



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 797 OF 2015**

**BETWEEN**

- 1. ABDALLAH MUMBA MGANDI ALIAS ABDALLA MUMBA**
- 2. KELI MAUNDU**
- 3. ABDUL BREAK SALIM**
- 4. MWALOMA OMAR LONYO**
- 5. FUMO OMAR FUMO**
- 6. MICHAEL MWAKIO MWACHENJE.....CLAIMANTS**

**VERSUS**

- 1. MOMBASA POLYTHENE BAGS LIMITED**
- 2. READY CONSULTANCY LIMITED.....RESPONDENTS**

**Rika J**

**Court Assistant: Benjamin Kombe**

**Kennedy Ngaira & Associates, Advocates for the Claimants Beatrice Opolo Advocate**

**instructed by the Federation of Kenya Employers [FKE], for the 1<sup>st</sup> Respondent**

**Birir & Company, Advocates for the 2<sup>nd</sup> Respondent**

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**JUDGMENT**

1. The Claimants filed their Statement of Claim, on 26<sup>th</sup> October 2015. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Claimants state they were employed by the 1<sup>st</sup> Respondent as Extrusionists/ Operators, in March 2003. The 4<sup>th</sup> Claimant was employed by the 1<sup>st</sup> Respondent as an Operator in 2000. The 5<sup>th</sup> Claimant was employed as a Machine Operator in 2002, while the 6<sup>th</sup> Claimant was employed by the 1<sup>st</sup> Respondent on 1<sup>st</sup> May 2007. It is not indicated in the Statement of Claim in what position the 6<sup>th</sup> Claimant was employed.

2. The Claimants state on 1<sup>st</sup> March 2010, the 1<sup>st</sup> Respondent contracted the 2<sup>nd</sup> Respondent to take over management of the manpower and operations of the 1<sup>st</sup> Respondent. They were placed under 6 months' contracts by the 2<sup>nd</sup> Respondent. The contracts were automatically renewed. Their contracts were terminated by the 2<sup>nd</sup> Respondent on 28<sup>th</sup> September 2015. They earned a monthly salary of Kshs. 13,848 as of the date of termination.

3. There was no reason given, to justify termination. They were required to sign fresh contracts, to remain in employment. They considered

the fresh contracts illegal, oppressive and demeaning, meant to deny them their retirement benefits. They state that termination was unfair and unlawful.

4. The Claimants state they worked 14 hours a day. They never went on annual leave. They pray for Judgment against the Respondents in the following terms:-

- a. Declaration that the Respondents engaged in unlawful, illegal and unfair labour practices from the year 2000 to 28<sup>th</sup> September 2015.
- b. Declaration that the contracts given to the Claimants, for the period above, were discriminatory, unlawful, unconstitutional, null and void.
- c. A declaration that the Claimants be deemed to have been confirmed permanent Employees with attendant benefits.
- d. An order that the Claimants' dismissal was unfair and unlawful and should be set aside.
- e. The Claimants are paid by the Respondents: 1 month salary in lieu of notice; public holidays worked for the entire period of service; annual leave pay over the entire period; 12 months' salary in compensation for unfair termination; and service pay. Under these heads the 1<sup>st</sup> Claimant, 2<sup>nd</sup> Claimant and 3<sup>rd</sup> Claimant pray for a sum of Kshs. 415,439 each; 4<sup>th</sup> Claimant Kshs. 491,604; 5<sup>th</sup> Claimant Kshs. 444,794; and 6<sup>th</sup> Claimant Kshs. 342,958.
- f. Interest from the year of employment.
- g. The Respondents to pay to the Claimant all overtime, all weekends and public holidays worked.
- h. Damages and aggravated damages.
- i. Costs of the cause plus interest.

5. The 1<sup>st</sup> Respondent filed its Statement of Response on 10<sup>th</sup> March 2016. Its position is that the Claimants were employed by the 1<sup>st</sup> Respondent as Casual Employees on diverse dates, up to the year 2010. The 1<sup>st</sup> Respondent outsourced labour from 2010. It entered into an outsourcing contract of 3 years with the 2<sup>nd</sup> Respondent. The contract was renewed for 4 years upon expiry, to December 2016. The Claimants were placed under contract by the 2<sup>nd</sup> Respondent. They were paid terminal dues by the 1<sup>st</sup> Respondent for the period served up to 2010. They ceased to be Employees of the 1<sup>st</sup> Respondent in 2010. The 1<sup>st</sup> Respondent prays the Court to dismiss the Claim with costs.

6. The 2<sup>nd</sup> Respondent filed its Statement of Response on 18<sup>th</sup> February 2016. Its position is that it first contracted the Claimants with effect from 1<sup>st</sup> October 2013, not 2010. They were informed upon expiry of contracts, that there would be no renewal. They were asked to report to 2<sup>nd</sup> Respondent's offices for clarification, but failed to do so. They were not required to work on weekends or public holidays. Overtime worked was compensated. They took annual leave on pro-rata basis. The 2<sup>nd</sup> Respondent urges the Court to dismiss the Claim with costs.

7. The 1<sup>st</sup> Claimant testified on 10<sup>th</sup> November 2016 and on 20<sup>th</sup> February 2018. The 2<sup>nd</sup> Claimant, 3<sup>rd</sup> Claimant, and 4<sup>th</sup> Claimant, testified on 20<sup>th</sup> February 2018. The 5<sup>th</sup> Claimant testified on 12<sup>th</sup> June 2018, when Claimants' case closed. The 1<sup>st</sup> Respondent did not call any Witness, opting to rely on the Pleadings, Documents and Submissions, filed by the Parties. The 2<sup>nd</sup> Respondent's Human Resource Manager, Ibrahim Alhaji, testified on the same date, 12<sup>th</sup> June 2018, bringing the hearing to an end. The matter was last mentioned on 9<sup>th</sup> October 2018, when Parties confirmed the filing of their Submissions.

8. The 1<sup>st</sup> Claimant confirmed he was employed alongside his Co-Claimants by the Respondents, as stated in the Statement of Claim. He explained that an Extrusionist's role, involves preparation of the rollers. He confirmed that the Claimants worked until 2010 when they were placed under the 2<sup>nd</sup> Respondent.

9. The Claimants all worked continuously. They did not go on annual leave. They worked 2 weeks of day shift and 2 weeks of night shift, every month. They were paid overtime at 1.5 hourly rate instead of double rate. N.S.S.F was deducted but not remitted. When they were placed under the 2<sup>nd</sup> Respondent, they were paid terminal dues shown in 1<sup>st</sup> Respondent's exhibit 3. There was no consultation on payable terminal dues. They were assured their contracts had not been terminated.

10. They were issued fresh contracts of 3 months by the 2<sup>nd</sup> Respondent, in 2013. On other occasions, they worked without written contracts. The 2<sup>nd</sup> Respondent issued Claimants with 6 months' contracts in April 2015. Neither Party signed these contracts. N.S.S.F contributions were remitted inconsistently.

11. The Claimants received a letter dated 28<sup>th</sup> September 2015 to the effect that there would be no renewal. They were not paid terminal dues. They worked all public holidays, except idd-ul fitr. Termination was without notice and/or cause. The Claimants asked for conversion to permanent terms. Their request was denied. They were told not to join a Trade Union of their choice. If they joined, they would be dismissed.

12. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants associated themselves fully with the evidence of the 1<sup>st</sup> Claimant.

13. On cross-examination, the 1<sup>st</sup> Claimant testified that he does not represent the Co-Claimants in this dispute. The Claimants worked continuously. The 2<sup>nd</sup> Respondent entered the scene in 2010 not 2013. Claimants' pay slips for 2015 were in the name of the 2<sup>nd</sup> Respondent. In 2014 they issued in the name of the 1<sup>st</sup> Respondent. Pay slips issued only after the Claimants demanded they are issued. The Claimants were asked by the 2<sup>nd</sup> Respondent to present themselves at 2<sup>nd</sup> Respondent's offices when the last contracts expired. They did so. They did not forge any of the pay slips on record. It is not true that they declined offer for alternative employment from the 2<sup>nd</sup> Respondent. The 5<sup>th</sup> Claimant told the Court that the Claimants worked on all public holidays including the various idd holidays. They were not privy to the contracts executed between the Respondents. They claim service pay from both Respondents. They have not pleaded specific overtime pay. The last contracts stood terminated, if not renewed. Lastly, the Claimants testified that the Respondents brought confusion to the Claimants' terms and conditions of service. The Claimants did not refuse to continue working.

14. Alhaji testified that the 2<sup>nd</sup> Respondent was contracted to manage 1<sup>st</sup> Respondent's manpower, from 1<sup>st</sup> October 2013. The 2<sup>nd</sup> Respondent did not terminate Claimants' contracts; the contracts expired. 1<sup>st</sup> Respondent determined the contract period, depending on availability of work.

15. The 1<sup>st</sup> Respondent indicated to the 2<sup>nd</sup> Respondent that there was no more work. The 2<sup>nd</sup> Respondent instructed the Claimants to report to 2<sup>nd</sup> Respondent's Office, to be offered alternative jobs. The Claimants did not heed instructions. Overtime was paid at the end of each month as captured in Claimant's pay slips. Leave was paid pro-rata as shown in the various contracts. Statutory dues were remitted to N.S.S.F and N.H.I.F.

16. Cross-examined by the Claimants' Advocates, Alhaji testified the 2<sup>nd</sup> Respondent became an agent of the 1<sup>st</sup> Respondent, in October 2013. The 1<sup>st</sup> contract between the Respondents indicates effective date was 7<sup>th</sup> January 2010. The date was postponed to 2013. The 2<sup>nd</sup> Respondent found some Employees already employed by the 1<sup>st</sup> Respondent, and started managing them. The workplace remained Mombasa Polythene. 1<sup>st</sup> Respondent supplied details of the Employee's personnel files. The contracts issued to the Claimants were periodical, but continuous in nature. The Claimants never stopped working for the period they were placed under the 2<sup>nd</sup> Respondent. The Claimants were placed under contracts by the 2<sup>nd</sup> Respondent in 2013. The copies of contracts exhibited in Court are unsigned. They would work overtime voluntarily. Any work done in excess of 8 hours daily, was compensated. Annual leave was paid as 1.75 of the basic pay, in accordance with the contracts. Any defaults in the N.S.S.F Statements on record, is attributable to the N.S.S.F. The Respondents remitted contributions in full.

17. Cross-examined by the Advocate for the 1<sup>st</sup> Respondent, Alhaji testified that there was no evidence to show the contract of 2010, between the Respondents, was deferred to 2013. The Claimants state they were placed under the 2<sup>nd</sup> Respondent in 2010.

18. Redirected, Alhaji testified that copies of its contracts with the Claimants were signed. The contracts lapsed at the end of 6 months. The Claimants do not seek refund of unremitted N.S.S.F deductions.

#### **The Court Finds:-**

19. The Claimants were employed on various dates as Extrusionists /Operators in the years 2000, 2002, 2003 and 2007. They were employed by the 1<sup>st</sup> Respondent to work at the 1<sup>st</sup> Respondent's workplace, and were under the control of the 1<sup>st</sup> Respondent, until the year 2010. They worked in continuity and cannot be deemed to have been on casual employment, for the aggregate number of years worked up to 2010 and beyond.

20. On 7<sup>th</sup> January 2010, the 1<sup>st</sup> Respondent entered into a contract for provision of labour services, with the 2<sup>nd</sup> Respondent. The contract was to run for a period of 3 years, ending 30<sup>th</sup> June 2013.

21. There is no evidence from the 2<sup>nd</sup> Respondent to establish that the effective date was postponed to 2013. There is evidence however that the Respondents executed another contract at the end of the 3 years. The 2<sup>nd</sup> contract was for another 3 years, running from 1<sup>st</sup> July 2013 to 31<sup>st</sup> December 2016.

22. The Claimants were therefore Employees of the 1<sup>st</sup> Respondent until 2010, when the 1<sup>st</sup> Respondent agreed with the 2<sup>nd</sup> Respondent, that the Claimants are placed under the employ of the 2<sup>nd</sup> Respondent effective from the date when the 1<sup>st</sup> contract between the Respondents, was executed- in the year 2010.

23. Liability to the Claimants, if any, should be apportioned to the Respondents, in proportion to the years the Respondents were Employers, of the Claimants.

24. The last contracts dated 1<sup>st</sup> April 2015, executed between the 2<sup>nd</sup> Respondent and the Claimants, alleged to have been for a period of 6 months, are unsigned, by the Parties. Those exhibited by the Claimants as well as by the Respondents, are all unsigned.

25. Section 9 of the Employment Act 2007, requires a contract of service for a period or number of working days, which amount in the aggregate to the equivalent of 3 months or more; or which provides for the performance of specific work which could not reasonably be expected to be completed within a period or number of working days in the aggregate to the equivalent number of 3 months; *shall be in writing*.

26. Section 9 [2] places the responsibility on the Employer who is a party to the contract, to cause the contract to be drawn up, stating particulars of employment. Subsection [3], requires the Employee consents to the terms and conditions of employment, by signing his name thereof; or by imprinting thereon, his thumb or 1 of his fingers, in the presence of a person other than his Employer.

27. The contracts exhibited by the Parties have no validity under Section 9[3] of the Employment Act 2007. The terms and conditions of service given under these contracts cannot be relied upon by the Court.

28. It has not been shown that the Claimants were employed by the 2<sup>nd</sup> Respondent on 6 months' contracts, which lapsed, and were not renewed.

29. The 2<sup>nd</sup> Respondent wrote to the Claimants on 28<sup>th</sup> September 2015, advising that the contracts would not be renewed after they lapsed on 30<sup>th</sup> September 2015. There was no reason justifying termination, other than that the Claimants were on 6-months' contracts which had lapsed.

30. The contracts relied upon to show this however, are not signed by the 2<sup>nd</sup> Respondent and importantly, by the Claimants and a Witness, other than the 2<sup>nd</sup> Respondent. The contracts are legally invalid.

31. Section 43 of the Employment Act requires that the Employer shall prove the reason or reasons for termination. Where the Employer fails to do so, termination is deemed to have been unfair, within the meaning of Section 45 of the Employment Act 2007.

32. Without exhibiting valid contracts, the 2<sup>nd</sup> Respondent has not shown that the Claimants' contracts expired after the contracted 6 months. Secondly, it is not possible to accept that the contracts were not automatically renewable, the Claimants having worked from as early as the year 2000. In 2015, some had worked for about 15 years in continuity. What evidence is there, that they were to work lastly on 6 months' contracts, which would not be renewed on expiry? Why would the 2<sup>nd</sup> Respondent turn Claimants' long term indefinite contracts into 3 months' or 6 months' term contracts? Did the Claimants concede this change in writing? The contracts adopted by the 2<sup>nd</sup> Respondent, in establishing its position on the reason or reasons for termination, are not valid.

33. In the respectful view of the Court, the 2<sup>nd</sup> Respondent was Claimants' last Employer. It was for the 2<sup>nd</sup> Respondent to show valid reason or reasons, justifying its decision of 28<sup>th</sup> September 2015. No such reason is, or reasons are, shown. Termination was unfair under Sections 43 and 45 of the Employment Act 2007. The Claimants merit compensation for unfair termination.

**34. The Claimants worked under the 2<sup>nd</sup> Respondent for the same number of years, from 2010 to 2015. They are allowed compensation for unfair termination, equivalent to 5 months' salary each, at Kshs. 69,240.**

**35. They are allowed the prayer for 1 month salary in lieu of notice, at Kshs. 13,848 each.**

36. There is evidence, from the pay slips on record that, the Claimants were paid overtime for excess hours worked, every month. The 1<sup>st</sup> Claimant testified that overtime work was compensated at the hourly rate of 1.5 hours. There is in any case no specific claim pleaded, for overtime pay. The Claimants make an omnibus prayer for '*all overtime, all weekends and public holidays.*' Similarly, the pay slips have shown that the Claimants received pro-rata annual leave pay. They have not accounted for what was paid, in their pursuit of annual leave pay, over their entire working period. These prayers are rejected.

37. Evidence of work done during public holidays is insufficient and inconsistent. The 1<sup>st</sup> Claimant testified it was only on idd-ul fitr that the Claimants did not work. His colleague, the 5<sup>th</sup> Claimant, testified that the Claimants worked on all public holidays including idd-ul fitr and idd-ul adha. This evidence is not tenable. The prayer for public holiday pay, which is duplicated under paragraphs [e] and [g] of the prayers in the Statement of Claim, is rejected.

38. There is evidence from the pay slips, and the N.S.S.F statements, that the Claimants were actively subscribed to the N.S.S.F. If there are gaps on remittance of contributions, this is a matter which the Claimants ought to pursue with the N.S.S.F, to enable them have full enjoyment of their pension. It is not a default which calls for the Court to extend the service pay regime to the Claimants. The statements are provisional. The Respondents state, they remitted N.S.S.F contributions, and default in the statements could be attributed to the N.S.S.F. The Claimants have not established that they merit service pay.

39. They have not established that they merit general and aggravated damages. The award of compensation serves to redress economic damage suffered by the Claimants, as a result of their loss of employment. The prayer for general and aggravated damages is declined.

**40. No order on the costs.**

**41. Interest allowed at 14 % per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

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

**b. Liability is apportioned to the 2<sup>nd</sup> Respondent solely.**

**c. The 2<sup>nd</sup> Respondent shall pay to each Claimant equivalent of 5 months' salary in compensation for unfair termination, at Kshs. 69,240 amounting to Kshs. 415,440.**

**d. The 2<sup>nd</sup> Respondent shall pay to each Claimant 1 month salary in lieu of notice, at Kshs. 13,848, amounting to Kshs.**

83,088.

e. In total the 2<sup>nd</sup> Respondent shall pay to the Claimants Kshs. 498,528 in full and final settlement of the Claim.

f. No order on the costs.

g. Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 25<sup>th</sup> day of January 2019.

James Rika

Judge