



**Opige & 4 others v Bollore Africa Logistics (K) Ltd & another (Cause 965 of 2016) [2022] KEELRC 13067 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13067 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 965 OF 2016  
B ONGAYA, J  
NOVEMBER 4, 2022**

**BETWEEN**

**PETER AWUOR OPIGE ..... 1<sup>ST</sup> CLAIMANT  
HASSAN MBUYA KISIANGANI ..... 2<sup>ND</sup> CLAIMANT  
HAMISI CHITI NYALE ..... 3<sup>RD</sup> CLAIMANT  
ABUBAKAR MOHAMED ATHUMAN ..... 4<sup>TH</sup> CLAIMANT  
MARTIN MGALA MWABAYA ..... 5<sup>TH</sup> CLAIMANT**

**AND**

**BOLLORE AFRICA LOGISTICS (K) LTD ..... 1<sup>ST</sup> RESPONDENT  
CAREER DIRECTIONS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimants filed the memorandum of claim on December 16, 2016 through Mathew Nyabena & Company Advocates. The claimant's case is that the respondent employed them and dismissed them on September 11, 2015 without a justifiable cause. The claimants further pleaded as follows. They were employed in 1995, 2002, 2002, 2007, and 2007 respectively. Their case is that the respondents terminated them on September 11, 2015 on account of redundancy and it was not genuine but was driven by bias and discrimination because thereafter the respondents recruited other employees to perform the tasks they used to perform, without regard to the claimants' long service, expertise, dedication and exemplary performance in their respective positions. They pleaded that the termination was in breach of sections 40, 41, 43, 45 and 47 (5) of the *Employment Act*, 2007 as well as article 41 of *ILO Convention 158* on termination of employment, 1982. The terminal dues paid was not in accord with their long service. Each claimed for awards on the headings of one-month pay *in lieu of* notice;



redundancy pay; and 12 months' salaries in compensation for unfair termination being a sum of Kshs 1,639,251. They prayed for judgment for:

- a. Payment of Kshs 1,639,251.
  - b. Certificate of service.
  - c. Costs and interest at court rates.
  - d. Any other relief that the court deems just and fit to grant.
2. The 1<sup>st</sup> respondent appointed Ameli Inyangu & Partners Advocates and filed the reply to memorandum of claim on March 7, 2017. The 1<sup>st</sup> respondent denied ever employing the claimants and denied ever terminating the contracts of service on September 11, 2015. Instead, it had contracted the 2<sup>nd</sup> respondent as an outsourced contractor to provide workforce as the sole employer. Under the outsourcing contract, it was the 2<sup>nd</sup> respondent's obligations to undertake employer obligations of the persons it employed and deployed to work on the 1<sup>st</sup> respondent's enterprise or premises. The obligations included:
- a. Under clause 5(h) to satisfy requirements of the *Employment Act*, 2007.
  - b. Under clause 7(d) the understanding that the contractor was the employer and at no given time whatsoever shall the employees be treated as 1<sup>st</sup> respondent's employees. The contract for outsourced labour would not be construed as establishing the relationship of master and servant between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent or the 2<sup>nd</sup> respondent's employees.
  - c. Under clause 7(e) the 2<sup>nd</sup> respondent had to adhere to provisions of the *Employment Act*, the *Labour Relations Act*, the *Occupational Health & Safety Act*, The *Work Injury and Benefits Act*, and other relevant enactments or amendments in Kenya. The 2<sup>nd</sup> respondent was to exercise fair labour practices; ensure employee discipline; provide employee safety wear and gear; provide them with identification tags; and keep all employee records.
  - d. Under clause 12 the 1<sup>st</sup> respondent was to pay the 2<sup>nd</sup> respondent direct wages and overtime per prevailing wage rates per minimum government wage rates; management fees at 7% of the gross monthly wage bill including monthly employee contribution to NSSF chargeable on monthly basis (to be at a maximum of Kshs 800,000.00 and minimum of Kshs 500,000.00 per month); and other costs such as under the *Work Injury Benefits Act*, 2007.
  - e. Clause 13 on billing stated the 2<sup>nd</sup> respondent to provide a bill by 15<sup>th</sup> of every month so it could be paid by the 1<sup>st</sup> respondent by 25<sup>th</sup> of every month and employees paid by last day of the month.
3. The 1<sup>st</sup> respondent pleaded that the 2<sup>nd</sup> respondent was not its agent or subsidiary but, it was an independent company. The 1<sup>st</sup> respondent denied terminating the contracts of employment and if there were terminations, the 1<sup>st</sup> respondent believed that the claimants must have been paid their final dues.
4. The 2<sup>nd</sup> respondent appointed Humphrey & Company LLP to act in the suit. The response to the claim was filed for the 2<sup>nd</sup> respondent on May 18, 2022. the 2<sup>nd</sup> respondent pleaded as follows:
- a. It employed the claimants by the contracts dated March 25, 2014 and seconded them to the 1<sup>st</sup> respondent to work.



- b. The 2<sup>nd</sup> respondent terminated the contracts on September 11, 2015 on account of redundancy. It became uneconomical to sustain them due to decline in business volumes. They were engaged depending on availability of work and the project they were engaged upon lapsed.
  - c. The termination was in compliance with section 40 of the [Employment Act](#), 2007. Sections 41 and 47(5) of the Act were not breached at all.
  - d. Upon termination each claimant was paid full terminal dues including days worked in September 2015; overtime allowance; one-month payment in lieu of the notice; severance payment; days worked; and accrued leave days. The reliefs sought are therefore not just.
  - e. The 2<sup>nd</sup> respondent was engaged by the 1<sup>st</sup> respondent about February 21, 2014 and they have separated.
5. The 2<sup>nd</sup> respondent prayed that the suit is dismissed with costs.
  6. The claimants' witness (CW) was Hassan Mbuya Kisiangani, the 2<sup>nd</sup> claimant. The 1<sup>st</sup> respondent's witness (RW1) was Maurice Lugadiru, the senior legal officer. The 2<sup>nd</sup> respondent's witness (RW2) was Rodgers Wafula, the legal officer.
  7. Final submissions were filed for the claimants on October 7, 2022 and for the 1<sup>st</sup> respondent on November 3, 2022. The 2<sup>nd</sup> respondent failed to file submissions despite the court's enlarged time to comply.
  8. The court has considered all the material on record and returns as follows.
  9. To answer the 1<sup>st</sup> issue, the court returns that by the agreement for provision and management of outsourced labour exhibited, the 2<sup>nd</sup> respondent was the sole employer of the claimants. The 2<sup>nd</sup> respondent by its own pleading admits to have employed the claimants. It is true that clause 5(e) provided that to ensure smooth transition from the previous contractor handling the provisions of outsourced labour services, the contractor (the 2<sup>nd</sup> respondent) was required to absorb all existing outsourced labour under the previous contractor on their current terms of employment and thereafter deal with the said employees in accordance with provisions of the [Employment Act](#), 2007 and all applicable legislation regarding the termination of their services. It is submitted for the claimants that the 3<sup>rd</sup> and 4<sup>th</sup> claimants' pay slips for period ended July 31, 2014 indicate each was employed on April 14, 2001 – so that pursuant to clause 5(e) the claimants were retained by the 2<sup>nd</sup> respondent with their accruing rights. While the submission sounds ingenious, the pleadings and the rest of the evidence taken together give a different account. The said 3<sup>rd</sup> and 4<sup>th</sup> claimants have pleaded that they were employed in 2002 and 2007 which conspicuously are not anywhere near April 14, 2001 said to be on the pay slips. The court finds that the allegation that the 1<sup>st</sup> respondent may have employed the claimants has no supporting evidence. The court has considered the submissions filed for the 1<sup>st</sup> respondent and finds that as submitted for the 1<sup>st</sup> respondent, CW in his witness statement admitted that all the claimants were employed by the 2<sup>nd</sup> respondent. The pleadings were ambiguous on who, of the respondents, was the employer. The court finds that the evidence was that the sole employer of the claimants was the 2<sup>nd</sup> respondent.
  10. Further, the claimants offered no evidence to show that each was employed on the date as was pleaded. In absence of any other material evidence, the court returns that the 2<sup>nd</sup> respondent was the sole employer and it employed each of the claimants on March 25, 2014.
  11. To answer the 2<sup>nd</sup> issue, the court returns that by the pleadings of the claimants and the 2<sup>nd</sup> respondent and their respective evidence, the claimants' contract of employment was terminated on September



- 11, 2015 on account of redundancy. Each had served for only one complete year in the service of the 2<sup>nd</sup> respondent.
12. To answer the 3<sup>rd</sup> issue the court returns that the termination was unfair both in substance and procedure. The evidence was that the termination was abrupt on September 11, 2015, it was in breach of all the safeguards in section 40 of the *Employment Act, 2007* about a months' notice to the claimants and the labour officer and, the selection criteria. While alleging that the project the claimants worked at lapsed, the evidence was that in fact the labour outsourcing contract between the respondents was subsisting. There is no reason to doubt the testimony by CW that thereafter the 2<sup>nd</sup> respondent engaged casual workers in the claimants' positions. RW2 confirmed the outsourcing contract was expiring on May 31, 2017 but the claimants were terminated long before then on September 11, 2015. He confirmed that the 1<sup>st</sup> respondent never influenced the terminations and there was no evidence filed to show business was declining as was alleged. RW2 further confirmed that the absorption clause existed and 1<sup>st</sup> respondent never instructed the claimants be terminated. The reason for termination is found not to have been genuine and fair per sections 43 and 45 of the Act.
13. The court has considered the period of time the claimants had served with the 2<sup>nd</sup> respondent being about only 1.5 years. They appear to have been good workers who wished to continue in employment. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had agreed in the labour out-sourcing contract to ensure that the claimants were absorbed not on diminishing terms of service. The aggravating factor is that the 2<sup>nd</sup> respondent acted in most unfair manner to terminate them suddenly and without due consultations and preparation. Each is awarded 5 months' salaries under section 49 of the Act in compensation for the unfair termination. Each was already paid severance payment, leave days, and a one-month notice per evidence by CW and RW2. In the circumstances, the claimants are entitled as follows:
- a. 1<sup>st</sup> claimant Kshs 18,903 x 5 = Kshs 94,515.
  - b. 2<sup>nd</sup> claimant Kshs 18,294 x 5 = Kshs 91,470.
  - c. 3<sup>rd</sup> claimant Kshs 14,820 x 5 = Kshs 74,100.
  - d. 4<sup>th</sup> claimant Kshs 18,903 x 5 = Kshs 94,515.
  - e. 5<sup>th</sup> claimant Kshs 18,903 x 5 = Kshs 94,515.
14. The claimants have substantially succeeded in their suit and the 2<sup>nd</sup> respondent will pay their costs. The 1<sup>st</sup> respondent was a necessary party for the expeditious, just, proportionate and complete determination of the suit. Thus each respondent to bear own costs of the suit. The certificate of service is due per section 51 of the Act.
15. In conclusion judgment is hereby entered for the claimants against the 2<sup>nd</sup> respondent with orders:
1. The 2<sup>nd</sup> respondent to pay each claimant the amount found due as follows:
    - a) 1st claimant Kshs 18,903 x 5 = Kshs 94,515.
    - b) 2nd claimant Kshs 18,294 x 5 = Kshs 91,470.
    - c) 3rd claimant Kshs 14,820 x 5 = Kshs 74,100.
    - d) 4th claimant Kshs 18,903 x 5 = Kshs 94,515.
    - e) 5th claimant Kshs 18,903 x 5 = Kshs 94,515.



2. The amount in (a) above be paid by December 31, 2022 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. The 2<sup>nd</sup> respondent to deliver each claimant's certificate of service by December 1, 2022.
4. The 2<sup>nd</sup> respondent to pay the claimants' costs of the proceedings.
5. Each respondent to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4<sup>TH</sup> NOVEMBER, 2022.**

**BYRAM ONGAYA**

**JUDGE**

