



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 451 OF 2016

(Consolidated with Cause No. 131 of 2017, Evans Fadhili Guyumba v. Diamond Industries Limited; Cause No. 356 of 2017, Amin Mutie v. Diamond Industries Limited; Cause No. 860 of 2017, Richard Shidagwa v. Diamond Industries Limited; Cause No. 796 of 2017, Kevin Odhiambo v. Diamond Industries Limited; Cause No. 358 of 2017, Joel Gitungwa v. Diamond Industries Limited; Cause No. 360 of 2017, Kamuti Mwengea v. Diamond Industries Limited; Cause No. 794 of 2017, Alexander Kyalo v. Diamond Industries Limited; Cause No. 359 of 2017, Kennedy Owino Opeyo v. Diamond Industries Limited; Cause No. 361 of 2017, Wilson Maluki v. Diamond Industries Limited; and Cause No. 357 of 2017, Yusuf Joseph Mlandi v. Diamond Industries Limited)

BETWEEN

- 1. MICHAEL JUMA CHINJO**
- 2. EVANS NGAO NDEGWA**
- 3. LEWA BELEWA**
- 4. MWARINGA LEWA MWARINGA**
- 5. DORCAS AKINYI AKONDE**
- 6. JOHN MUNGA KOLO**
- 7. SIMON NJOROGI MUTURI**
- 8. SIMON PULA MENZA**
- 9. PETER AGUVASU KIBIYI**
- 10. JUMA ABDALLAH MUSUKO**
- 11. MICHAEL NYANJE KITSAO**
- 12. FRANK MWAOKA KISILA**
- 13. GIDEON MANINGI MWALIKO**
- 14. MOSES DENA**
- 15. OMAR MAZERA NDUNGU**
- 16. STANLEY KAZUNGU MWALIMU**
- 17. EVANS AKHOBE CHIBOLE**
- 18. FELIX MULOLWA**
- 19. JONES KIMUNZI RIGHA**

20. RAPHAEL MWALIMA MWAMBI
21. TSUMA DAMAU CHIPHOO
22. BAYA MUNYAMBU MUNDANDO
23. SYLVESTER ANDATI NGAIRA
24. EDWARD KOPLO MJOMBA
25. MWAKUMBA J. MWAGAMBOGA
26. AMINI HAMISI MANDO
27. BAKARI MWATAI CHIYONDO
28. RAMADHANI JASHO MWAGADI
29. MWAMBURI NYAMBU
30. CHAKA MWAMWENDA CHILUKU
31. SHEM CHIBOLE MOHOBE
32. SALIM ALI JUMA
33. NJEI KUFASA MVUNGU
34. STANLAUS M. KOTIENO
35. COLLINS MASIKA WAMALWA
36. NDORO CHENGO NDORO
37. VITALIS OTIENO WAMBANI
38. RAPHAEL MUNGA NZAKA
39. SAID RUWA MOSES
40. HAMISI KITSESO
41. TSUMA NDARO NYASI
42. JAPHETH JUMA MENZA
43. ALI KAZUNGU KENGA
44. PETER MUSYOKA
45. FRED MUSEE MUTUA
46. OMAR MRABU NDARO
47. HAMISI OMAR MWAKUKOSA
48. ALFRED ROPIA MTINDA
49. HASSAN WAMBUA MTIO
50. RAMA BOSU MWAKUGOMBA
51. ISAACK ABWAO

52. JAMES NGAMBAO KARRISA
53. MOSES OGUTU OYUGI
54. HARISON BAYA RUMBA
55. BAIK RASHID ABDALLA
56. DOUGLAS M. SAID
57. SULEIMAN O. NZAKA
58. SAID MWINGA LAMBI
59. DAVID WALI KAMWILWA
60. BENZ KARANI MADI
61. ALFRED M. PETERSON
62. CHRISTINE NGINA KITOVA
63. RAMADHAN SALIM HASSAN
64. WITNESS TUNGU NDAA
65. SHEE MWINYI SHEE
66. CHRISTOPHER M. KIMANTHI
67. NASIB AI TSUMA
68. DANIEL ODUOR ODERO
69. KARISA KALUME KAINGU
70. GABRIEL H. MBOGO
71. HENRY MUCHANGI
72. DOROTHY ATIENO ABOMA
73. GAMOYO FRANCIS GAMOYO
74. BAKARI MASOUD ALI
75. DENNIS ONYANGO WAYUAU
76. JAMES W. WAKWABUBI
77. ALI HAMISI DZUYA
78. ALEX WANGILA KITUI
79. NELSON KAHINDI NGUMBAO
80. MWERO SWALEHE MGALLA
81. ERICK WANJALA WAMALWA
82. JEFWA KAHINDI MBOE
83. OCTAVIAN MWAGODI MWATIKA

84. STEPHEN MWACHIA KWAKIWA
85. ORETA OJWANG BENSON
86. JIRA NGOME
87. ANTHONY MOGAITO MONARI
88. ISAACK WANYONYI MUTORO
89. JAMES BAHATI CHARO
90. CHRISTOPHER MUTUA JEDIDA
91. GILBERT MWENDWA KASOYA
92. ROBERT MUTURI NYAMASEGE
93. HASSAN MBWEMBWE
94. KENNEDY NELSON AGORO
95. BONIFACE MUTINDA MUTHUSI
96. KARISA KITHI KOMBE
97. KOMBO VUTA CHIKOZA
98. BAKARI CHIRINGA DZUYA
99. NESPHORY M. KITONGA
100. WILLIAMS JUMA OGOLA
101. RASHID MBAJI SABURU
102. VIGIL EDWARD LENJO
103. GABRIEL JUMA RANGINYA
104. BEATRICE B. OBONYO
105. NEREEA ANYANGO ADERO
106. MAGDALINE ACHIENG WERE
107. BENARD OCHIENG
108. EVANS FADHILI GUYUMBA
109. AMIN MUTIE
110. RICHARD SHIDAGWA
111. KENNEDY ODHIAMBO ODHIAMBO
112. JOEL GITUNGA KALAINA
113. KAMUTI MWENGEA
114. ALEXANDER KYALO MBITHI
115. KENNEDY OWINO OPEYO

116. WILSON MALUKI

117. YUSUF JOSEPH MLANDICLAIMANTS

VERSUS

DIAMOND INDUSTRIES LTDRESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

J.A Abuodha & Company Advocates for the Claimants No. 1-107

Onyango Oballa & Partners, Advocates for the Claimants No. 108-117

Beatrice Opollo Advocate, instructed by the Federation of Kenya Employers [FKE] for the Respondent.

JUDGMENT

1. 117 Former Employees of the Respondent Company filed separate Claims against the Respondent, in the years 2016 and 2017.
2. Parties agreed to have the Claims consolidated. The Claims were heard, under Cause No. 451 of 2016.
3. It is not contested that the Claimants were on diverse dates, employed by the Respondent. On 28th August 2015, the Respondent issued notice of redundancy.
4. The notice issued to the Claimants' Trade Union – Kenya Chemical and Allied Workers Union, as well as to the County Labour Office, Mombasa.
5. The notice resulted in strike action. This was not the 1st strike action. The dispute was reported to the Labour Office. It was explained to the Claimants, that redundancy payments could not be made based on the CBA as demanded by the Claimants, because the CBA was not registered.
6. Redundancy payments were computed in consultation with the Labour Office. They were deposited with the Labour Office by the Respondent and paid out to the Claimants
7. The Claimants were not satisfied with the payments received, and filed these consolidated Claims, seeking Judgment against the Respondent for:-
 - a) 1 month salary in lieu of notice.
 - b) Unpaid annual leave.
 - c) Severance pay
 - d) Damages for unfair termination
 - e) Costs and Interest.
8. The Respondent filed Statements of Response common in all the Claims. Its position is that redundancy was carried out fairly, in accordance with the law, and all benefits paid to the Claimants through the Labour Office. Declaration of redundancy was justified, as the Respondent had to restructure its mode of business, to counter the financial challenges brought about by cheap smuggled goods in the market. The Respondent prays that the Claims are dismissed, with costs to the Respondent.
9. Evidence for the Claimants was presented by Michael Ouma Ogingo (1) and Amin Mutie (109). They gave evidence on 19th March 2019, closing the Claimants' case. Mombasa County Labour Officer, Joseph Nyaga, gave evidence for the Respondent on 18th June 2019, when the hearing closed.
10. Claimant No. 1 told the Court that about 200 Employees were affected. There was no genuine redundancy situation. Claimant No. 1 had worked for 7 years. The longest serving Employee had put in 28 years. The Respondent announced fresh vacancies, simultaneous with redundancy. There was no genuine redundancy. Claimant No. 1 received severance, leave and notice pay. In total, he received about Ksh.100,000. Cross-examined by the Advocate for the Co-Claimants, Claimant No. 1 said Employees came to learn of the purported redundancy, only upon payment of terminal benefits.

11. Cross-examined by the Advocate for the Respondent, Claimant No. 1 said the Claimants were in casual employment. They were daily rated. There were 2 strikes, occasioned by poor management at the workplace. Claimant No. 1 confirmed he was paid severance based on 7 years completed in service; 161 days of annual leave; and notice. A new company called GEFCON was to take over Respondent's business. This company is not a Party herein. The Claimants did not lose any years of service. He did not know if notice issued to Claimants' Trade Union. There were several meetings, involving the Respondent, and the Trade Union. Terminal benefits were paid through the Labour Office.

12. Amin Mutie (109) associated himself fully with the evidence given by Michael Ouma Ongigo (1). He was a Production Supervisor. An outsourcing company called GEFCON was introduced to the Claimants by the Respondent. Claimants were required to sign fresh contracts. Mutie was paid Ksh.125,809 in terminal dues. Other Employees were hired immediately. Termination was unfair.

13. Claimants' positions were advertised while they were still in employment, Mutie told the Court on cross-examination. They were members of Chemicals Union. Mutie did not know that notice of redundancy issued to the Union. He was paid his dues through the Labour Office. Mutie told the court that he received all his terminal dues. His grouse with the Respondent is that termination was unfair.

14. Mombasa County Labour Officer, Joseph Nyaga, explained to the court that he received notification to declare redundancy dated 28th August 2015, from the Respondent. The General Secretary of Chemicals Union, representing the Claimants, also received the notification.

15. The Labour Office replied, advising the Respondent to adhere to redundancy law. The Claimants went on strike on 15th September 2015. The issue in dispute was on modality of payment of redundancy dues. Parties were not able to have guidance from the CBA, because the CBA had not been registered with the E&LRC to be binding. The Union insisted on applying the unregistered CBA.

16. On 22nd September 2015, Parties agreed on return-to-work formula. It was agreed the Respondent computes redundancy dues, and forwards them, to the Labour Office. The Labour Office scrutinized computation, and agreed they were regular. The issue of unfair termination was not raised with the Labour Office Mombasa. Mr. Nyaga considered the dispute concluded. Employees were treated fairly.

17. On cross-examination, Mr. Nyaga testified Employees have a right to strike. Employees issued notice to County Government, Constituency Office and Labour Office, to hold peaceful demonstrations. The notice is dated 23rd July 2015. Redundancy followed this. Employees were free to reapply for their jobs, under the return-to-work agreement. Mr. Nyaga did not know exactly when Claimants left employment. The Respondent was experiencing financial problems. He did not know if new Employees were recruited. He advised the Respondent that technically, Employees with long service could not be categorized as casuals. If the CBA was registered, and some terminal benefits accrued to Claimants upon registration, payment could always be made later. The Claimants went on strike while the redundancy process was ongoing. On redirection, County Labour Officer told the Court a legal strike should have been preceded by a 7- day notice, issued by the Chemicals Union General Secretary. No notice issued. Majority of the Employees wished to be paid off. Those who wished to continue with employment were free to reapply.

The Court Finds:-

18. The 117 Claimants were employed by the Respondent Company in various positions, and on various dates.

19. They were members of Kenya Chemical & Allied Workers Union which has a Recognition Agreement with the Respondent.

20. At the time the dispute arose, the Union and the Respondent had a CBA, which was executed, but unregistered, and therefore unbinding.

21. On 23rd July 2015, the Claimants issued a notice to the Respondent, which was copied to various offices, including those of the Governor and Women Representative, Mombasa County; Member of Parliament Changamwe; MCA Changamwe Ward; Assistant County Commissioner Changamwe; and Changamwe Police Station.

22. Under the banner of "*We workers of Diamond Industries Limited Changamwe,*" the Claimants notified they would hold a peaceful demonstration from Monday, 27th July 2015. They stated in clear terms, that all workers (helpers, operators and all staff) "*are not supposed to report to work. Work will resume the time when all workers will be paid their work service.*"

23. They were complaining about "*grievance and strikes as a result of mistreatment, under payment and outsourcing from another company.*"

24. Although indicated to be "*peaceful demonstration*" the poorly worded notice was a notice calling on the Claimants to a wildcat strike. The Claimants withdrew their labour.

25. They were represented by a Union, but did not involve their Union in their strike. Their grievances were capable of redress through the existing grievance and dispute handling mechanisms, created by the Industrial Relations Machinery put in place by their Union and the Respondent. They ignored that machinery, and engaged in an illegal strike.

26. The notice issued by the Claimants suggests there were other strikes in the past. The evidence of the Parties, is that even after the 'peaceful demonstration,' another strike followed.

27. On the 28th August 2015, the Respondent issued "*Notification to Declare Employees Redundant.*" It is indicated that the Respondent intended to restructure its workforce. The Respondent alleged it was going through tough economic times, made worse by continuous influx of cheap smuggled goods in the market.

28. The notification went out to the Claimants' Union, Federation of Kenya Employers and the County Labour Office.
29. On 2nd September 2015, County Labour Officer wrote to the Respondent, advising that the Respondent adheres to redundancy Law. The Respondent was advised to pay Severance, Pending Leave, Wages for days worked and issue Certificates of Service.
30. On 3rd September, 2015 the Claimants' Union through its national General Secretary, Were Dibo Ogutu, wrote to the Cabinet Secretary, Ministry of Labour reporting the existence of a trade dispute between the Union and the Respondent.
31. The issue subject matter of the report was "*company intention to declare workers redundant*". The report does not seem to have been followed-up by the Parties and the Labour Office. There is no indication that the Ministry of Labour at the Head office took cognizance of the dispute. Instead, the Parties continued to engage with the aid of the County Labour Office. Mr. Nyaga told the Court he is not aware if the report made at Nairobi was escalated to conciliation.
32. Sometime in September 2015, the Claimants seem to have again gone on strike. On 15th September 2015, the Claimants through their Shop Stewards, the Respondent through its Human Resource and Administration Manager, and the County Labour Officer Mr. Nyaga, met and crafted a return-to-work formula.
33. The Agreement was signed on 22nd September 2015.
34. It is after this, that the Respondent wrote to the Claimants' Union on 24th September 2015, advising that the Claimants would be paid redundancy benefits.
35. The Parties confirm Claimants received severance pay, notice pay, and leave pay. From their evidence, the Claimants did not seem to contest terminal benefits which they were paid. The Advocate for the first 107 Claimants made brief Opening Submissions, acknowledging that the Claimants received substantial payments in redundancy package. Amin Mutie, giving evidence for Claimant 108-117 stated "**All my dues were up to date. My only issue is unfair termination.**"
36. The Court is satisfied that the Claimants were paid terminal benefits, redundancy benefits, and the only issue left for the Court to consider and determine is: **was termination by way of redundancy fair?**
37. Section 43 of the Employment Act 2007, requires that in any Claim arising out of termination of a contract, the Employer shall be required to prove the reason, or reasons for termination. The reason or reasons are matters that the Employer, at the time of termination, genuinely believed to exist.
38. The reason given by the Respondent in justifying termination was that it was experiencing financial constraints. Its business was affected by cheap counterfeit goods, flooding the Kenyan market. It was compelled to restructure its workforce, and declare redundancy.
39. There are no financial records availed to the Court to support the position that the Respondent experienced financial constraints. There is no record of wage bill. Evidence of counterfeit goods flooding the market, and how this impacted on the Respondent, was not availed to the Court.
40. The Claimants went on a wildcat strike. Redundancy notification followed this illegal strike. The strike seems to have triggered declaration of redundancy.
41. The return-to-work formula discounts the presence of a genuine redundancy situation. Clause 3 of the formula states that "*any worker whose service has been terminated, can reapply if he so wishes to continue with work.*" The Respondent even put out notice, advertising positions which were held by the Claimants.
42. Work at the Respondent was still available. There were no positions which were found and declared to be redundant. The Respondent invoked redundancy Law, not because there was a demonstrable economic problem in its business, but to counter the illegal strikes its workforce was prone to engage in. Rather than undertake disciplinary processes, against the Employees for their involvement in persistent strikes, the Respondent opted to declare redundancy.
43. That declaration was a colourable exercise, to adopt a term used by the Court, in its decision in ***Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others (Industrial Court (Nairobi) Cause No. 1616 of 2012)***
44. The Respondent acted under 'colour' or 'guise' of authority granted under Section 40 of the Employment Act, to terminate Employees' contract owing to their engagement in incessant wildcat strikes.
45. Redundancy cannot therefore have been a valid termination decision. The Labour Officer told the Court the issue of unfair termination was not placed before him. It was therefore never examined by the Labour Office if there was a genuine redundancy situation.
46. To the extent that notices of redundancy issued upon Claimants' Union and the Labour Office; and considering also that basic redundancy dues were paid and received by the Claimants, as stipulated under Section 40 of the Employment Act; the Court finds procedure would have been fair, assuming termination was based on redundancy.
47. The Respondent failed completely on substantive justification as discussed above, and termination therefore was unfair, under Section 43 of the Employment Act, read with Section 45.

48. The Court has taken into account that a majority of Claimants had worked from as early as 2007. Others had worked for brief periods. They were not model Employees. They engaged in wildcat strikes. They disregarded the industrial relations machinery available to them in handling their grievances. It is likely if the Respondent focused on disciplinary action based on the illegal strike, rather than a far-fetched redundancy justification, the Court would hardly fault termination. The Court has taken into account also, that the Claimants received terminal benefits, which included severance pay and notice pay.

49. *The Claimants merit and are granted compensation for unfair termination.*

50. *Certificates of Service to issue.*

51. *No order on the costs.*

IN SUM IT IS ORDERED:-

a) The Respondent shall pay to the Claimants, based on the Claimants' last monthly salaries, compensation for unfair termination as follows:

i. Employees engaged before, or between 2007 and 2011 – 3 months' salary.

ii. Employees engaged between 2012 and 2014 – 2 months' salary.

iii. Employees engaged in 2015 – 1 month salary.

b) Certificates of Service to issue.

c) No order on costs.

Dated and delivered at Mombasa this 20th day of January 2020.

James Rika

Judge