



**Ouma & 150 others v Alliance One Tobacco (K) Limited (Cause 1097 of 2018)
[2022] KEELRC 14634 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14634 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1097 OF 2018
NZIOKI WA MAKAU, J
NOVEMBER 17, 2022**

BETWEEN

DICK OCHIENG' OUMA & 150 OTHERS CLAIMANT

AND

ALLIANCE ONE TOBACCO (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimants instituted this claim vide a Statement of Claim dated June 29, 2018 against Alliance One Tobacco (Kenya) Limited. The 151 Claimants are represented in the suit by Dola Magani & Co. Advocates and Namada & Co Advocates who filed their lists of the individual Claimants they each represent. The Claimants aver that the Respondent employed them on diverse dates and they worked in various designations. That prior to being declared redundant by the Respondent, they worked in its Thika Sub-County, Migori County and Murang'a County in the respective periods between 2004 and 2015, with good production results and profit to the Respondent company. That in the said period, they were employed in the respective Leaf Centres such as Kenblest, British American Tobacco (BAT), Trust Feed warehouses in Thika Sub-County and Migori County.
2. It is the Claimants' averment that the Respondent gave public notice of its intention to downsize operations by closing its operation centres in Migori County sometime in May 2015. That in June 2015, the Respondent's management in Thika then placed a notice declaring staff redundant with effect from July 5, 2015. That by a Conciliation meeting held between their representatives and the Respondent's management team on July 24, 2015 presided over by Sub-County Labour Officers in Thika, the dispute was resolved and the Respondent committed to settle their redundancy dues as follows: each employee was to be paid severance pay at an enhanced rate of 57 days for every completed year of service; and an accrued annual leave at the rate of 1.75 days for every year worked. That the Respondent equally undertook to make the payments in accordance with the discussions and resolutions arrived at in the meeting and further directed that the Claimants collect their payments from Kenya Commercial Bank Thika Branch. That when the Respondent failed to



honour the undertaking, another conciliation meeting was held on November 2, 2015 involving the Respondent's Regional MD, its HR Director and representatives of the employees which resolved that the Respondent honours the earlier resolution of July 24, 2015. That unfortunately, the Respondent again failed to honour the resolutions. That in early January 2016, the Respondent posted a public notice promising some workers to expect phone calls on January 27, 2016 for them to collect their cheques at Kenblest offices but which never happened.

3. They further aver that upon failing to realize their claims from the Respondent, they enquired about their withheld statutory deductions from the NSSF and were provided with Nil Transcripts meaning the Respondents never remitted the deductions. That the Respondent's failure to honour its obligations in their employment have led to them suffering economic and emotional stress. They aver that save for Miscellaneous Application No 7 of 2016 which was wholly withdrawn, there is no pending suit relating to the Claimants in this cause. The Claimants pray for judgment against the Respondent for:
 - a. A declaration that the Claimants are entitled to their dues arising from the employment.
 - b. Severance pay at an enhanced rate of 57 days for every completed year of service as per the undertaking in the letter dated September 30, 2015 by the Respondent.
 - c. Accrued leave pay at the rate of 1.75 days for every year worked as per the undertaking in the letter dated September 30, 2015 by the Respondent.
 - d. General and exemplary damages for breach of undertakings.
 - e. Interests thereon from July 24, 2015 until payment in full.
 - f. Payment of all statutory deductions not remitted to the various Authorities of the Government and interests accrued up to the date of payment.
 - g. Any other appropriate relief that this honourable court will deem fit and proper to grant.
 - h. The Respondent to issue each of the Claimants with Certificate of Service.
 - i. Costs of the claim and interests thereon.
4. In reply, the Respondent filed a Statement of Response dated October 9, 2018 averring that its decision to conduct a global restructuring included scaling down its Kenyan operations due to the substantial shift in the global supply and demand of flue-cured virginia (FCV) Tobacco around March 2015. That despite conducting several meetings and considering all other alternative solutions, the need to declare some of its employees redundant in order to ensure long-term sustainability became evident in May 2015. The Respondent's evidence is that it took part in meetings between representatives of its employees and the Ministry of Labour and consequently paid the terminal dues for all employees it employed during the redundancy period, including its seasonal casual employees. It admits giving public notices on its decision to downsize its operations in Kenya and holding the conciliation meeting of July 24, 2015.
5. The Respondent further avers that its employees were categorised into: permanent and pensionable; fixed term contracts; and seasonal casual labourers. That seasonal casual labourers such as the Claimants were only employed for brief periods of time annually during the buying and processing season, after which season their engagement would immediately terminate. That with every period of engagement, a seasonal casual labourer would be issued with a fresh work identification number and a gate pass indicating the period of engagement, which automatically expired once the time lapsed. It also noted that a number of seasonal casual labourers did not work continuously during the harvest season,



only worked a few days and were assigned varying roles and job descriptions for labour organisational purposes and to effectively fulfil its needs. It is the Respondent's averment that it allowed its employees on fixed term contracts and the seasonal casual labourers to continue working until the end of the assigned period and that termination for the two latter categories was therefore by effluxion of time.

6. The Respondent avers that in addition to settlement of the severance pay and accrued leave days, the agreed formula of calculation of the Claimants' terminal dues was the total accumulated number of working days in one year divided by 26 days and the answer then divided by 12 to get the number of completed years. It contends that the amounts indicated in the Claimants' Memorandum of Claim have been overstated as the Claimants did not follow the agreed formula of calculation and calculated the completed years from the date they started working. The Respondent further avers that even if the Claimants do not understand how their terminal dues were calculated, they have not exhausted all channels put in place by the company to deal with complaints arising from the redundancy process. That it paid the Claimants between October 2015 and January 2016 through its bank account at KCB to the employees' respective bank accounts and that payments were as shown in paragraph 30 of its Statement of Response. It therefore denies that the Claimants are entitled to the reliefs sought in their claim. It further avers that NHIF and NSSF directly handled the Claimants' complaints on the said statutory deductions. That the claim herein should be dismissed further because 135 Claimants were duly paid all their terminal dues, 5 Claimants had duplicated their claims and 11 Claimants did not exist in the employment records of the Respondent.

Claimants' Submissions

7. The Claimants submit that under Section 10(3)(c) of the *Employment Act*, where employment is not intended to be for an indefinite period, the period for which it is expected to continue and the date when it is to end if it is for a fixed term must be written in the employment contract. That Sections 9 and 10 of the Act impose a duty on the employer to reduce all contracts of service aggregate to the equivalent of 3 months or more into writing. That however, in this case the Respondent's witness confirmed they never gave employees any contracts at the start and neither were they issued with any letters terminating their employment at the end of their tenure. That the so-called gate pass cannot pass as an employment letter as it contained no terms of employment and neither did it specify that its validity period synchronized with the validity of employment. They submit that their testimony was that they worked either with or without renewed gate passes as gate passes were merely issued or renewed intermittently as and at the convenience of the management.
8. It is further submitted that failure to convert their terms of service to casual or permanent contracts was a tactic employed by the Respondent to subject them to unfair labour practices and eliminate the benefits entitled to permanent and casual employees. That Section 37 of the Act provides for conversion of casual employment to term contract. That the Court in the case of *Ruth Nyasuguta Areimba v Conference Caterers Limited* [2021] eKLR further held that upon conversion of the casual employment to a contract of service for payment of a monthly salary, the same became protected from unfair and wrongful termination by the employer under Section 45 of the Act. They further submit that Section 74 of the *Employment Act* puts the legal obligation to keep and produce records of employment upon the employer, the absence of which the law assumes production of the records would militate against the employers' position in the case as held in the case of *Susan Misoka v Vcapro Kenya Limited* [2020] eKLR. That being a multinational company, the Respondent cannot lie that it had no records or cannot produce records of their employees even when the employees had work identification numbers. It is the Claimants' submission that the Respondent has failed to prove that some of the Claimants were not its employees and that under Section 107 of the *Evidence Act*, it was



not for the Claimants to adduce evidence to rebut the same. Further, that the records the Respondent produced were not sufficient to show they were engaged as casual employees.

9. It is submitted by the Claimants that the process of redundancy did not adhere to provisions of Section 40 of the *Employment Act* and that a series of suits were in fact filed against the Respondent in Kisumu ELRC 119 of 2015 and Nyeri ELRC No. 163 of 2015 over the same matter and judgment entered in favour of the Claimants arising from the redundancy. That since they were not members of a trade union, the required notice ought to have been served personally upon them and copied to the Labour Officer but which was not done. Furthermore, no such consultations were held between the Respondent employer and the employees to address the concerns and reach a solution and that their interests were undermined in the consultations held thereafter. The Claimants further submit that the Respondent also failed to follow the selection criteria as stipulated. That in the case of *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the Court held that a selection criterion adopted by an employer should be applied systematically and uniformly across the board and that where the numbers involved are large, it must be structured and comparatively based.
10. Further, if the court were to rule out that some Claimants were seasonal employees and that their terms of employment did not convert to casual or permanent employment, the effect of the said proposal to calculate the number of “completed” years worked would be an attempt aimed at denying the Claimants’ right to severance pay mandatory upon redundancy, as provided for in Section 40(g) of the *Employment Act, 2007*. The Claimants submit that the only payments issued to them were salary arrears owing and due to them and not the said terminal dues as averred by the Respondent. That the Respondent’s witness confirmed she could not dispute the duration of employment as tabulated by the Claimants (page 41-48 of Claimants’ Bundle), especially the fact that they commenced their employment in 2004 and ended in 2015 upon declaration of the redundancy. That this shows that payment was haphazard, subjective to the people calculating and was meant to undermine the employees’ entitlements. They urge this Court to re-evaluate their entitlement by stating and affirming the formula, the rate, the undisputed period of service and the final amount payable to each of the Claimants. They urge the Court to also note that RW1 admitted in her testimony that she did not have the register of the employees showing their names and number of days worked, which informed the number of completed years worked. The Claimants suggest that from the final figure, the amount proved to have been earlier paid in 2015 as redundancy dues would then be deducted from the final figure available for the Claimants, before interest can be applied.
11. It is submitted by the Claimants that they have proved their claim to the requisite standard and are entitled to the prayers sought in their Claim. That the Respondent’s allegation that it remitted the said monies to the Claimants’ bank account is false and was not proved on a balance of probability. They further submit that they were faced with unconscionable terms of bargain meaning that the provisions were so one-sided, in view of all the facts and circumstances, they as the contracting party were denied any opportunity for meaningful choice. That this Court ought to thus uphold the settlement formula encompassed in the letter dated September 30, 2015 and to apply an equitable remedy. That this Court has the duty to intervene to ensure that justice is done as prayed for and payment made as calculated. That where there are contradicting contracts or basis of contract or oral agreements endorsed in a letter, equity demands that the first in time prevails. On the claim for statutory deductions, the Claimants cite the case of *Morris Abuga Nyabate v Narcol High School & another* [2017] eKLR where the Court ordered the respondent to refund to the claimants any monies deducted but not remitted to NSSF and NHIF. For severance pay, they cite the case of *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi* [2019] eKLR where the Court upheld that severance pay is only payable under Section 40(g) of the *Employment Act, 2007* where an employee is terminated on account of redundancy. The Claimants further pray that salary in lieu of notice be paid according to each of their



daily wage as in the schedule outlined in paragraph 16 of the Statement of Claim and also ask the Honourable Court to compute their leave days in reference to their details in the schedule outlined in paragraph 16 of the statement of Claim.

Respondent's Submissions

12. The Respondent submits that the Claimants did not tender any evidence to prove that they worked continuously for the period stated in their Statement of Claim, demonstrating that they were piece rate or seasonal workers who would not be automatically re-engaged during any given season. That the Respondent's witness was categorical during her testimony that though the Respondent could not practically submit all the daily engagement records for the approximately 2000 seasonal or piece rate employees, the records submitted in court showed that the Respondent's computation and payment of redundancy dues as indicated in Appendix 1 - Severance Paid Calculation Schedule were conducted in consultation with the Claimants' representatives and the Labour Officer. Further, it is trite law that a casual employee and employee on piece-work terms are regulated under different provisions of the *Employment Act, 2007* as held in *Kenya Power & Lighting Company Limited v Kenya Electrical Trades and Allied Workers Union* [2017] eKLR. The Respondent also relies on the Court of Appeal case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR where the Court held that

“Whereas the Employment and Labour Relations Court may have used the phrase casual labourer in contradistinction with casual or piece work, any contract of employment for a period of time, whether oral or in writing, express or implied, or even a contract of apprenticeship and indentured learning, all qualified as contracts of service. The Employment and Labour Relations Court ought to have determined in which category of employment the Respondents were engaged.” (Emphasis theirs).

They submit that the Court of Appeal stated that there was a distinction between a casual employee and a piece rate worker and concluded that the learned Judge had erred in equating the two forms of employment and converting piece work employees to casual employees.

13. The Respondent submits that by virtue of the Claimants' seasonal or piece rate engagement, their employment did not convert to permanent and pensionable employment by dint of Section 37 of the *Employment Act*. That from its plain language, Section 37 of the *Act* applies to casual employees, as opposed to piece work employees who are not mentioned in the provision. The Respondent also denies that there are suits filed over the same subject matter stating that Nyeri ELRC No 163 of 2015 was in relation to permanent and pensionable employees and those on fixed term contracts and not seasonal labourers or piece rate workers. The Respondent submits that the Claimants were not unfairly terminated as their employment ended by effluxion of time and that the terminal dues paid to the Claimants were over and above their legal entitlement under the law. That it has demonstrated it issued notices, consulted all relevant stakeholders and allowed the employees on fixed-term contracts and the seasonal labourers, such as the Claimants, to continue working until the end of the assigned periods. It relies on the case of *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another* [2012] eKLR where the Court of Appeal held that an employer was not obligated to give reasons to an employee why a fixed-term contract of employment should not be renewed. It further submits that it provided at pages 52 and 53 of the Respondent's Bundle of Documents, one such payment voucher, that is, payment voucher number 16080 dated November 20, 2015 for KES 12,584,010 which clearly indicates that it was raised for purpose of paying our severance pay, and the payment instruction to KCB dated November 20, 2015 and acknowledged by the Branch Manager KCB Makongeni. That the amounts that were calculated as redundancy dues using the redundancy



formula outlined in the letter dated November 16, 2015 are the exact amounts that were included in Payments Schedule produced by Respondent's witness.

14. It submits that the Claimants have not provided any evidence to support their claim that their salaries were in arrears and that they were employed continuously from 2005 to 2015. That the Claimants have also not proved that the statutory deductions were deducted from their daily wages or terminal dues and are not entitled to the same as it never deducted any NHIF and NSSF contributions. It submits that even though the burden of proving or disapproving certain aspects of employment rests on the employer, this does not extinguish the Claimants' burden of proving their case as held in the case of *Benard B'Kones Ndiema v Twin Oaks Limited* [2022] eKLR. The Respondent further submits that the salary in lieu of notice claimed by the Claimants being represented by Namada Advocates is not payable because they were notified of the redundancy process and it was not pleaded in the Memorandum of Claim. It relies on the trite law that a party is always bound by his pleadings whether the same is defended or not.
15. The dispute herein is on account of a redundancy that was declared by the Respondent. It is not denied that suits being - Kisumu ELRC 119 of 2015 – Jackson Obale Tebakor v Alliance One (K) Tobacco Ltd [2015] eKLR and Nyeri ELRC No 163 of 2015 consolidated with Nyeri ELRC Cause No 164 of 2015 – Kenya Union of Commercial, Food and Allied Workers & 5 others v Alliance One Tobacco (Kenya) Ltd [2015] eKLR. It is apparent from the Ruling in Jackson Obale Tebakor v Alliance One (K) Tobacco Ltd [2015] eKLR, other suits being Kisumu ELRC Cause Nos 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132 and 133 all of 2015 were similarly filed. The Court has compared the names on the suits filed previously and the Claimants before the Court are not in the suits that had been determined earlier. In addition, the Court noted that the 51st, 63rd and 116th Claimants did not sign the authority to plead and thus acquiesced to their non-joinder to the claim before the Court. As such the decision of the Court is in respect of all the Claimants to the exclusion of the 51st, 63rd and 116th Claimants.
16. Mr Dick Ochieng' Ouma, Mrs Damaris Njeri Chege testified for the Claimants as did Mrs Paulette Anne Elizabeth Kankhwede from Malawi for the Respondent. The Respondent admittedly closed shop and this was confirmed by the three witnesses who testified. The Claimants ranged from piece rate workers to seasonal workers. Unfortunately, the business of the Respondent came to an end and there was payment of some amounts to the Claimants at the end of their contracts/service to the Respondent. The Claimants took umbrage with the amounts paid and their classification. It is clear from work performed by the Claimants, some were permanent and pensionable staff, others were piece rate workers and others were seasonal labourers. It is understood that the business the Respondent carried out was in relation to tobacco which is a crop that is planted, weeded and harvested at different times in the year and as such there was a category of staff that could only be engaged during the planting or weeding season while others were engaged during harvest and processing. As such, the Claimants could not be paid a uniform figure for their service even if they worked the same number of hours or days for the Respondent. From the schedules produced in evidence, the Claimants laboured to show underpayment. Whereas Mr. Ouma stated that there were non-remittances to NHIF and NSSF, no statement was produced by the Claimants to prove these sums were not paid on their behalf where such deductions were made. Indeed, the bank statements produced by the Claimants all showed there were payments made by the Respondent some of which were in excess of 4 times the monthly salary the Claimants earned. For instance, on the bank statement of Faith Wambui Gikonyo, she received Kshs 74,535/- on November 8, 2015 and Kshs. 17,675.95 on November 23, 2015. On the statement of Sammy Muchanji Odawa, there is a credit of Kshs. 72,296.35 on November 23, 2015 while for Nelson Mandela Matuli had salary credits of Kshs 3,301/- in July 2015 and a credit of Kshs 13,671/- on November 6, 2015 and another credit of Kshs 71,108.35 on November 23, 2015. Granted the



sample of payments made, it is clear the Respondent made substantial payments to the Claimants in November 2015 as part of terminal dues. In my considered view, the Respondent did not underpay the staff at the time of termination of service. There was therefore no basis for the claims made against the Respondent. Given the relative positions of the parties as the inevitable dismissal of the suit is given, there shall be an order to that effect and each party will bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

NZIOKI WA MAKAU

JUDGE

