



**Mulunda & 4 others v Frodak Services Limited (Cause 38, 39, 40, 42 & 48 of 2018
(Consolidated)) [2022] KEELRC 1625 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1625 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 38, 39, 40, 42 & 48 OF 2018 (CONSOLIDATED)**

**NJ ABUODHA, J
JULY 29, 2022**

BETWEEN

**PETER NYONGESA MULUNDA 1ST CLAIMANT
FESTUS OKUMU MACHONI 2ND CLAIMANT
ELIJAH NICK MUSITA 3RD CLAIMANT
ISAAC WAFULA SICHILAI 4TH CLAIMANT
MARK MURUNGA 5TH CLAIMANT**

AND

FRODAK SERVICES LIMITED RESPONDENT

JUDGMENT

1. This cause and cause numbers 39,40,42, and 48 all of 2018 were consolidated by consent of the parties and proceeded under this cause as the lead file.
2. The claimants were employees of the respondent employed on various dates as cane loaders.
3. According to the claimants, their monthly salary was Ksh.4,080 and that they worked for the respondent until 2nd may, 2017 when the respondent wrongly and unfairly terminated their service and failed to pay their terminal dues which they individually prayed the court should order the respondent to pay them.
4. The respondent on its part pleaded that its role was to recruit employees, servants and or agents for prospective employers at a commission and further offer supervisory roles and duties subject to mutual agreement between the principal and agents.
5. The respondent denied contracting or employing the claimants or allocating them any duties as alleged. The respondent therefore denied terminating the service of the claimants and further denied liability to



- pay them any terminal dues or compensate them for unfair termination. According to the respondent, it was not privy to the ongoings at Butali Sugar Mills where the claimants worked hence did not know how much salary the claimants were earning.
6. In the alternative the respondent stated that if there existed any employment contract, which was denied, the claimants were guilty of insubordination, absconding duty and participating in an illegal strike even after a notice had been put forward but they failed and ignored to abide by the tenets that relate to employment relationship.
 7. The respondent contended that it had no legal obligation over the claimant's service and that its role ended at the point when the claimants were engaged by Butali Sugar Mills.
 8. At the hearing, Mr. Peter Nyongesa Mulundu who gave evidence on behalf of the rest stated that they worked for the respondent as loaders and that he recorded a statement on 22nd January, 2017 which he relied on as his evidence in chief.
 9. The claimant further stated that on 2nd May, 2017 they were beaten by security and chased away. They complained about low pay and that they were not provided with uniforms.
 10. It was his evidence that they did not participate in the strike and that he and his colleagues were not at work at the material time.
 11. Mr. Mulundu further stated that they were not called for any disciplinary hearing and never received any show cause letters.
 12. In cross-examination he stated that they were employed as cane loaders and that loading was done at the farms. They were initially paid Ksh.14 per tonne which was later increased to Ksh.17 per tonne in 2015.
 13. He further stated that there was a meeting between some staff, management and the labour officer but they were not around when the meeting was held. The staff wanted overalls, gumboots and gloves. They also raised concern over overtime and house allowance.
 14. Concerning working hours, he stated that they used to report to work at 4.00am and when a tractor got stuck in the mud they would be forced to stay out overnight.
 15. The respondents witness Mr. George Onyango Ager stated that he worked for the respondent as operations Manager and that he was familiar with the claimants. According to him the claimants joined the respondent between 2013 and 2015. He wrote his witness statement and filed the same on 26th April, 2021 which he sought to rely on as his evidence in chief.
 16. It was his evidence that the claimants were paid Ksh.14 and later increased to Ksh. 17 per tonne and that all the claimants were paid their dues. The claimant were paid per tonne and it included house allowance.
 17. According to him, the respondent tried to address the striking workers before termination. The respondent called the Labour Officer from Kakamega and the claimants called their representatives to the meeting at Butali. He stated that the respondent's employees wanted to be employed by Butali Sugar but this was not resolved. It was his evidence that Peter attended the meeting and that he was the chair for Butali Sugar Committee. The claimants' were advised to resume work but they refused. Butali Sugar then terminated the contract.
 18. In cross-examination he stated that the claimants were respondent's employees and were part of the striking workers.



19. Concerning payment, he stated they were paid every fourteen days and before any payment was made, all employees verified their tonnage and that payment varied depending on tonnage loaded by the employee.
20. Regarding termination, he stated that this was done after meeting the Labour officer and that he was aware notice was issued before termination. The notice of termination was before the Court.
21. Although the claimant initially pleaded that they were terminated without a reason, from the evidence it now emerges that their service was terminated as a result of a strike which took place on 2nd May, 2017.
22. From the documents submitted by the respondent and which were not contested by the claimants' the Court perused through report by the County Labour Officer. Mr. G.O. Abuto dated 3rd May, 2017. In that report, R. Abuto states that there were attempts to resolve the unrest and that Respondent's employees elected twelve representatives from different departments and that the respondent and Batali Sugar sent three representatives each.
23. The meeting deliberated the issues that caused the strike and at the conclusion of the meeting he reached a finding that the issues raised by the employees of Frodak (respondent) had no backing at all and were speculation. According to him the strike was as a result of incitement and that the gist of the strike was that loaders who were employees of Frodak wanted Butali Sugar Mills to employ them immediately which was unprocedural and not supported by any legal instrument.
24. Section 76 of the [Labour Relations Act](#) permits strikes or lock out in cases where the strike or lock out concerns terms and conditions of employment and dispute remained unresolved after conciliation under the Act and seven days written notice of the strike or lock out has been given to the other parties.
25. The Act further provides at section 80 that an employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employees contract and is liable to disciplinary action and is not entitled to any payment or any other benefit under the [employment Act](#) during the period the employee participated in the strike.
26. The claimants never stated whether they were members of the union nor was there any evidence of such on record. They were however still bound by the law.
27. The claimants never produced in evidence any strike notice to the respondent as required by law. The respondent was therefore justified on taking disciplinary action against them in accordance with section 80 of the [Labour Relations Act](#).
28. On the issue whether the claimants were entitled to procedural processes contained in the [Employment Act](#), the Court holds the view that not all cases require strict adherence to the provisions of the Act. Striking employee are naturally rowdy and at times may turn out to be violent. In this particular case there were allegations that they had engaged in destruction of property. Under those circumstances it would not be possible to issue show cause notices and conduct formal disciplinary hearing. It is also important to note that the claimants were seasonal piece-rate workers. To this extent the court does not agree that the termination of the claimant's service was unfair within the meaning of sections 45 of the [Employment Act](#). They are therefore not entitled to compensation for unfair termination.
29. Regarding overtime, the claimant never itemized the period they worked overtime in addition to the overtime that was reflected in the payroll summary report and was paid. Besides Mr. Peter Mulindu said the only time they worked overtime was when it rained and the tractor got stuck in the mud.



30. The Court of Appeal in the case of *Krystalline Salt Limited -V- Kwekwe Mwakale & others* cited by the respondent observed as follows:

“the *Employment Act* recognizes four main types of contracts of service, contract of an unspecified period of time, for a specified period of time, for a specific task (piece of work) and for casual employment.

Piece-work form of employment is defined under section 2 to mean “any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance. In a piece-work, or as it sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended on doing it.”

31. The claimants were paid based on the amount of cane each loaded. It was their evidence that they were paid Ksh.17 per ton.

32. For the above reasons, the claimants could not lay a claim for overtime and work during public holidays. These claims are therefore rejected.

33. In conclusion the Court finds the entire claims unmerited however considering that the respondent had admitted to pay their terminal dues and even informed them to collect the same from Kakamega County Labour Office, the court hereby directs that they do so. Each party shall therefore bear their own costs of the suit.

34. It is so ordered.

DATED AT ELDORET THIS 29TH DAY OF JULY, 2022

DELIVERED THIS 29TH DAY OF JULY, 2022

Abuodha Jorum Nelson

Judge

