



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

**CAUSE NUMBER 577 OF 2017**

**BETWEEN**

**VINCENT OWINO ODUOR.....CLAIMANT**

**VERSUS**

**MITCHEL COTTS FREIGHTS [K] LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Matete Mwelese & Company Advocates for the Claimant*

*Mogaka Omwenga & Mabeya, Advocates for the Respondent*

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**JUDGMENT**

1. It was agreed by the Parties, that Judgment in this Claim, shall be adopted in Cause Numbers 576, 578, 579, 580 and 581 all of 2017. The Claimants share the same Advocates. The Respondents' Advocates are the same in all Claims. The Claims are against the same Employer. The legal and factual backgrounds are similar.

2. The Claimant herein, filed his Statement of Claim on 18<sup>th</sup> July 2017. He avers, he was employed by the Respondent as a Casual Loader, in May 2008. He earned a daily wage at the rate of Kshs. 540 daily. His contract was terminated by the Respondent's Supervisor, Julius Ambaa on 23<sup>rd</sup> April 2017. There was no notice, no hearing and no valid reason justifying termination.

3. He and his Co-Claimants, pray for Judgment against the Respondent for:-

- a. Notice pay.
- b. Accrued annual leave over years worked.
- c. Arrears of house allowance over the same period.
- d. 12 months' salary in compensation for unfair termination.
- e. Service pay.
- f. Declaration that termination was on permanent basis.
- g. Costs

h. Certificate of Service to issue.

4. The Respondent's position through its Statement of Response on record, is that the Claimant was engaged on a day to day basis, through Gang Leaders, subject to availability of work at the Respondent. He was not employed by the Respondent, but by his Gang Leader. The Respondent could not terminate Claimant's contract, and could not therefore be held liable for any terminal benefits or compensation as pleaded. The Respondent prays the Court to dismiss the Claim.

5. The Claimant Vincent, and Claimant in Cause Number 576 of 2017, Albert Otieno Anyango, gave evidence on 3<sup>rd</sup> December 2019. Respondent's Human Resource and Administration Manager, Samuel Otieno Odera, gave evidence on the same date, bringing the hearing to a close.

6. In either case, the Claimants told the Court that Julius Ambaa, the Supervisor approached the Claimants, demanding they execute fresh contracts. The Respondent did not take account of the years already served by the Claimants. It was intended to reduce the daily wage in the fresh contracts. Vincent was to earn Kshs. 440 instead of Kshs. 540. The Employees declined to sign the fresh contracts. They were advised they could not continue working. They seek the assistance of the Court as pleaded.

7. Cross-examined, Vincent told the Court he was employed in 2006 not 2008. The exhibited Duty Roster for 2016 is incorrect. Some aspects are correct. Julius terminated Claimants' contracts. The Claimants were permanently casual. They did not complain to the Labour Office about this status. It is not because they were never Employees of the Respondent that, they failed to raise the issue with the Labour Office. On cross-examination, Albert stated that the Claimants did not have letters of employment. Duty Roster indicated they were engaged as Casuals on given dates. They were loading and offloading. Julius paid the Claimants' wages. Termination was by Julius. The Respondent did not give the Claimants letters of employment and termination.

8. Samuel Otieno Odera told the Court that the Claimants were not employed by the Respondent. The Respondent does not have their records. The Respondent does not engage Casual Employee; it contracts Gang Leaders, who supply labour. The Respondent therefore did not have contracts with the Claimants. It did not terminate. The Duty Roster was maintained for purposes of tracking possible false work injury claims. It did not confer employment right. The Respondent could not grant leave, notice or service pay to non-Employees. The Claims have no merit.

9. Cross-examined, Samuel told the Court, he is the General Manager, Human Resource and Administration. He has custody of staff records. The Respondent outsources casual labour from 3<sup>rd</sup> Parties. He did not have any outsourcing agreement. Julius is not an Employee of the Respondent. He was a Gang Leader, alongside Gilbert. He was not Respondent's outsourcing agent. Samuel conceded Julius played the role of an outsourcing agent. The Respondent paid Julius and Gilbert for supplying labour. Julius would have been liable in case the Employees were injured. Samuel did not have casual records, for the period the Claimant alleged to have been Employees of the Respondent. He did not know where Julius and Gilbert were. They could confirm if the Claimants were their Employees, and not of the Respondent.

**The Court Finds:-**

10. The resolution of this dispute hinges on uncovering one man: Julius Ambaa.

11. What was he to the Parties?

12. The Respondent states he was not its Employee. He was a Gang Leader, who supplied casual labour to the Respondent.

13. The Claimants describe Julius as a Supervisor, who employed and paid them, and terminated their contracts of employment.

14. The Court has not seen any outsourcing agreement between the Respondent and Julius. It has not been indicated whether Julius and Gilbert were legitimate outsourcing agents. Employers cannot be allowed to pick just any other backstreet labour market operator with ready casual labourers, and purport to have entered into outsourcing agreement with such individuals for supply of labour. Outsourcing of labour is regulated, and workers must be legally protected from the exploitation of backstreet operators. The Respondent alleges Julius and Gilbert were Gang Leaders. These so-called Gang Leaders were not shown to be in legitimate outsourcing businesses. It is not surprising that the Respondent could not execute any outsourcing agreement with the Gang Leaders.

15. The Respondent engaged 2 individuals- Julius and Gilbert- to supply them with loaders. To avoid meeting regulatory burdens, the Respondent paid the loaders through Julius and Gilbert.

16. The Respondent was the principal Employer, regardless of the number of facades erected by the Respondent around its workplace. The Claimants worked for years at the Respondent's premises. The Respondent retained their Duty Roster, and regulated how they worked. The Respondent took out insurance cover for work injury, extending to the Claimants. Control of the workplace remained with the Respondent. Julius was just a façade, used in supply of labour, and used in protecting the Respondent from employment liability. The Respondent did not muster courage to call either Julius or Gilbert, to explain their relationship with the Parties herein.

17. The Claimants have adequately shown that they were employed by the Respondent.

18. They were paid a daily rate of Kshs. 540. Daily rate takes into account the housing element. Their prayers for arrears of house allowance have no foundation.

19. They similarly have not established their prayers for annual leave and service pay.

20. They worked for different number of years. Albert worked for 13 years; Vincent 9 years; Stephen 11 years; Anderia 4 years; Bernard 9 years; and Ernest 8 years. The Court does not think any of the Claimants, after these years of service, could be considered to be in causal employment, as at the time of exit. There was no valid reason given to justify termination. Procedural fairness was disregarded. Judgment is entered for the Claimants as follows:

*a. Albert Otieno: compensation equivalent of 12 months' salary at Kshs. 168,840; and notice at Kshs. 14,040 – total Kshs. 182,880.*

*b. Vincent Oduor: compensation equivalent of 8 months' salary at Kshs. 112,320; and notice at Kshs. 14,040- total 126,360.*

*c. Stephen Onyango: compensation equivalent of 10 months' salary in compensation for unfair termination at Kshs. 140,400; and notice at Kshs. 14,040- total Kshs. 154,440.*

*d. Anderia Oketch: compensation equivalent of 3 months' salary at Kshs. 42,120; and notice at Kshs. 14,040- total Kshs. 56,160.*

*e. Bernard Ochieng': compensation equivalent of 8 months' salary at Kshs. 112,320; and notice at Kshs. 14,040- total 126,360.*

*f. Ernest Oduor: compensation equivalent of 7 months' salary at Kshs. 98,280; and notice at Kshs. 14,040- total Kshs. 112,320.*

*g. It is declared that termination was unfair.*

*h. Certificates of Service to issue.*

*i. Costs to the Claimants.*

*j. This Judgment as agreed, shall apply in all the Claims with copies placed in all the relevant files identified herein.*

Dated and delivered at Mombasa this 26<sup>th</sup> day of March 2020.

James Rika

Judge