



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 225 OF 2015

DAVID KWOPA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 224 OF 2015

FREDRICK ONYANG OKAKA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 226 OF 2015

NICHOLAS MALENYA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 229 OF 2015

WYCLIFFE MUTAI.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 254 OF 2015

TIMOTHY MUDDY MUTSOLI.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 254 OF 2015

KENNETH MUKANGALA KAGALI.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The claimants are all former employees of the respondent, a limited liability company, incorporated in Kenya and carrying on business in Kisumu and other cities and towns within Kenya. The respondent's main activity is milling of maize and wheat for human consumption and milling of animal feed. The claimants were all engaged in the animal feed milling section.

On 5th November 2013 the respondent issued a notice of redundancy to the General Secretary, Bakery, Confectionery, Food Manufacturing and Allied Workers Union (Kenya). The self-explanatory notice is reproduced below–

“5th November 2013

Ref: Union/2013/073

The General Secretary

BACOFOMAWU(K)

P.O. Box 57751 – 00200

NAIROBI

RE: CLOSE DOWN NOTIFICATION OF FEED MILL

Lately the demand for animal feeds has declined due to introduction of Value Added Tax (VAT) notwithstanding farmers resorting to blending feeds for their animals at farm level. The company has equally been running the feed mill well below its optimum capacity leading to huge production overheads.

In view of the aforesaid, the company will shut down feed mill operations effective 31st December 2013 thus a total of fourteen employees will be laid off.

Pursuant to the Collective Bargaining Agreement (CBA) Clause 7 (b) and Employment Act 2007 section 40 you are hereby notified and formally invited for discussions on Thursday, 14th November 2013 2:00 pm at our Human Resources Offices before issuance of notices to individual employees.

We look forward to your co-operation whilst embarking on the aforesaid exercise.

Yours Faithfully,

SIGNED

Duncan Abwawo

Human Resources Manager

CC: The Branch Secretary General – BACOFOMAWU(K)

The Chief Shop Steward – United Millers Limited

County Labour Officer – Kisumu

Regional Manager FKE – Western”

On 20th November 2013 the respondent issued notice of closure of the Feed

Mill to all permanent, casual and piece rate workers engaged at the Feed Mill. The notice is reproduced below –

“To: FEED MILL Date: 20th November 2013

(Permanent, Casual and Piece Rate Workers)

From: HR OFFICE Ref: IM/2013/0165

RE: CLOSURE OF THE FEED MILL

The company is in the process of closing down Feed Mill operations. This has been occasioned by unsustainable overheads leading to recurrent failure of the mill breaking even notwithstanding other macroeconomic factors.

In view of aforesaid, I wish to inform all of you that Feed Mill will be shut down effective 31st December 2013.

When your last working date falls due as indicated above, all of you will be required to handover company properties in your custody and obtain a clearance certificate in return for you final dues if any.

In the meantime, I take this opportunity on behalf of the management to thank you for the service you put into the company and wish you well in your future endeavours.

SIGNED

Duncan Abwawo

CC: All Notice Boards

Chief Operating Officer

Noocc: Director's office”

Unhappy with the notice, the union filed a dispute in Nairobi and obtained temporary orders staying the intended redundancy on 30th January 2014.

The claim was later transferred to Kisumu and registered as Cause No. 26 of 2014. The claim was however withdrawn by the union on 31st March 2014.

The claimants herein are some of the employees who were declared redundant by the respondent following the withdrawal of the case by the union.

Vide their separate claims filed variously on 2nd, 12th and 17th July 2015 which are identical but for the name of the claimant and the date of employment, the claimants allege that they were unlawfully terminated from employment. They seek the following remedies –

- a. One month's pay in lieu of notice
- b. Payment in lieu of untaken leave
- c. Damages for unlawful, wrongful termination of employment
- d. Damages for loss of employment (12 months's salary)
- e. Exemplary damages
- f. Costs of the claim
- g. Interest on a) – d) above
- h. Any other relief that the court may deem just and fit to grant.

The respondent filed memorandum of defence in each of the six claims in which it denies the averments by the claimants and states that it did not employ the claimants but they were employed in the respondent's Feed Mill by a labour contractor by the name Mr. Peter Were Odongo. A copy of the labour contract is annexed to the response as appendix 1.

The respondent avers that all the claimants were engaged on piece rate in the following tasks –

- a. Transferring raw materials to production floor
- b. Dosing raw materials into production process
- c. Packing of finished products
- d. Stacking
- e. Transferring finished products from production floor to storage area
- f. Loading and off-loading
- g. Rebagging

The respondent avers that the recruitment of piece rate workers was determined by work requirements and was done on daily basis by the labour contractor, referred to as “*Gang Leader*” as they worked in “*gangs*”. That the gang leader was responsible for hiring and managing all the gang members and maintained all their records including the tasks performed and the wages payable to each gang member on a daily basis. The respondent paid the gang leader who in turn paid the members of his gang according to the records he kept.

The respondent thus denies that there was any employment relationship between the claimants and the respondent.

The respondent states that the Feed Mill was closed down on 31st December 2013 and all work performed by the claimants ceased.

The respondent prays that the claim be dismissed.

The cases were consolidated on 20th July 2016 by an order made in Cause No. 226 of 2015, but to be heard under Cause No. 225 of 2015. The court further directed on the same date that Peter Were Odongo, the Labour Contractor (Gang Leader) be enjoined as a third party.

When the case came up for hearing on 10th October 2016, the court referred the matter to the County Labour Officer to investigate and prepare a report with findings and recommendations to be filed in court within 45 days. Counsel for the claimants, respondent and third party were directed to submit their memorandum to the County Labour Officer with 21 days.

Hellen Maneno, the County Labour Officer, Kisumu County, filed her report in court on 31st January 2017. In the report she made the following findings –

Investigations confirmed the following;

- That indeed the feed mill section of United Millers Ltd (Respondent) was closed down on 31st December, 2013.
- That the management/ Respondent gave the affected employees (permanent, casual and piece rate) notice of the intended closure of the feed mill as required by Section 40 of the Employment Act 2007.
- That the Union (Bakery, Confectionary Food Manufacturing Union) was also notified of the same in writing vide a letter date 5 November, 2013.
- That the Respondent had a supply of Labour Contract with one Peter Odongo Were.
- My visit to the factory also confirmed that the same system of piece rate workers is operational in certain sections of the factory such as maize and wheat milling sections, and general goods sections.
- Some of the records seen confirmed that the claimants were not working regularly or continuously in any one month.
- As a fair practice and in order to retain those piece rate workers, management used to top up the payment if the piece rates would not have reached the daily minimum rates.
- That; the monies paid to the gang members were signed from the cash office by an employee of the Respondent and given to the Contractor to pay the gang members.
- That; the employees were paid only for work done. They were not on a monthly contract.

The County Labour Officer made the following recommendations –

From the findings above, and pursuant to Section 54(1) of the Labour Institutions Act which I quote “**where the immediate employer of an employee is himself in the employment of another person and that employee is employed on the premises of that other person, that other person is for the purposes of this part deemed to be the employer of that employee jointly with the immediate employer**”

As a basis of an amicable solution to the dispute the claimants should be paid the following;

Accrued leave and severance pay as follows:

1. David Kwoba

Severance pay (10 years)	70,500/=
Leave (3 years)	<u>29,610/=</u>
Total	100,110/=

2. Nicholas Malenya

Severance pay (9 years)	63,450/=
Leave (3 years)	<u>29,610/=</u>
Total	93,060/=

3. Fredrick Onyango

Severance pay (9 years)	35,250/=
Leave (3 years)	<u>29,610/=</u>
Total	64,860/=

4. David Kwoba

Severance pay (10 years)	70,500/=
Leave (3 years)	<u>29,610/=</u>
Total	100,110/=

5. Kenneth M. Kagali

Severance pay (9 years)	42,300/=
Leave (3 years)	<u>29,610/=</u>
Total	71,910/=

6. Timothy Muddy Mutsoli

Severance pay (9 years)	28,200/=
Leave (3 years)	<u>29,610/=</u>
Total	57,810/=

The claimants and the respondent accepted the report of the Labour Officer as a basis for resolution of the case and filed submissions on the report of the Labour Officer.

The claimants submitted that the computation by the Labour Officer did not take into account all their years of service as follows –

- a. David Mukhebi Kwoba – served from 1994 to 2013 = 19 years
- b. Nicholas Malenya – served from 1998 to 2013 = 15 years
- c. Fredrick Onyango – served from 2000 to 2013 = 13 years
- d. Kennedy Kagali – served from 2003 to 2013 = 10 years
- e. Timothy Muddy Mutsoli – served from 2007 to 2013 = 6 years
- f. Wycliffe Mutayi – served from 1996 to 2013 = 17 years

The claimants submitted that they were not piece rate employees but were in fact permanent employees of the respondent and served for several years and must be treated as such in determining their terminal dues.

That the years worked were not as indicated by the Labour Officer and the same had been unfairly and grossly underestimated to deny them their full dues after they had diligently and faithfully served the respondent, who was in fact their employer.

That the years computed for the leave earned but not taken had also been underestimated.

The claimants tabulated their benefits as follows –

a. David Kwoba

Severance Pay $470 \times 15 \times 19 = 133,950$

Leave for 19 Years $14,100 \times 19 = 267,900$

Total 401,850

b. Nicholas Malenya

Severance Pay $470 \times 15 \times 15 = 105,750$

Leave for 15 years $14,100 \times 15 = 211,500$

Total 317,250

c. Wycliffe Mutai

Severance Pay $470 \times 15 \times 17 = 119,850$

Leave for 19 Years $14,100 \times 17 = 239,700$

Total 359,550

d. Fredrick Onyango

Severance Pay $470 \times 15 \times 13 = 91,650$

Leave for 15 years $14,100 \times 13 = 183,300$

Total 274,950

e. Kennedy Kagali

Severance Pay $470 \times 15 \times 10 = 70,500$

Leave for 19 Years $14,100 \times 10 = 141,000$

Total 211,500

f. Timothy Muddy Mutsoli

Severance Pay $470 \times 15 \times 6 = 42,300$

Leave for 15 years $14,100 \times 6 = 84,600$

Total 126,900

The claimants prayed that judgment be entered in their favour as computed with costs.

For the responded it is submitted that the Labour Officer found that the

claimants did not work continuously, that the table of employees attached to the claimants' submissions was never submitted to the labour office and was unknown to the respondent and that Section 74(2) of the Employment Act requires production of records to the Labour

Officer.

The respondent prays that the Labour Officer's recommendations be adopted as the judgment of the court in this matter.

Determination

I have considered the pleadings, the report of the Labour Officer and the submissions filed by both parties.

There is no dispute that the claimants were declared redundant when the respondent closed the Feed Mill where they were working on 31st December 2013. The redundancy was reported to the union and County Labour Officer on 5th November 2013, almost two months before the closure of the Feed Mill on 31st December 2013.

The employees were also notified of the closure by letter dated 20th November 2013. The notices thus complied with the requirements of Section 40.

The claimants have not controverted the evidence produced by the respondent to the effect that the claimants were employees of Peter Were Odongo under a labour contract and that they were paid through the labour contractor.

The claimants have disagreed with the length of service as set out in the report of the Labour Officer. They have however not adduced any evidence that they worked for the periods set out in their submissions and tabulation of terminal dues.

For the foregoing reasons I agree with the findings and recommendations of the County Labour Officer and enter judgment in favour of the claimants against the respondent as set out in the recommendations of the County Labour Officer as follows –

Accrued leave and severance pay

1. David Kwoba

Severance pay (10 years) 70,500/=

Leave (3 years) 29,610/=

Total 100,110/=

2. Nicholas Malenya

Severance pay (9 years) 63,450/=

Leave (3 years) 29,610/=

Total 93,060/=

3. Fredrick Onyango

Severance pay (9 years) 35,250/=

Leave (3 years) 29,610/=

Total 64,860/=

4. David Kwoba

Severance pay (10 years) 70,500/=

Leave (3 years) 29,610/=

Total 100,110/=

5. Kenneth M. Kagali

Severance pay (9 years) 42,300/=

Leave (3 years) 29,610/=

Total 71,910/=

6. Timothy Muddy Mutsoli

Severance pay (9 years) 28,200/=

Leave (3 years) 29,610/=

Total 57,810/=

TOTAL PAYMENTS 488,460

The respondent shall pay claimants' costs.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 24TH DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 14TH DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE