair and unlawful termination will equally collapse. While making that finding the Court considers that once the 2nd respondent's enterprise came to an end, the 2nd respondent was entitled to lock its premises as manifested in what the claimants called their being locked out on 09.06.2017. Further, that lock out by the 2nd respondent did not constitute termination of employment because the 1st respondent (and not the 2nd respondent) was the claimants' employer and had not terminated the relationship but instead, offered the transfer.

The 3rd issue for determination is whether the claimants are entitled to any of the prayers made, and, the 1st respondent to the counterclaim. First, as there was no termination, the claims and prayers for notice pay and damages for unfair termination will collapse. CW testified that they were paid for the month of June 2017 and that they claimed about 10 days in May 2017 between 6th to 15th May 2017 when they were not paid because the company did not have materials and they were sweeping and cleaning. The Court finds that it is trite law that special damages are specifically pleaded and strictly proved. CW's explanation for the claim for May 2017 salaries was not specifically pleaded as much and will be declined. Further, they were not employed to clean and if materials were not available, then the Court finds that they did not work and they were not entitled to the pay. Severance or service pay is not due as claimed because redundancy was not established at all and further, in any event, the claimants were members of NSSF and service pay is not due in view of provisions of section 35 of the Employment Act, 2007.

The claimants are praying for annual leave pay for January to June 2017. While they would be entitled to prorate annual leave, they were serving a distinct one year fixed term contract and they had not yet earned the leave as 12 months had not lapsed per section 28 of the Act. The 1st respondent's counterclaim for pay of one month in lieu of notice is found not justified. The evidence is that the claimants rejected the transfer and the 1st respondent condoned the same without instituting a disciplinary action per section 41 of the Act. The Court considers that the claimants and the 1st respondent's director appear to have agreed to separate in the manner they did or must be deemed to have so agreed by reason that the claimants did not go on transfer and the 1st respondent failed to initiate disciplinary action in that regard. The 2nd respondent failed to reply the demand letter. Further, while the 1st respondent was the employer, the claimants worked at the 2nd respondent's premises and enterprise but the 2nd respondent appears not to have cared to formally advise the claimants (by itself or through the 1st respondent) not to report on duty in view of the closure of enterprise, until, the claimants were locked out. In view of all the circumstances of the case, parties will bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties for:

- 1) The declaration the 1st respondent was the sole employer of the claimants.
- 2) The declaration that in the circumstances of the case, there was no established unfair or unlawful termination of the claimants' respective contracts of service.
- 3) Dismissal of the claimant's suit as well as the counterclaim.
- 4) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE