



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 307 OF 2015

CHARLES OKUNGU ODHIAMBO.....1ST CLAIMANT
ELIAS OMONDI OBUYA.....2ND CLAIMANT
GILBERT YAURA SHIKA VALE.....3RD CLAIMANT
HAJI CHITE JUMA.....4TH CLAIMANT
JAMES MUENDO MWETU.....5TH CLAIMANT
ONESMUS MUOKA KITUMBI.....6TH CLAIMANT
JOHN KIMWILL.....7TH CLAIMANT
PATRICK SAKWA NAMAKHABWA.....8TH CLAIMANT
JOSEPH PUDO AKENG'O.....9TH CLAIMANT
DAUDI ODHIAMBO OKETCH.....10TH CLAIMANT
ANDREW ANYANGU ANGAYA.....11TH CLAIMANT
TOM NYONGESA MBANGA.....12TH CLAIMANT
JOSECK OKACHI ALELA.....13TH CLAIMANT
MOURICE OTIENO WINYO.....14TH CLAIMANT
JOSEPH ONYONG'O MUSAMBAL.....15TH CLAIMANT
THOMAS OCHIENG' ODHIAMBO.....16TH CLAIMANT
NZIOKA MAITHYA.....17TH CLAIMANT
LIVINGSTONE MAKHOHA SHIUNDU.....18TH CLAIMANT
STEPHEN KANJA CHIIRA.....19TH CLAIMANT
LIVINGSTONE CHIEMA ANJERE.....20TH CLAIMANT
KENEDY OCHIENG AWINO.....21ST CLAIMANT
FELIX OTIENO OBADE.....22ND CLAIMANT

FREDRICK ODHIAMBO HADULO.....23RD CLAIMANT
DICK ODHIAMBO OMOLO.....24TH CLAIMANT
JAMES NAMENGE OKONGO.....25TH CLAIMANT
EMMANUEL ODHIAMBO OMBUORO.....26TH CLAIMANT
ERICK OTIENO OMONDI.....27TH CLAIMANT
EDWARD OKELLO OBIERO.....28TH CLAIMANT
KITHEKA MBOTO.....29TH CLAIMANT

VS

JUJA COFFEE EXPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially heard by **Rika J** who, on 16th June 2017, delivered judgment in favour of the Claimants in the total sum of Kshs. 16,433,800 comprising of terminal dues and compensation for unfair termination of employment.
2. According to the record, the Respondent failed to present its witnesses within the time prescribed by the Court and its case was therefore marked as closed on 11th October 2016.
3. On 25th July 2017, the Respondent filed an application seeking stay of execution of the judgment, setting aside of the judgment and reopening of proceedings. **Rika J** granted an interim stay of execution on the same date of the application subject to the Respondent depositing the total decretal sum of Kshs. 16,433,800 in court within 14 days.
4. The Respondent subsequently filed another application for stay of execution on 17th August 2017, during the court recess. A second interim stay of execution was granted by the Duty Judge in Nairobi.
5. In the end, by a ruling delivered on 23rd November 2017, **Rika J** dismissed the Respondent's two applications with costs to the Claimants.
6. The Respondent appealed against the ruling by **Rika J** and the Court of Appeal set aside the judgment of 16th June 2017 and directed that the case be reopened.
7. On 21st June 2019, **Rika J** determined that because he had delivered the initial judgment, objectivity in the retrial would be comprised. He therefore directed that the matter be reheard by another Judge. Being the only other Judge at Mombasa ELRC, the matter found its way on my cause list.

The Claimants' Case

8. By a Memorandum of Claim dated 5th May 2015 and filed in court on 8th May 2015, the Claimants state that they were all employees of the Respondent, working as blenders in the Tea Blending Section.
9. They claim to have served for diverse periods as outlined hereunder:
 - a) 1st Claimant- July 1994 to 18th September 2014;
 - b) 2nd Claimant – 1995 to 18th September 2014;
 - c) 3rd & 4th Claimants – 2000 to 18th September 2014;
 - d) 5th Claimant – 2001 to 18th September 2014;
 - e) 6th & 7th Claimants – 2002 to 18th September 2014;
 - f) 8th & 9th Claimants – 2003 to 18th September 2014;

- g) 10th – 20th Claimants – 2005 to 18th September 2014;
- h) 21st & 22nd Claimants – 2006 to 18th September 2014;
- i) 23rd & 24th Claimants – 2008 to 18th September 2014;
- j) 25th – 28th Claimants – 2010 to 18th September 2014;
- k) 29th Claimant – 2012 to 18th September 2014.

10. The Claimants contend that their employment was terminated on 18th September 2014, without prior notice. They further contend that they were not allowed to go on leave nor were they paid in lieu thereof.

11. The Claimants state that they were earning a daily wage of Kshs. 800, amounting to Kshs. 20,800 per month. They claim that they were not paid house allowance as stipulated by law.

12. The Claimants' case is that the termination of their employment was without justifiable cause and in violation of due process.

13. The Claimants have tabulated their respective claims as follows:

1st Claimant: Charles Okungu Odhiambo

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 21 years.....352,800
- c) Service pay.....52,000
- d) 12 months' pay in compensation.....249,600

2nd Claimant: Elias Omondi Obuya

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 20 years.....336,000
- c) Service pay.....240,000
- d) 12 months' pay in compensation.....249,600

3rd Claimant: Gilbert Yaura Shivakale

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 15 years.....252,000
- c) Service pay.....180,000
- d) 12 months' pay in compensation.....249,600

4th Claimant: Haji Chite Juma

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 15 years.....252,000
- c) Service pay.....180,000
- d) 12 months' pay in compensation.....249,600

5th Claimant: Gilbert Yaura Shivakale

- a) One month's pay in lieu of notice.....Kshs. 20,800

- b) Leave pay for 14 years.....235,200
- c) Service pay.....168,000
- d) 12 months' pay in compensation.....249,600

6th Claimant: Onesmus Muoka Kitumbi

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 13 years.....214,400
- c) Service pay.....156,000
- d) 12 months' pay in compensation.....249,600

7th Claimant: John Kimwili

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 13 years.....214,400
- c) Service pay.....156,000
- d) 12 months' pay in compensation.....249,600

8th Claimant: Patrick Sakwa Namakhabwa

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 12 years.....201,600
- c) Service pay.....144,000
- d) 12 months' pay in compensation.....249,600

9th Claimant: Joseph Pudo Akeng'o

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 12 years.....201,600
- c) Service pay.....144,000
- d) 12 months' pay in compensation.....249,600

10th Claimant: Daudi Odhiambo Oketch

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 10 years.....168,000
- c) Service pay.....120,000
- d) 12 months' pay in compensation.....249,600

11th Claimant: Andrew Anyangu Angaya

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 10 years.....168,000
- c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

12th Claimant: Tom Nyongesa Mbanga

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

13th Claimant: Joseck Okachi Alela

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

14th Claimant: Mourice Otieno Winyo

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

15th Claimant: Joseph Onyong'o Musambai

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

16th Claimant: Thomas Ochieng Odhiambo

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

17th Claimant: Nzioka Maithya

a) One month's pay in lieu of notice.....Kshs. 20,800

b) Leave pay for 10 years.....168,000

c) Service pay.....120,000

d) 12 months' pay in compensation.....249,600

18th Claimant: Livingstone Makhoha Shiundu

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 10 years.....168,000
- c) Service pay.....120,000
- d) 12 months' pay in compensation.....249,600

19th Claimant: Stephen Kanja Chiira

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 10 years.....168,000
- c) Service pay.....120,000
- d) 12 months' pay in compensation.....249,600

20th Claimant: Livingstone Chiema Anjere

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 10 years.....168,000
- c) Service pay.....120,000
- d) 12 months' pay in compensation.....249,600

21st Claimant: Kennedy Ochieng Awino

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 9 years.....151,200
- c) Service pay.....108,000
- d) 12 months' pay in compensation.....249,600

22nd Claimant: Felix Otieno Obade

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 9 years.....151,200
- c) Service pay.....108,000
- d) 12 months' pay in compensation.....249,600

23rd Claimant: Fredrick Odhiambo Hadulo

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 7 years.....117,600
- c) Service pay.....84,000
- d) 12 months' pay in compensation.....249,600

24th Claimant: Dick Odhiambo Omolo

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 7 years.....117,600

- c) Service pay.....84,000
- d) 12 months' pay in compensation.....249,600

25th Claimant: James Namenge Okongo

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 5 years.....84,000
- c) Service pay.....48,000
- d) 12 months' pay in compensation.....249,600

26th Claimant: Emmanuel Odhiambo Ombuoro

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 5 years.....84,000
- c) Service pay.....48,000
- d) 12 months' pay in compensation.....249,600

27th Claimant: Erick Otieno Omondi

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 5 years.....84,000
- c) Service pay.....48,000
- d) 12 months' pay in compensation.....249,600

28th Claimant: Edward Okello Obiero

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 5 years.....84,000
- c) Service pay.....48,000
- d) 12 months' pay in compensation.....249,600

29th Claimant: Emmanuel Odhiambo Ombuoro

- a) One month's pay in lieu of notice.....Kshs. 20,800
- b) Leave pay for 3 years.....50,400
- c) Service pay.....36,000
- d) 12 months' pay in compensation.....249,600

14. The Claimants also ask for certificates of service, costs and interest.

The Respondent's Case

15. The Respondent filed a Reply dated 22nd June 2015 in which it denies terminating the Claimants' employment on 18th September 2014 or at all.

16. The Respondent states that the nature of its business does not allow it to have employees for a continuous period making them qualify for leave.

17. The Respondent denies having employed any of the Claimants whether as casuals or permanent employees. The Respondent further denies having dealt with the Claimants, save for the 1st Claimant, Charles Okungu Odhiambo.

18. The Respondent states that it never paid any of the Claimants any money as daily wages. The Respondent adds that it always paid an agreed sum per bag of blended tea, at a fee agreed upon between the Respondent and the 1st Claimant.

19. Regarding the claim for house allowance, the Respondent states that it could not pay house allowance to persons who it never retained whether as casuals, term or seasonal employees or employees of any sort whatsoever.

20. The Respondent avers that it never terminated the employment of the Claimants. The Respondent further avers that the Claimants, if at all they were at the Respondent's business premises, simply completed the tasks for which they had been hired and went home.

21. The Respondent submits that a substantial portion of the Claimants' claims is time barred by Section 90 of the Employment Act.

Findings and Determination

22. From the parties' pleadings, testimony and pleadings, the first issue that falls for determination is whether there was an employment relationship between the Claimants and the Respondent, capable of enforcement by this Court.

23. The Claimants plead that they were employed by the Respondent on diverse dates ranging from 1994 to 2012. On its part, the Respondent denies ever having employed the Claimants and states that it had an arrangement with the 1st Claimant, Charles Okungu Odhiambo, by which Okungu supplied labour on need basis.

24. Section 2 of the Employment Act, 2007 defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”

25. The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

26. A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

27. The existence of an employment relationship is a matter of evidence and where it is in contention, the burden of proof is on the party alleging its existence (see ***Joseph Otieno Ogutu & 24 others v Allied Wharfage Ltd & another [2016] eKLR***).

28. The Claimants claim to have been employed orally. The 1st Claimant, Charles Okungu Odhiambo and the 16th Claimant, Thomas Ochieng Odhiambo testified on their own behalf and on behalf of their co-claimants. I have had occasion to read their testimony as recorded by **Rika J.**

29. In cross examination, Ochieng testified that he started working for the Respondent in 2005 when the blending machine was mounted. He states that he was recruited by Okungu, who kept an attendance register.

30. Ochieng was equivocal as to who paid him. On the one hand he claimed to have been paid by the Respondent's cashier and on the other he stated that he received money from Okungu. Okungu himself confirmed that he received money from the cashier, which he paid to the other Claimants. Okungu further confirmed having recruited the other Claimants from other tea companies.

31. Okungu testified that he joined the Respondent in 1994 at which time he was handling cereals. This piece of testimony is at variance with the pleading in the Memorandum of Claim that the Claimants were employed as blenders in the Tea Blending Section.

32. The Respondent's witnesses Francis Okoth Otieno, who worked as a Warehouse Clerk and Idris Ali, who was employed as a Supervisor testified that during their employment, the Respondent periodically sourced labour from Okungu, whom they described as a *'gang leader'*.

33. My analysis of the evidence on record reveals that although there may have been a work relationship between some of the Claimants and the Respondent, there was no employment relationship as defined in law.

34. It would follow naturally that because the Claimants' claims are premised on the existence of an employment relationship, the claims must fail.

35. Each party will bear their own costs.

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Chala for the Claimants

Mr. Kongere for the Respondent