



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 694 OF 2016

BETWEEN

1. TIME ABDALLA
2. HASSAN SAID
3. ATHMAN WACHU
4. MOHAMMED SHUGA
5. SWABIR MOHAMMED
6. MUNGA NDUNE
7. BAKARI FUMO
8. MIKDADI YUSUF
9. ORPA JAVAN
10. SOFIA KASSIM
11. NURU ALI
12. AMINA CHIZI
13. MERCY SHADRACK
14. ISSA TUNU
15. KONDE KADZENGA
16. MONICA ATHIENO
17. EVERLIN JAKA
18. STEPHEN BAYA
19. JOSEPH OGETO
20. BARACK OWINO
21. JOSEPH KINUTHIA
22. GEORGE ODIEDO.....CLAIMANTS

VERSUS

1. MOMBASA MAIZE MILLERS LIMITED

2. READY CONSULTANCY COMPANY LIMITED.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Tolo & Company Advocates for the Claimant

V.N.Okata & Company Advocates for the 1st Respondent

Birir & Company Advocates for the 2nd Respondent

JUDGMENT

1. The 22 Claimants above, filed their Statement of Claim on 21st September 2016. They aver they were employed by the Respondents, on diverse dates, beginning January 2008, ending 16th January 2016. They were employed in different positions, including machine operation, stamping, milling and packing. Some aver they were employed by the 1st Respondent initially, before being placed under the 2nd Respondent in 2011. The 2nd Respondent is a labour outsourcing business. They were paid different daily rate of between Kshs. 530 and Kshs. 650.

2. They allege they were summarily dismissed by the 2nd Respondent on 16th January 2016. A meeting convened on 28th January 2016 by the Labour Office, Mombasa resolved, in a return-to-work formula, that the Claimants are allowed to continue working at the 1st Respondent, and if not assigned work, they report to the 2nd Respondent. The Respondents did not implement the resolution.

3. They ask the Court find termination was unfair, and order the Respondents to pay to them, terminal benefits comprising notice; annual leave; service; and public holidays' pay. They seek compensations for unfair termination. These claims total Kshs. 8,600,550. They ask for costs, interest and any other suitable relief.

4. The 1st Respondent filed an Amended Statement of Response dated 27th October 2016. It denies to have employed the Claimants from January 2008 to 16th January 2016. It entered into an outsourcing agreement with the 2nd Respondent, from 1st January 2012. It was agreed the 2nd Respondent would provide the 1st Respondent with all staff, and manage all staff, for smooth operations of the 1st Respondent. At the time of takeover by the 2nd Respondent, the 22 Claimants were not employed by the 1st Respondent. The 1st Respondent does not have any records of the Claimants. The 1st Respondent is unaware of circumstances leading to Claimants' contracts being terminated. The 1st Respondent did not participate in the process leading to termination. Without prejudice to the foregoing, the 1st Respondent states if the Claimants worked for the 1st Respondent, their claims against the 1st Respondent, are time-barred under Section 90 of the Employment Act. The 1st Respondent prays to have the Claim dismissed with costs.

5. The 2nd Respondent filed its Statement of Response on 9th May 2017. It similarly denies having employed the Claimants, from January 2008 to 16th January 2016. The Claimants were Casual Employees at the 1st Respondent. They were paid their wages through the 2nd Respondent, an outsourcing Company contracted by the 1st Respondent to provide labour. The meeting alluded to by the Claimants involving the Labour Office, related to 29 other Employees who worked as stackers, not the Claimants. The 2nd Respondent asks the Court to dismiss the Claim with costs.

6. The 2nd Claimant Hassan Said, gave evidence for the Claimants on 5th December 2018. Human Resource Officer Stanslious Kahindi gave evidence for the 1st Respondent on the same date, 5th December 2018. The 2nd Respondent was a no-show, and proceedings were marked as closed, on 5th December 2018. Parties confirmed filing of their Closing Submissions on 22nd February 2019.

7. Said confirmed that he was employed by the 1st Respondent, in 2008. The 2nd Respondent took over management of labour later. Said used to stamp bags.

8. He confirmed that the other Claimants worked with him. The Claimants were in different departments. They worked on public holidays. They did not go on annual leave. They were not subscribed to N.S.S.F. They were not issued employment letters. On 16th January 2016, they found Police Officers at the workplace gate. The Claimants were locked out. They took their grievance to the Labour Office Mombasa.

9. The 2nd Respondent and the Claimants agreed at the Labour Office, on resumption formula. Nuru Ali, the 11th Claimant herein, represented the Claimants. The Claimants were to go back to work. They were told by the 2nd Respondent there was no more work when they reported. The 2nd Respondent told the Claimant they could elsewhere for work. They consulted Kituo Cha Sheria, who issued demand letter on their behalf. There was no response from the 2nd Respondent.

10. The Claimants did not leave employment of their own volition. They were not invited back after lockout. There were no valid reasons given to justify termination. No disciplinary proceedings of any nature took place. There was no notice. The Claimants never went on annual leave. Said adopted as Claimants' evidence-in-chief, his Witness Statement dated 20th September 2016, and 5 documents contained in a list filed on the same date.

11. Cross-examined by the Advocate for the 1st Respondent, Said testified that he worked from 2008. He stamped bags. He continued doing this after the 2nd Respondent took over. He worked without break. He worked in shifts.

12. He earned a daily rate of Kshs. 250 initially. The Claimants did 1 shift daily. The 2nd Respondent took charge of the Employees. It supervised and regulated Claimants' work. There was a problem on 16th January 2016. The Claimants found Police at the gate. They were locked out. The meeting at the Labour Office involved the 2nd Respondent and the Claimants, not the 1st Respondent. There was no representative of the 2nd Respondent at the meeting.

13. On redirection, Said told the Court that he was employed by the 1st Respondent. The 2nd Respondent came into the picture through the 1st Respondent.

14. 1st Respondent's Human Resource Officer, Stanslous Kahindi Baya, adopted his Witness Statement and documents filed by the 2nd Respondent, as 2nd Respondent's evidence-in-chief.

15. He is responsible for Employee recruitment and dismissal. The 1st Respondent does not employ Casual Employees. This is done by an outsourcing Company, the 2nd Respondent herein. The 2nd Respondent manages all temporary Employees. The 2nd Respondent designs and implements temporary contracts. The 1st Respondent informs the 2nd Respondent on the number of Employees required by the 1st Respondent.

16. The Claimants were not on the payroll of the 1st Respondent. Statutory obligations under the N.S.S.F etc. was under the 2nd Respondent. Employees worked on 8 hours shifts. None worked in excess of 1 shift.

17. On 16th January 2016, there was a problem 1st Respondent's Milly Branch, Mombasa. Some of the Claimants threatened 1st Respondent's Director. He called in the Police. There was a meeting at the Labour Office. Baya attended but was asked by the Labour Officer to leave at the beginning, after the Labour Office saw a copy of the outsourcing agreement concluded by the Respondents. The 1st Respondent was therefore not a Party to the agreement concluded between the 2nd Respondent and the Claimants at the Labour Office.

18. Cross-examined by the Advocate for the Claimants, Baya testified that he was employed in 2009. He was not aware of what went on before this. He did not know when the outsourcing agreement was signed. The agreement was valid for 1 year initially. There was another for 2013-2015. He was not aware if it was extended by the 1st Respondent. The Claimants continued to work after the expiry of the outsourcing agreement. The Director of the 1st Respondent called in the Police. Redirected, Baya testified that he found the 2nd Respondent on the ground when he joined the 1st Respondent. The 2nd Respondent controlled the Employees. It entered into agreement with the Claimants at the Labour Office.

The Court Finds:-

19. There is adequate evidence to establish that the Claimants were initially employed by the 1st Respondent. They were employed as Machine Operators, Stampers, Packers and Millers. They last earned a daily wage of between Kshs. 530 and Kshs. 650. They left employment on 16th January 2016 in contested circumstances.

20. The issues in dispute as understood by the Court, are:-

§ Whether the Claimants were employed by the 1st, 2nd or both Respondents.

§ Whether their contracts were unfairly terminated by their Employer or Employers.

§ Whether they are entitled to compensation for unfair termination, terminal dues, costs and interest.

21. There are 2 contracts for provision of services exhibited by the Parties. The contracts are between the Respondents. The 1st is dated 4th January 2012, to cover the period between 1st January 2012 and 31st December 2012. The contract states it is for provision of services, for the '*production of wheat, maize flour and cleansing [cleaning?] services, and other related jobs.*' Although poorly phrased, there is common understanding that this was the 1st contract between the Respondents, for provision of labour.

22. The contract stipulates that the 2nd Respondent would be responsible for all the legal requirements of the Employee. The Court understands this to mean that the 2nd Respondent assumed employment responsibility for the Employees, for the duration of the contract for provision of labour.

23. The 2nd contract is dated 7th January 2013. It covered the period 1st January 2013 to 31st December 2015. It could be extended for 1 year by agreement between the Respondents. It is indicated to be a contract for provision of labour for security, production, packaging of maize

and wheat flour, animal feeds and other related jobs. Again the 2nd Respondent assumed employment responsibility for all the Employees.

24. There was some form of disagreement between the Employees and 1st Respondent's Director on 16th January 2016. It is not very clear from the record what the nature of the disagreement was, but it was mentioned by Baya that Employees had threatened the Director, who called in the Police, before the disagreement was reported to the Labour Office Mombasa.

25. There is an Agreement concluded at the Labour Office between the 2nd Respondent and the Employees. Although the 2nd Respondent alleges that the agreement involved Stackers, and not the Claimants, it is clear that the Claimants were represented at the meeting by the 11th Claimant, Nuru Ali. She signed the agreement. The agreement suggests there were Stackers and "other Claimants" involved in the dispute. The Claimants were part of the disagreement, otherwise Nuru would not have been involved, and there would be no reference to other Claimants in the agreement.

26. The agreement at the Labour Office was executed on 28th January 2016. It was executed by the Parties to the exclusion of the 1st Respondent. Although the last agreement for provision of labour, between the Respondents, is indicated to have expired on 31st December 2015, the exclusion of the 1st Respondent in the meeting held at the Labour Office, suggest that the 2nd Respondent was still managing the Employees, and responsible "for all legal requirements" as stated in the outsourcing agreement. The Respondents appear to have extended their last contract "subject to mutual agreement of both Parties" as given under the outsourcing agreement.

27. The 2nd Respondent was therefore the lone Employer, as of 16th January 2016, the date the Claimants left employment, having assuming total control and responsibility of the labour force, under successive outsourcing agreements.

28. *The 2nd Respondent is exclusively liable to the Employees for the period 1st January 2012 to 16th January 2016.*

29. *The 1st Respondent is liable to the Employees for any liabilities that may be found due, for the period between the dates individual Employees were employed prior to 1st January 2012, and 1st January 2012.*

30. The 2nd Respondent did not give evidence and therefore missed out the opportunity to prove the reason justifying termination. There was a disagreement between Management and Employees on 16th January 2016, which led to lock out and conciliation before the Labour Office. The agreement at the Labour Office, executed by the Claimants and the 2nd Respondent, suggested that the Employees should resume duty. The 2nd Respondent has not told the Court why it did not implement the agreement. The Claimants continued to be locked out, and were not assigned any duties. Their contracts were terminated without notice or just cause. They were not heard at any disciplinary forum. They were not given valid reason to justify termination. They had worked continuously in aggregate for a number of years placing them out of the rank of casual engagement.

31. They are entitled to notice pay and compensation for unfair termination.

32. Annual leave days accruing before the 1st outsourcing agreement should have been claimed from the 1st Respondent, at the time the Claimants were placed under the 2nd Respondent. No annual leave can reasonably be demanded from the 1st Respondent, years after the 1st Respondent handed over staff to the 2nd Respondent. Similarly the Claimants ought to have made demands for service pay, if they were not subscribed by the 1st Respondent to the N.S.S.F, prior to January 2012.

33. The 2nd Respondent has not availed to the Court any annual leave records for the period between 1st January 2012 and 16th January 2016, to discount the Claimant's assertion that they never took annual leave. The 2nd Respondent seems to have treated the Claimants as casuals and therefore deemed them ineligible for annual leave. The 2nd Respondent submits at paragraph of its Closing Submissions that that it is not disputed that the Claimants initially worked for the 1st Respondent as Casual Employees, and continued to work under the 2nd Respondent after 2012. It is not doubted that the Claimants worked in continuity from dates before 2012. They worked in aggregate for years, qualifying them as regular Employees. Their roles, machine operation, grain bag stamping, and milling – were regular roles, central to the 1st Respondent's business to be taken casually. The Claimants merit annual leave pay for the period they worked under the 2nd Respondent.

34. The outsourcing agreements expressly placed the burden of deducting and remitting of Claimants' statutory dues, on the 2nd Respondent. The 2nd Respondent has not placed before the Court any evidence showing deduction and remittance of N.S.S.F dues on the Claimants' respective accounts. They are entitled to service pay, under Section 35[5] of the Employment Act, from 1st January 2012, to 16th January 2016

35. The Claimants have not shown that they worked on public holidays. They were paid daily rates and did not claim any public holiday pay from the 1st Respondent, at the time of changeover. The voluminous vouchers exhibited by the 1st Respondent, characterized as casual labour vouchers, do not indicate that any of the Claimants worked on a shift falling on public holiday. There is similarly no evidence of work performed on public holidays after 1st January 2012.

36. In sum the Court finds in favour of the Claimants, against the 2nd Respondent, and rejects the Claim against the 1st Respondent.

37. The 2nd Respondent shall pay to the Claimants notice, compensation, annual leave and service, all based on the period 1st January 2012 and 16th January 2016, or between the date of employment after 1st January 2012 and 16th January 2016, as the case may be.

38. **IT IS ORDERED:-**

A. Termination was unfair.

B. The Respondent shall pay to:-

1st Claimant, Time Abdallah: 1 month salary in lieu of notice at Kshs. 19,500; annual leave of 21 days each year, for 4 years at Kshs. 54,600; 15 days' salary for 4 years completed in 2nd Respondent's service at Kshs. 39,000; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 78,000 – total Kshs. 191,100.

2nd Claimant, Hassan Said: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

3rd Claimant, Athman Wachu: 1 month salary in lieu of notice at 15,900; annual leave of 21 days at Kshs. 11,130; service pay for 1 year at Kshs. 7,950; and equivalent of 1 month salary in compensation for unfair termination at Kshs. 15,900 - total Kshs. 50,880.

4th Claimant, Mohammed Shuga: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600- total Kshs. 155,550.

5th Claimant, Swabir Mohammed: 1 month salary in lieu of notice at 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600- total Kshs. 155,550.

6th Claimant, Munga Ndune: 1 month salary in lieu of notice at Kshs. 16,800; annual leave of 21 days for 4 years at Kshs. 47,040; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 33,600; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 67,200 – total Kshs. 164,640.

7th Claimant, Bakari Fumo: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

8th Claimant, Mikdadi Yusuf: 1 month salary in lieu on notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600- total Kshs. 155,550.

9th Claimant, Orpa Javan: 1 month salary in lieu of notice at Kshs. 19,500; annual leave of 21 days for 4 years at Kshs. 54,600; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 39,000; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 78,000 – total Kshs. 191,100.

10th Claimant, Sofia Kassim: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600- total Kshs. 155,550.

11th Claimant, Nuru Ali: 1 month salary in lieu of notice at Kshs. 19,500; annual leave of 21 days for 4 years at Kshs. 54,600; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 39,000; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 78,000- total Kshs. 191,100.

12th Claimant, Amina Chizi: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

13th Claimant, Mercy Shadrack: 1 month in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

14th Claimant, Issa Tunu: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

15th Claimant, Konde Kadzenga: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

16th Claimant, Monica Athieno: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs 63,600 – total Kshs. 155,550.

17th Claimant, Everlin Jaka: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

18th Claimant, Stephen Baya: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

19th Claimant, Joseph Ogeto: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 - total Kshs. 155,550.

20th Claimant, Barack Owino: 1 month salary in lieu of notice at 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

21st Claimant, Joseph Kinuthia: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

22nd Claimant, George Odiedo: 1 month salary in lieu of notice at Kshs. 15,900; annual leave of 21 days for 4 years at Kshs. 44,250; 15 days' salary for each of the 4 years completed in 2nd Respondent's service at Kshs. 31,800; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 63,600 – total Kshs. 155,550.

GRAND TOTAL..... KSHS. 3,433,200.

C. Costs to the Claimants to be paid by the 2nd Respondent.

D. The Claim against the 1st Respondent is rejected with no order on the costs.

Dated and delivered at Mombasa this 21st day of June 2019

James Rika

Judge