



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 112 OF 2015**

**BAYA NYONGA BAYA.....1<sup>ST</sup> CLAIMANT**

**DALL MOHAMMED DALU.....2<sup>ND</sup> CLAIMANT**

**JOSEPH MRICHWA.....3<sup>RD</sup> CLAIMANT**

**SALIMU ISMAIL BENJOMA.....4<sup>TH</sup> CLAIMANT**

**SALIM MOHAMED MGANDI.....5<sup>TH</sup> CLAIMANT**

**JOHN CHOMBA GACHOKI.....6<sup>TH</sup> CLAIMANT**

**VS**

**STEEL MAKERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimants' claim arises out of respective employment relationships between them and the Respondent.
2. The claim is documented by a Memorandum of Claim dated 2<sup>nd</sup> March 2015 and filed in court on 6<sup>th</sup> March 2015.
3. The Respondent filed a Response on 5<sup>th</sup> June 2015 but did not attend the trial in spite of due service. The 1<sup>st</sup> Claimant, Baya Nyonga Baya testified on his own behalf and on behalf of his co-claimants.

**The Claimants' Case**

4. The Claimants state that they were employed by the Respondent on diverse dates between 1995 and 2013. They worked until 15<sup>th</sup> December 2014, when their employment was terminated.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Claimants aver that they were employed as general workers and that at the time of termination, they were working as tongs men earning a daily wage of Kshs. 472. The 3<sup>rd</sup> and 4<sup>th</sup> Claimants state that they worked as general workers also earning a daily rate of Kshs. 472.
6. The 6<sup>th</sup> Claimant, John Chomba Gachoki withdrew his claim by notice dated 2<sup>nd</sup> June 2015.
7. Regarding the circumstances leading to the termination of their employment, the Claimants state that on 15<sup>th</sup> December 2014, they were informed not to report to work the following day as their services were no longer required. They were further told that since they had commenced legal proceedings against the Respondent on account of injuries sustained at work, the Respondent had no faith in them.
8. The Claimants' case is that the termination of their employment was unlawful and unfair. They add that they were not paid their accrued dues. Their particular claims are as follows:

**1<sup>st</sup> Claimant: Baya Nyonga Baya**

- a) One month's pay in lieu of notice.....Kshs. 12,272
- b) Leave pay for 19 years.....188,328
- c) Years of service.....134,520
- d) 12 months' salary in compensation.....147,264

**2<sup>nd</sup> Claimant: Dall Mohamed Dalu**

- a) One month's pay in lieu of notice.....Kshs. 12,272
- b) Leave pay for 13 years.....128,856
- c) Years of service.....92,040
- d) 12 months' salary in compensation.....147,264

**3<sup>rd</sup> Claimant: Joseph Mrichwa**

- a) One month's pay in lieu of notice.....Kshs. 12,272
- b) Leave pay for 11 years.....109,032
- c) Years of service.....77,880
- d) 12 months' salary in compensation.....147,264

**4<sup>th</sup> Claimant: Salimu Ismail Benjoma**

- a) One month's pay in lieu of notice.....Kshs. 12,272
- b) Leave pay for 11 years.....109,032
- c) Years of service.....77,880
- d) 12 months' salary in compensation.....147,264

**5<sup>th</sup> Claimant: Salim Mohamed Mgandi**

- a) One month's pay in lieu of notice.....Kshs. 12,272
- b) Leave pay for 2 years.....19,824
- c) Years of service.....14,160
- d) 12 months' salary in compensation.....147,264

9. The Claimants further ask for certificates of service as well as costs plus interest.

**The Respondent's Case**

10. In its Response dated 5<sup>th</sup> June 2015 and filed in court on the same date, the Respondent states that the Claimants had from time to time been employed as casual workers.

11. The Respondent however denies having employed the Claimants as set out in the Memorandum of Claim. The Respondent further denies terminating the Claimants' employment on 15<sup>th</sup> December 2014, on account of work injury claims filed by the Claimants.

**Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the Claimants have made out a case of unlawful termination;

b) Whether the Claimants are entitled to the remedies sought.

### **Unlawful Termination?**

13. By its Response dated 5<sup>th</sup> June 2015, the Respondent makes an admission that the Claimants worked for it at some point but on casual basis.

14. At paragraph 6 of the Response, the Respondent pleads as follows:

*“the Respondent states that it has never terminated the employment of the claimants and/or refused to employ them as casual workers save on days when there are no materials for production.”*

15. The Respondent then goes ahead to make a general denial of the Claimants’ claim.

16. The Respondent did not seize the opportunity to cross examine the Claimants’ witness and did not call any witness. The Court is therefore left to glean the line of defence from the Response and supporting documents.

17. My understanding of the Respondent’s defence is that the Claimants were casual employees employed on need basis. Section 2 of the Employment Act defines a casual employee in the following terms:

*“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”*

18. The Respondent did not present any credible evidence to support its assertion that the Claimants were casual employees. In this regard, the Court found the unsigned and unexplained sheets bearing the Claimants names to be of nil probative value.

19. In the result, the Respondent’s entire defence collapses, the corollary being a finding that the Claimants’ employment was unlawfully and unfairly terminated.

### **Remedies**

20. Pursuant to the foregoing findings, the Claimants are entitled to compensation. Taking into account the respective periods of service, I award twelve (12) months’ salary to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants and four (4) months’ salary to the 5<sup>th</sup> Claimant in compensation.

21. I further award each Claimant one (1) month’s salary in lieu of notice.

22. In the absence of any evidence to the contrary, the claims for leave pay and service pay are allowed.

23. I therefore enter judgment in favour of the Claimants as follows:

#### **1<sup>st</sup> Claimant: Baya Nyonga Baya**

a) 12 months’ salary in compensation.....	Kshs.147,264
b) 1 month’s pay in lieu of notice.....	12,272
c) Leave pay for 19 years (12,272/30x21x19) .....	163,218
d) Service pay for 19 years (12,272/30x15x19) .....	<u>116,584</u>
<b>Total.....</b>	<b>439,338</b>

#### **2<sup>nd</sup> Claimant: Dall Mohamed Dalu**

a) 12 months’ salary in compensation.....	Kshs.147,264
b) 1 month’s pay in lieu of notice.....	12,272
c) Leave pay for 13 years (12,272/30x21x13) .....	111,675
d) Service pay for 13 years (12,272/30x15x13) .....	<u>79,768</u>
<b>Total.....</b>	<b>350,979</b>

**3<sup>rd</sup> Claimant: Joseph Mrichwa**

a) 12 months' salary in compensation.....	Kshs.147,264
b) 1 month's pay in lieu of notice.....	12,272
c) Leave pay for 11 years (12,272/30x21x11) .....	94,494
d) Service pay for 11 years (12,272/30x15x11) .....	<u>67,496</u>
<b>Total.....</b>	<b>321,526</b>

**4<sup>th</sup> Claimant: Salimu Ismail Benjoma**

a) 12 months' salary in compensation.....	Kshs.147,264
b) 1 month's pay in lieu of notice.....	12,272
c) Leave pay for 11 years (12,272/30x21x11) .....	94,494
d) Service pay for 11 years (12,272/30x15x11) .....	<u>67,496</u>
<b>Total.....</b>	<b>321,526</b>

**5<sup>th</sup> Claimant: Salim Mohamed Mgandi**

a) 4 months' salary in compensation.....	Kshs....49,088
b) 1 month's pay in lieu of notice.....	12,272
c) Leave pay for 2 years (12,272/30x21x2) .....	17,181
d) Service pay for 2 years (12,272/30x15x2) .....	<u>12,272</u>
<b>Total.....</b>	<b>90,813</b>

24. These amounts will attract interest at court rates from the date of judgment until payment in full.

25. The Claimants are also entitled to certificates of service plus costs of the case.

26. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mbithe for the Claimants

No appearance for the Respondent