



**Kenya Union of Commercial and Allied Workers v Coastal Bottlers Limited  
(Cause 91 of 2019) [2022] KEELRC 12965 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12965 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 91 OF 2019  
B ONGAYA, J  
OCTOBER 28, 2022**

**BETWEEN  
KENYA UNION OF COMMERCIAL AND ALLIED WORKERS ..... CLAIMANT  
AND  
COASTAL BOTTLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant trade union filed the memorandum of claim on 28.11.2019 in person as signed by its Secretary General Boniface M. Kavuvi. The suit was filed on behalf of 318 employees who worked for the respondent but were sourced through labour outsourcing companies. It is pleaded as follows. In 2009 the respondent contracted Career Directions Limited (CDL), Asego Warehouse Services and other companies to provide labour. On 14.10.2016 Asego Warehouse Services gave the respondent a 30-days' notice of its intention to sever its contract with the respondent. The reason stated in the letter of termination was that with the coming of the trade union on site, it had become difficult for Asego Warehouse Services to operate under the prevailing contract for outsourcing of labour as concluded with the respondent. Subsequently the respondent contracted Stratostaff E.A Ltd to replace Asego Warehouse Services and Career Directions Limited. Stratostaff was to recognise the trade union and the employee benefits would remain unchanged and guaranteed by the respondent. The agreement was concluded in those terms between the respondent and Stratostaff on 24.10.2016 duly exhibited for the claimant.
2. The claimant further pleaded as follows. On 07.11.2016 the respondent wrote to Asego Warehouse Services acknowledging letter of 14.10.2016 to terminate the labour outsourcing contract and requesting the extension of the notice to 30.11.2016 to give room for preparation and handover to the in-coming labour outsourcing services supplier. The letter concluded "In the meantime, please notify your employees of the same, prepare and share their final dues before 30.11.2016 to enable us make the payments and reimbursement on time. We further request you to prepare and hand-over to the management of the incoming supplier." Asego Warehouse Services replied by the letter dated



- 09.11.2016 agreeing to extend the notice to 30.11.2016 to enable the smooth handover to the new supplier and one month's notice given to employees upto 30.11.2016.
3. The claimant further pleads that on 14.11.2016 the respondent wrote to its other labour outsourcing company known as Career Directions Limited. The letter conveyed that its employees seconded to the respondent were not willing to be managed by Career Directions Limited. Thus, the respondent had been left with no option but to get another supplier of the to manage the labour. The letter gave a one-month notice and notified that Career Directions Limited would no longer be engaged effective 15.12.2016. The letter concluded, "In the meantime, please notify your employees of the same, prepare and share any accrued and not taken leave days before 15<sup>th</sup> November, 2016 to enable us make the payments and reimbursement on time. We further request you to prepare and hand-over to the management of the incoming supplier." Career Directions Limited replied on 16.11.2016 accepting the termination notice but lamenting that it fell short of the agreed 2-months' notice by 30-days which it demanded it be paid in lieu of the same.
  4. The claimant's further case is that on 16.11.2016 Smart Human Capital was engaged by the respondent to supply outsourced labour as the other outsourced companies left without paying the employees severance pay for the years 2008 to 2016. The respondent wrote to the respondent on 24.09.2018 that the respondent had assured and guaranteed workers benefits were to remain unchanged but the severance payment had not been effected. The claimant proposed a meeting but the respondent by the letter dated 05.10.2018 declined stating that the agreement of 24.10.2016 had been between Stratostaff and the claimant with the respondent management only playing an observer role. The respondent denied knowledge of Stratostaff declaring any of the employees redundant. The letter by the respondent concluded, "This is to bring to your attention that contractors supplying us with labour are independent bodies registered within the companies act cap. 486 laws of Kenya. It would be wise if you refer to the wordings or meaning of body corporate in line with section 21(a, b, &d) of the labour relations act 2007 we would wish to state that your claim should be channelled to the said employers. Therefore your demand and claim for redundancy payment is misplaced or misguided in pursuant to section 40 of the Employment Act 2007. Be advised accordingly."
  5. The claimant reported a trade dispute against the respondent. A conciliator was appointed, parties made their representations but the conciliator did not render a report. The claimant filed the instant case.
  6. The claimant's case is that per definition in the Employment Act, 2007 and the Labour Relations Act, redundancy is the loss of employment, occupation, job or career by involuntary means through no fault of an employee at the initiative of an employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment. Further, section 40 of the Employment Act prescribes the procedure to be followed in event of declaration of redundancy. Further, the basis of the outsourcing companies closing their operations on 30.11.2016 and 15.11.2016 amounted to redundancy with benefits per section 40 of the Act. That the section was binding upon the outsourced companies and the respondent as the principal employer who guaranteed workers benefits at the meeting of 24.10.2016. The guarantee by the respondent made the outsourced companies to escape their obligations under the said section 40 of the Act and the labour outsourcing companies were not ready to recognise the claimant union, the aggrieved employees being the claimant's members. While the outsourced companies had the obligation to pay the redundancy dues, the respondent in whose premises the employees guaranteed that the benefits would be paid.
  7. The claimant claimed against the respondent payment of redundancy dues for each of the aggrieved 318 employees being severance payment in the sum of Kshs.15, 556, 529.50. The claimant prayed for payment of that money, any other fit and just relief, and, costs of the suit.



8. The respondent filed the response to the memorandum of claim on 21.08.2020 through Wangira Okoba & Company Advocates. The respondent pleaded as follows. That at no time did it employ the grievants. The grievants were employed by the companies outsourced by the respondent. The claimant demanded recognition by the outsourced companies and there was unrest and work disruption at the respondent's premises. The respondent offered to mediate between the union and the outsourced companies which were not keen to recognise the union. It is within that understanding that on 24.10.2016 the respondent brought the claimant and Stratostaff East Africa Limited to sign the agreement that as the latter took up outsourced staff previously employed by Asego Enterprises and Career Directions Limited, the employees would not suffer loss of benefits as were due to them under the previous outsourced employers.
9. The respondent further case is that it implored the out-going outsourced companies to pay their staff any outstanding dues, and, any outstanding dues from the respondent due to the out-going outsourced companies would be made available for meeting such due and outstanding employees' benefits. A new outsourced company known as Smart Human Capital agreed to recognise the claimant trade union. Further, the respondent rejected all the claimant's attempts to tie the respondent to non-existent liabilities. Further, it never guaranteed to pay the alleged redundancy dues now claimed and it was not party to the contract of employment subject of such claims. The industrial dispute was unfairly initiated and imposed upon the respondent. It had never employed any of the grievants. The respondent prayed that the claimant's suit be dismissed with costs.
10. The claimant's 1<sup>st</sup> witness (CW1) was John Githinji Mwangi. He was the Chief Shop Steward at the material time. He confirmed that he worked with Asego as an outsourced company since 2008. Further, in 2016 employees insisted that the companies the respondent had outsourced do recognise the claimant. In the process his employer known as Asego terminated the outsourcing contract due to coming of the claimant on site. In the circumstances, his labour or employment was transferred to the in-coming outsourced company. Prior to the transfer, there had been go-slow by workers involving picketing and stoppage of work. An agreement was signed on 24.10.2016 and employees resumed normal work. The in-coming outsourced company had agreed to recognise the union. CW1 stated that no demands for severance pay had been made against the out-going outsourced companies because the respondent had guaranteed that their benefits were protected.
11. The respondent's witness (RW) was Joseph Ng'ang'a, the respondent's Human Resource Manager. His testimony was that redundancy would occur only for a reason beyond the business and no such reason emerged in the respondent's undertaking at all material times. Further the meeting of 24.10.2016 was the CEO's effort to mitigate the situation because of the strikes and job stoppage that was prevailing in the circumstance that the union wanted to be recognised. The meeting of 24.10.2016 was to mediate and calm parties at the work place. The then outsourced companies had their contracts terminated under pressure by staff because staff wanted to join the union and for the union to be recognised.
12. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
13. To answer the 1<sup>st</sup> issue, the Court returns that there was no contract of service between the grievants and the respondent. CW1 by his own evidence confirmed that since 2008 he had worked as an employee of an outsourced company commonly known as Asego. By that evidence, the respondent never employed the grievants. The respondent's case and submissions are upheld in that regard.
14. The 2<sup>nd</sup> issue is whether the respondent guaranteed that the out-going outsourced companies would pay severance pay and failing, it would pay. The claimant relied on the agreement on the way forward dated 24.10.2016. The meeting was a tripartite between the claimant, the respondent and the in-



coming outsourced company known as Stratostaff E. A Limited. The three parties signed. The clause 7 in issue stated “7. All benefits of the employees will remain unchanged and guaranteed by CBL” The Court finds that as per the respondent’s case, the clause protected staff from diminishing benefits in the new employment with Stratostaff E. A Limited. It did not guarantee the benefits with outgoing outsourced companies. The reading of the agreement was clearly on the way forward and not on the way backwards. It was therefore misconceived and misleading for the claimant to urge that the agreement protected the grievants’ benefits with the out-going outsourced companies. Further, the Court considers that in law a guarantee is an undertaking to answer for the payment or performance of another person’s debt or obligation in event of a default by the person primarily responsible for it. In that sense, CW1 confirmed that there had been no attempted demand by the grievants or the union against the out-going outsourced companies to pay the alleged severance payments. Thus the Court returns that even if the respondent had guaranteed as alleged but which was not the case, it has not been shown that the legal notion of a guarantee ever accrued at all.

15. To answer the 3<sup>rd</sup> issue, the Court finds that in any event the respondent performed its part of the agreement on the way forward as had been concluded on 24.10.2016. In particular, CW1 confirmed that he had remained in the employment of the new out-sourced company, his terms of service were not said to have diminished at all, he had joined the claimant union and, which union had been recognised by the prevailing outsourced company.
16. There is no reason to doubt the testimony by RW that in the circumstance, the respondent was a going concern that had at all material time not suffered a redundancy situation. Further, the Court finds that in any event, the outsourced companies were in the circumstance the primary or principal employers of the grievants and it was misconceived for the claimant to urge that the respondent was the principal employer. The Court has found that there existed no contract of service between the respondent and the claimant’s members, the grievants.
17. The Court has considered the subsisting workplace relationship between the parties and each will bear own costs of the suit towards fostering sustained work place rest and stability.
18. In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 28<sup>TH</sup> OCTOBER, 2022.**

**BYRAM ONGAYA**

**JUDGE**

