



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 219 OF 2014

BETWEEN

- 1. ROBERT KAZUNGU KAINGU**
- 2. JAMES MATONGOLO MBAYA**
- 3. VINCENT ALAI NDALA**
- 4. MUSEMBI MUNUVE**
- 5. NEPHORY SHAKI MASAGA**
- 6. SAMUEL KALAMA RUWA**
- 7. SULEIMAN KOMBO**
- 8. AGGREY OKUSIMBA SIRAKU**
- 9. FRANKLINE FILOTWA BENARD**
- 10. SILVESRTER NZAKA MGANGA**
- 11. MWANIA MULONZIA**
- 12. KUTOJA NGANDA MWADZUMA**
- 13. WILFRED OSASO ARATI**
- 14. ALEX KADENY**
- 15. BENARD MWAKESI**
- 16. MAGARO DUME YAWA**
- 17. MAKAU MUMO**
- 18. CHANGAWA NZAI KOMBE**
- 19. JULIUS ODHIAMBO OGUTU**
- 20. LENNY ODONGO**
- 21. TOYO CHAKA MBEGA**
- 22. JOSEPH ODIANYA OKOYA**
- 23. HENRY FUNDI MWASISHO**

24. NDINDA BENDERA MWENDA
25. DEEN BARRY
26. MKAUMA MDIGO MAGONGO
27. JACKSON OTIENO OJUANG
28. JEREMIAH OTIENO OKUMU
29. MARTIN KITSAO NYOTA
30. FRANCIS NDEGWA DZINARE
31. KALU NZOLE CHAMBU
32. IBRAHIM ONGWEKO WAFULA
33. FAIDA KAHINDI BIMWALEWA
34. ALEX JONATHAN TITUS
35. SULEIMAN HUSSEIN CHIBUDU
36. STEPHEN NGELA GEORGE
37. DIO CHOMBO DIO MASHUD
38. REGINALD ANTHONY PAUL
39. CHILALU KATERIA CHOME
40. PAUL MULEI
41. ELIUD KAZUNGU KATANA
42. CHARLES LIMO KASUKA
43. JOHA TSUMA RASHI
44. DAVID NJERI KATSINA
45. STEPHEN NZUMA KILUNGYA
46. DOUGLAS LICHACHA INDULACHI
47. BAKARI CHABO
48. HASSAN MKAUMA TSAMA
49. MUNGUMI CHIRUNGA
50. MAISHA GONA JOSEPH
51. SILAS MLALA DARAVA
52. ONGWEKO STEPHEN JUMA
53. ALI MWANDUKA
54. DANIEL J. MBINGO
55. JOB ONYENGO OTIENO

56. ABEL KYENGO MULELA
57. NICODEMUS KASEVE MULWA
58. MARTIN KILUU KONGO
59. SALIM CHAMBA DUME
60. MANGALE YAWA NYAMAVI
61. ABEDNEGO MUSYOKA
62. ISSAC OPIYO INUNDI
63. HARUN GITAU
64. VINCENT OPAYO AYIMBO
65. BENSON MUTHOKA MAKAU
66. AUGUSTINE OCHIENG OTIENO
67. ALI SAHA MKAUMA
68. MICHAEL OKOTH
69. MAURICE ATIENO ABONDO
70. GEOFFREY KALOKI SAILI
71. JEPHA NYAWA MWACHIT
72. GEORGE OTIENO NYONGO
73. DICKSON SHAURI LWAMBI
74. PATRICK KAZUNGU KARISA
75. JONATHAN CHIRO SANGA
76. KHERI MKUZI TSAMA
77. ELISHA NETO OKUMU
78. MALAU MWERO MKALA
79. KIBWANA ALI MSINDA
80. LUCAS OWINO OWIDHI
81. MAYAMA MEZI
82. DAVID MUGALU MWABONU
83. PATRICK ODHIAMBO
84. ABDALLA DUME KANDORO
85. LUNGWE TSOYEYE
86. HAMISI MAKANGA NDORO
87. GEORGE OTIENO NYONGO

88. STEPHEN OMANGA ONYIKWA
89. HAMISI TAANGARI NGOLOKOLO
90. BONIFACE MBOGO NJAGI
91. DANSON MWAPEA MWASI
92. SAMBA MWAKOYO SIMBA
93. MYAMBU CHENGO MANGALE
94. NGAO MANGISI NGAO
95. FRANCO MWENI TUMBO
96. NICHOLAS MUTUA MUSANGO
97. HARRISON KARIGA KIBIGU
98. ELISHA KAZUNGU KATANA
99. RAYMOND DUME MUNGA
100. KATNE KILUNGYA MWAU
101. ILINGU KIEMA
102. JACKSON MWIKAMBA MUNYASYA
103. FRED WAFULA SIMIYU
104. DANIEL NDEGWA CHIVUTO
105. SAMMY SAHA SHUBI
106. NGULI THOMAS
107. PATRICK MUANGE KIMULI
108. MBITHI N.MBUVI
109. FONDO MKAMBA CHIVUTO
110. ALI HUSSEIN JILO
111. RAPHAEL KAHINDI KATANA
112. PANGA EDWARD MKUZI
113. NGALE FUKWE DENA
114. CHABO MRUU KABAJI
115. MAKAU MUSYOKA MULI
116. HAMISI KALONZI BENARE
117. JOSEPH ODHIAYA OKOYO
118. ALEX NYONDO
119. MATANO BAKARI KUSEYA

120. HASSAN NGALE JOHN
121. SAMUEL KAVU CHENGO
122. REMIGIUS ODHIAMBO OSAMO
123. ALI AMBARI JAKA
124. DANIEL SAHA KAGUMBA
125. MICHAEL SAIDI NDECHE
126. MUSILI MUTEMI
127. SALIM NDORO MANGALE
128. NGOWA NYONDO MAKANGA
129. AMOSI MUDHAMBKI KITHEKA
130. DAN ODERA WELLINGTON
131. STEPEHEN NZOLE CHOMBO
132. ELEPALET PAMBA
133. YONA MEYO ONGIA
134. JOSEPH PINY
135. SILAS BWIRE OUMA
136. JOSPHAT MUNENE KANYI
137. DOUGLAS MWANGOMA MWARABU
138. ALI MWABEGA KAHOLE
139. ALEX KEDENYI
140. WILFRED OSASO ARATI.....CLAIMANTS

VERSUS

COOK 'N' LITE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oduor Siminyu & Company Advocates for the Claimants

Aboo & Company Advocates for the Respondent

JUDGMENT

1. This Claim was filed by a group of 285 former Employees of the Respondent. The initial Statement of Claim was filed on 2nd May 2014. The Statement of Claim was subsequently amended culminating in the Amended Statement of Claim, filed on 11th June 2014. The number of the Claimants was amended to 157 Claimants, from the initial list of 285.

2. On 7th June 2018, Parties filed a consent letter, to the effect that:

a) The correct number of Claimants herein is 156 as per the Amended Statement of Claim.

b) The number of the Claimants is reduced from 156 to 147 to exclude 9 Claimants, who have not appended their signatures giving authority to ROBERT KAZUNGU to pursue this Claim.

3. However, the Authority to Act, given to ROBERT KAZUNGU, which is attached to the Amended Statement of Claim, is signed by 140 Claimants, whose names are shown in the title to this Claim, captured above.

The Claim

4. The Claimants aver that they were employed by the Respondent at the onset on the year 1999, as Casual Employees.

5. They went on a go-slow in early 2014, to press for improvement of their terms and conditions of employment. Through their Union, Kenya Engineering Workers Union [KEWU], they wrote to the Respondent on 9th April 2014, seeking amicable settlement of their collective grievances. The grievances included failure by the Respondent to raise their wages; lack of paid annual leave; denial of sick leave; non-payment of overtime; lack of social security benefits; and lack of medical cover. Rather than address the grievances, the Respondent opted to summarily dismiss the Claimants.

6. They pray for Judgment against the Respondent in the following terms:

a) 1 month salary in lieu of notice.

b) Accumulated annual leave pay.

c) Public Holidays.

d) Service pay.

e) House allowance.

f) Travelling allowance.

g) N.S.S.F dues deducted, but not remitted.

h) Damages for wrongful termination.

i) Costs.

j) Interest.

The Response and Counterclaim

7. The Respondent answers that the Claimants were its Casual Employees. They were Members of KEWU. The Respondent had entered into an agreement with KEWU, to have the Claimants gradually converted into regular terms and conditions of employment.

8. However, on 7th April 2014, the Claimants went on an illegal strike. They paralyzed the operations of the Respondent, from 7th April 2014 to 14th April 2014. This illegal strike was condemned by KEWU and the Labour Office. KEWU General Secretary recorded a Statement, which is in the record of the Court, holding the position that the KEWU did not authorize the strike action, and that the Claimants had not given the Respondent and KEWU time, to exhaust the dispute settlement mechanism, under the workplace labour contracts concluded between the Respondent and KEWU. The Labour Office advised the Respondent to notify striking Employees to resume work. The Respondent did so. Some Employees returned to work. The Claimants did not. Their contracts were not terminated by the Respondent. Those who returned went on working.

9. The Respondent even went further, and advertised for casual vacancies after the Claimants left. The Claimants did not apply, or avail themselves to continue working.

10. The illegal strike resulted in production losses for the Respondent, in the sum of Kshs. 20,493,760. The Respondent counterclaims this amount from the Claimants.

11. The Claimants did not work in continuity. The attendance sheets, exhibit 5 of Respondent's documents, shows attendance was inconsistent. Some Claimants would be away from work for as long as 5 months.

12. The Respondent prays the Court to dismiss the Claim, and allow the Counterclaim, with costs to the Respondent. The Claimants filed a brief Reply to the Statement of Response, and Response to the Counterclaim, on 19th August 2014.

Conciliation

13. On 22nd July 2014, the Court referred the dispute for conciliation before the Labour County Officer, Mombasa County.

14. Parties appeared before the County Labour Officer, and made their representations on various occasions.

15. The Labour Officer filed his Report in Court on 13th November 2014.

16. His Findings and Observations are as follows:-

- Parties agreed that the Claimants were on term contracts. They were paid wages on weekly basis.
- Parties agreed that the Claimants went on strike 7th April 2014.
- It was not disputed by the Claimants that the strike was not authorized by their Union, KEWU.
- The Claimants did not give notice to the Respondent for work stoppage. They failed to return when required to return. Termination of employment was at the instance of the Claimants. It was unlawful, and without notice. They ought to pay notice to the Respondent.
- The Respondent should pay any annual leave dues owed to the Claimants.
- Public holiday worked should be compensated at single daily rate, from the date the Claimants were placed on term contracts, to the time they left.
- House allowance was included in the periodical wages paid to the Claimants, and therefore not payable in arrears.
- Any Claimant who made a request to be paid leave travelling allowance where applicable, and was not paid, should be paid if he worked for 2 months continuously.
- The claim for unremitted N.S.S.F deductions is not supported by documents, and is therefore not sustainable.
- The Claimants acted in breach of contract by engaging in illegal strike. They should be held liable for the loss incurred by the Respondent.

Further Orders of the Court:-

17. On 29th November 2017, the Court recorded the following main orders, with the consent of the Parties:-

- The Claim shall be considered and determined based on the Conciliation Report on record.
- Parties to file Submissions, showing why they agree, or do not agree with the Conciliation Report.

Submissions

18. **The Claimants** do not agree with the Conciliation Report on the nature of their strike action. They submit that they issued notice to the Respondent before going on strike. They rely on a strike notices filed by the Claimants in Court on 9th July 2015, dated 9th September 2013 and 10th June 2013 respectively. They are entitled to notice pay.

19. They agree with the recommendation of the Conciliator, that they are entitled to annual leave pay.

20. They accept the recommendation that they are paid for Public Holidays worked, in the period they were engaged under contract.

21. The Claimants submit they are entitled to house allowance in arrears. What they were paid did not include the housing element.

22. The prayer for leave travelling allowance is withdrawn through the Claimant's Submission. The Court record shall reflect this prayer as withdrawn.

23. The Claimants submit they are entitled to refund of unremitted N.S.S.F deductions. They submit they were unable to access N.S.S.F records.

24. The recommendation that the Respondent is entitled to recover from the Claimants, lost income sustained through interrupted production, is not based on evidence. There are no profit and loss accounts; balance sheets; and commercial contracts, exhibited by the Respondent, showing any loss was suffered, as a result of the industrial action called by the Claimants. The Counterclaim has no merit.

25. **The Respondent** relies on this Court's decision in *Elvis Isangi Mwandemba & 71 others v Devki Steel Mills Limited & another [2016] e-KLR*, where the Court held that:-

- Employees did not have continuity of service.
- They worked under different contracts, which had their own rights and duties, and consequences at every lapse.
- It was unreasonable to claim terminal benefits on the assumption that service was uninterrupted.
- Events leading to termination were co-authored by the Employees.
- Employees had no reason to expect to be paid notice, having engaged in strike action.
- The Claim was rejected in its entirety with no order on the costs.

26. The Respondent asks the Court to uphold Conciliator's recommendation on notice pay. No strike notice was issued by KEWU. The action was disowned by KEWU General Secretary, in his Statement filed in Court.
27. On annual leave pay, the Respondent submits it is willing to pay such, on presentation of valid claims.
28. The Respondent submits it has exhibited N.S.S.F records, showing full compliance under the N.S.S.F Act, with respect to all Employees.
29. The Respondent lastly submits it is entitled to recover loss of income occasioned through the Claimant's wildcat strike. The Respondent has given a schedule, detailing this loss. Parties were bound in contract, to meet their obligations. The Conciliator found the Claimants were liable for the loss occasioned to the Respondent. The Court should uphold this finding and recommendation.

The Court Finds:-

30. The Claimants were employed by the Respondent Company on various dates, dating back from 1999. They were employed as Casual Employees.
31. They were Members of Kenya Engineering Workers Union, which had a Recognition Agreement and Collective Bargaining Agreement with the Respondent. Employment and labour relations involving the Respondent, the Claimants and KEWU, were regulated by these labour contracts.
32. On 7th April 2014, the Claimants went on a wildcat strike. They did not involve their Union. Rule 18 of the KEWU Constitution reserves the right of calling Employees to withdraw their labour, on the Executive Committee of KEWU.
33. Section 76 [c] of the Labour Relations Act 2007, gives authorized representatives of Trade Unions, Employers or Employers' Organizations, the mandate of issuing strike notices to the relevant Minister and other affected Parties.
34. The law does not permit Employees, more so where such Employees are Members of a Trade Union, to issue strike notices.
35. KEWU did not issue any strike notice to the Respondent and the Labour Office, before the strike of 7th April 2014.
36. The Statement filed by General Secretary KEWU, Charles Natili [exhibit 2 of Respondent's bundle], clearly establishes that the industrial action taken by the Claimants was illegal. The Claimants declined the instructions of their Trade Union to abandon their activities, and channel grievances through the established industrial relations machinery. The General Secretary states he was ready to engage with the Respondent under this machinery. The grievances raised by the Claimants were matters regulated under the machinery created by their Employer and their Union. The strike was therefore a prohibited strike, under Section 78 of the Labour Relations Act.
37. The strike notices exhibited by the Claimants dated 9th September 2013 and 10th June 2013, did not issue in accordance with KEWU Constitution and the Labour Relations Act. It is not clear if the notices in any event, are relevant to the strike of 7th April 2014. The 1st notice contains a host of grievances and states, "*Kwa hivyo, mgomo utaendelea, kama ulivyo pangwa siku yeyoye*" [Kiswahili for "*the strike will go on as planned, at any time.*"] This notice assuming it was relevant to the events of 7th April 2014, cannot be a valid strike notice. It is an indefinite notice of intention to engage in a strike. It is issued by the wrong persons, and is in the wrong form. The 2nd notice states that Casual Employees would go on strike on 10th June 2013, until the following matters are settled: -

- 14% wage increment.
- Arrears [of what?]
- 2 off duties [days?] to be removed.
- Weekly payment.

The notice is unsigned. It does not specify the notice period. The issues listed on the notice are as stated elsewhere, negotiable subjects under the labour contracts concluded between the Respondent and the Union. Any strike action following such a notice would be a prohibited strike. There is no link shown by the Claimants, between this notice and the strike action of 7th April 2014.

38. The Court upholds the finding and recommendation of the Conciliator, that the Claimants engaged in an illegal strike, and are not entitled to notice pay.
39. The Respondent asked the Claimants to abandon their strike and resume duty. The Claimants' Union advised as much. The Claimants did not resume. They rejected the counsel of their own Union and are reported to have sought audience instead, with the Governor Mombasa County, to agitate for better terms and conditions of service. Why would Workers reject the industrial machinery available to them, and resort to political intervention? The Respondent advertised vacancies. The Claimants did not resume, or apply to be employed in these vacancies. The Respondent did not terminate their contracts, little less, wrongfully terminate the contracts.
40. The prayers by the Claimants for salary in lieu of notice and for damages for wrongful termination are rejected.
41. The total Claim, less damages for wrongful termination, is tabulated at Kshs. 22,692,633 as per the Amended Statement of Claim.
42. The Court is satisfied that the Conciliator reached a correct finding on house allowance. The Claimants were paid a rate which included

the housing element. Their prayer for arrears of house allowance has no merit and is rejected.

43. There are no records from the N.S.S.F to support their prayer for refund of N.S.S.F deductions. The Claimants have not exhibited any Statements of Accounts. They state they do not even know their N.S.S.F registration numbers. How is the Court to order they are refunded N.S.S.F deductions in a vacuum? The Respondent exhibited its own N.S.S.F records, for the year 2011, shown to have been received at the N.S.S.F Office in Mombasa, indicating contributions were received at the N.S.S.F. The Claimants have not disputed these records. The Court is of the view, if there were contributions deducted and unremitted over other years of service, the Claimants ought to pursue the Respondent at the N.S.S.F Office, under the N.S.S.F Act for compliance.

44. The rest of the prayers consist Leave Dues, Public Holiday Pay, Service Pay and Travelling Allowances.

45. The Respondent states it is willing to pay Leave Dues if proper claims are forwarded by the Claimants to the Respondent. The other prayers are not conceded.

46. On the Counterclaim, the Conciliator found the Claimants liable to the Respondent on notice pay. It was also the finding of the Conciliator that the Claimants were liable for the business loss sustained by the Respondent, following the wildcat strike called by the Claimants.

47. The sum counterclaimed as business loss is quoted at Kshs. 20,493,760 in the Statement of Response and Counterclaim. In a letter dated 15th August 2014 from the Respondent to its Advocates, the amount is quoted at Kshs.29,925,470. This latter sum is restated in Respondent's Closing Submissions.

48. The Respondent has not shown the specific amount lost as a result of the strike action. The Court however agrees with the Conciliator that the Respondent made business loss, following the illegal strike. What the Respondent has not been able to show to the Court, is the specific amount lost.

49. There is no doubt that the Claimants had contractual obligation to discharge their functions in accordance with their terms and conditions of service, as negotiated, concluded, and from time to time reviewed, by their Employer and their Union. They acted completely outside the law and contract which regulated their employment. They ought to compensate the Respondent for lost business.

50. The Court is of the view that, what would be owed to the Claimants by the Respondent, including the prayer for annual leave which the Respondent has conceded, and other prayers which this Court has not expressly rejected, shall ultimately offset their collective liability to the Respondent. The amount claimed in the Amended Statement of Claim at Kshs. 22,692,633 should offset Claimants' liability to the Respondent, pleaded inconsistently at figures of Kshs. 20,493,760 and Kshs. 29,925,470. Although the amount of business loss has not specifically been proved, the Court is in agreement that the strike action resulted in business loss to the Respondent, which a reasonable adjudicator ought not to ignore, in addressing this Claim. As the Claimants were defying their Employer and their Union, and pouring into the streets demanding the County Governor intervenes in their workplace grievances, production lines were at a standstill at Cook 'N' Lite. The Court cannot overlook the effect wildcat strikes have upon production. The Claimants abused the legitimate right to strike. They disregarded established industrial relations machinery. They ignored the Labour Relations Act, the Labour Contracts established between the Respondent and the Claimants' Union, and the Industrial Relations Charter. Protected strikes are not delict, or in breach of the employment contract. The Employer however can, where the strikers are involved in wildcat strikes, sue for contractual or delictual damages. If the Employees' Trade Union is involved in prohibited strike, damages can be recovered from the Union. Employees who reject the advice of their Union, and engage in prohibited, outlaw strikes, expose themselves to direct liability for losses suffered by their Employer as a result of the illegal industrial actions. Even without the labour contracts concluded between the Union and the Employer, it is recognized that the Employer and the Employee have a direct relationship, with individual rights and obligations. Employees do not normally have the financial wherewithal, to meet decrees obtained by their Employers in Claims for recovery of business losses. Judgments in favour of the Employer in such situations are ordinarily, symbolic. Where the Employees claim terminal benefits such as in the present case, forfeiture of benefits, can go a long way in redressing liability owed to the Employer. Redress becomes less symbolic. The amounts owed by either Party need not be assessed with exactitude. Parties were not able to specifically prove the amounts owed to each other. In this case the Court is satisfied what is probably owed by either Party to the other, is sufficient to offset liability, and satisfy the demands of industrial equilibrium. The Respondent cannot be expected to raise money to meet the terminal demands of Employees, who have ill-advisedly withdrawn their labour, and shut down production lines. There was no production for the time the Claimants withdrew their labour. The Claimants initiated the chain of events which ended in loss of employment to them, and loss of business to the Respondent.

51. **IT IS ORDERED:-**

[a] Termination was at the instance of the Claimants. What would have been due to the Claimants shall compensate the Respondent for loss of business.

[c] The file shall be marked as closed.

[d] Parties shall be supplied with a copy of this Judgment and if need be, certified copies of the proceedings, upon payment of requisite Court Fees.

Dated and delivered at Mombasa this 25th day of January 2019.

James Rika

Judge