



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 181 OF 2017

[As consolidated with 171, 172,

173,174,175,176,177,178,179,180,182,183,184,185,186,187,188,189,266,267,268,269,270,271,272,273,274,275,276]

(Before Hon. Justice Mathews N. Nduma)

ERICK OCHIENG ARAM.....1ST CLAIMANT
PETER RUNE SHIRO.....2ND CLAIMANT
ALBERT AMBETSA.....3RD CLAIMANT
LILIAN AWINO OKOTH.....4TH CLAIMANT
EVERLYINE ANYANGO ODHIAMBO.....5TH CLAIMANT
DICKSON MANDILA.....6TH CLAIMANT
BRIAN OWINO ONYANGO.....7TH CLAIMANT
NICHOLAS OTIENO.....8TH CLAIMANT
DAVID JASON TERA.....9TH CLAIMANT
CHRISTINE AUMA OLERO.....10TH CLAIMANT
ANNE VOSEVA INDIAZI.....11TH CLAIMANT
EDWIN OMONDI OCHIENG.....12TH CLAIMANT
ERASTO SEDA OKWIRI.....13TH CLAIMANT
EVERLYNE OKUDA ADHIAMBO.....14TH CLAIMANT
HILDA MUHONJA INDIAZI.....15TH CLAIMANT
ODHIAMBO ODIANG'O.....16TH CLAIMANT
WALTER OMB AISI OPEYWA.....17TH CLAMANT
ENOCK SIKOBE KHAMETE.....18TH CLAIMANT
WYCLIFFE OJWANG.....19TH CLAIMANT
BETTY KEMUNTO GICHAMBA.....20TH CLAIMANT

MAUREEN NJOKI KITECHI.....21ST CLAIMANT
WILLIAM OPONDO DIMO.....22ND CLAIMANT
GODLIVER AORI MURANIA.....23RD CLAIMANT
JARED OTIENO SIGUYU.....24TH CLAIMANT
CHRISTINE AKINYI OTIENO.....25TH CLAIMANT
LUCY ANYANGO BOLO.....26TH CLAIMANT
EUNICE ACHIENG OKOTH.....27TH CLAIMANT
LINET ACHIENG OSUMBA.....28TH CLAIMANT
MERCY AKOTH WANDERE.....29TH CLAIMANT
IMMACULATE ATIENO.....30TH CLAIMANT

VERSUS

FOAM MATTRESSES LIMITED.....1ST RESPONDENT
JOKALI HANDLING SERVICES.....2ND RESPONDENT

JUDGMENT

1. The claimants in causes numbers, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 266,267,268,269,270,271,272,273,274,275,276 of 2017 were consolidated by Hon. Maureen Onyango and an order made by the judge on 16th October 2017 to the Ministry of Labour to conciliate the parties and/or prepare a report with findings and recommendations to guide the court on the dispute.
2. The report dated 27th February 2018 was filed on 1st March 2018. The lead file is cause no. 181 of 2017 and the consolidated suit proceeded for hearing before me on 25th April 2019.
3. In the various memoranda of claim the claimants allege that they were employed by the 1st respondent through the 2nd respondent, the 2nd respondent acting as the recruitment agent on diverse dates. That they all worked in the plastic factory of the 1st respondent in various capacities and the 2nd respondent managed the affairs of the employees so engaged including and not limited to paying them salaries obtained from the 1st respondent.
4. That by and large all claimants worked as General Workers and earned salaries as follows:

Erick Ochieng Aram	- Kshs. 13,702
Peter Rune Siiro	- Kshs. 13,702
Albert Ambetsa	- Kshs. 14,527
Lilian Awino Okoth	- Kshs. 13,702
Everlyine Anyango Odhiambo	- Kshs. 13,702
Dickson Mandila	- Kshs. 14,526
Brian Owino Onyango	- Kshs. 13,520
Nicholas Otieno	- Kshs. 13,708
David Jason Tera	- Kshs. 13,700
Christine Auma Olero	- Kshs. 13,702

Anne Vosevwa Indiazi	- Kshs. 13,702
Edwin Omondi Ochieng	- Kshs. 13,708
Erasto Seda Okwiri	- Kshs. 13,700
Everlyne Okuda Adhiambo	- Kshs. 13,702
Hilda Muhonja Indiazi	- Kshs. 13,702
Odhiambo Odiang'o	- Kshs. 14,526
Walter Ombaisi Opeywa	- Kshs. 13,702
Enock Sikobe Khamete	- Kshs. 14,526
Wycliffe Ojwang	- Kshs. 17,857
Betty Kemunto Gichamba	- Kshs. 13,702
Maureen Njoki Kitechi	- Kshs. 13,000
William Opondo Dimo	- Kshs. 13,702
Godliver Aori Murania	- Kshs. 13,702
Jared Otieno Siguyu	- Kshs. 13,702
Christine Akinyi Otieno	- Kshs. 13,702
Lucy Anyango Bolo	- Kshs. 12,200
Eunice Achieng Okoth	- Kshs. 13,702
Linet Achieng Osumba	- Kshs. 13,000
Mercy Akoth Wandere	- Kshs. 13,702
Immaculate Atieno	- Kshs. 13,702

5. That on or about the 1st March 2017, the claimants reported on duty as usual only to be notified that their employment with the respondents had been terminated.

6. The claimants allege that the termination was not lawful and was without any justifiable reason. The claimants allege that they suffered loss and damage and claim damages equivalent to twelve (12) months salary in compensation for the loss of their employment and payment of terminal benefits including one month salary in lieu of notice and in lieu of leave days earned.

7. That the claimants made and served notices of demand but the respondent has failed to make good the loss incurred by each one of them. The claimants also pray for interest and costs.

8. CW1, Erick Ochieng Aram; CW2, Emmaculate Atieno and CW3 Ann Vosevwa Indiazi testified on behalf of all the claimants. The witness statements made by CW1, CW2 and CW3 were admitted by consent of the parties as their evidence in chief. The witnesses also produced documents annexed to each statement of claim by consent including but not limited to salary slips, job cards and letters of demand.

9. CW1 Erick Ochieng Aram testified that he was employed by the respondents on or about 19th February 2014 as a general worker earning a monthly salary of Kshs. 13,702 per month. That the 2nd respondent was engaged by the 1st respondent as a recruiting agent and the 2nd respondent was generally in-charge of managing affairs of the employees including payment of their salaries.

10. That CW1 and others worked diligently until 1st March 2017, when they reported to work as usual and were notified that their employment had been terminated by the respondents without any lawful cause and unfairly. That before the termination, the respondents did not give the claimants any warnings, notice nor were they called to any hearing to explain their side of the story.

11. That the respondents did not pay the claimants the lawful terminal dues upon termination.

12. That the termination was unlawful and unfair since no notice was given nor was any lawful procedure followed.

13. CW1 testified that he was simply told that there was no more work and that he and others should go home and would be recalled when work was available. CW1 testified that they were not recalled. That they were paid salary for days worked without payment of any terminal benefits.

14. CW1 added that he and others worked as labourers in the Foam Mattress Factory. CW1 named some of the claimants including Dickson Mandila, David Tera, Odhiambo Odayo; Wycliffe Ojwagi; Enock Sikobe; Edwin Omondi; Albert Abetsa and Peter Rune as some of his colleagues at the Foam Mattress Factory with whom they had their employment terminated on the same day and in the same manner. CW1 claimed compensation and payment of terminal benefits by the respondents.

15. CW1 was cross examined on 26th April 2019 upon being stood down to get an interpreter from Luo language to English.

16. CW1 stated under cross examination that he and others did not get letters of appointment. That they were paid for NSSF and had NSSF statements. They were also paid for NHIF and had statements.

17. CW1 stated that they had worked continuously until the date they were informed there was no more work. That they should go home and would be recalled. That they were all paid salary for days worked. That he worked with other claimants but were employed on different dates. That they were not paid in lieu of leave days not taken. The evidence of CW1 was adopted by consent of the parties as the testimony in all the consolidated suits.

18. CW2, corroborated evidence by CW1. Emmaculate Atieno testified that she was employed by Foam Mattresses Limited as a cleaner. CW2 said the 2nd respondent was employed by the 1st respondent to supervise workers. CW2 stated that she was employed on 12th February 2013 and worked until 14th April 2016. That her monthly salary was Kshs. 13,703. On the day CW2 went to work as usual and was informed that there was no more work. That she should go home and would be recalled. CW2 stated that the 1st respondent paid their salaries. CW2 stated that she only received salary for days worked but was not paid terminal benefits. That she was not recalled to work. CW2 produced documents attached to the statement of claim as exhibit. CW2 named Christine Akinyi Otieno; Erasto Seda Okwiri; Walter Ombaisi; Nicholas Otieno; Lilian Akoth; Jared Otieno Siguyu; Godliver Aori Murania; William Opondo Odipo; Maureen Njoki Kitechi; Betty Kemunto Gichamba; Lucy Anyango Boro; Eunice Achieng; Linet Achieng and Mercy Akoth Madere as her colleagues with whom she worked and were sent home in a similar manner on the same date. CW2 stated that the termination was unlawful and unfair and claim compensation and payment of terminal benefits.

19. Under cross examination by Mr. Wangonda for the respondents, CW2 stated that they got no notice of termination. That they were told work had reduced and that they should go home but would be recalled. However they were never recalled. That they all had no letters of appointment. That the respondents kept a record book. That they were all on NSSF and NHIF and have statements of the paid dues. That the respondents started remitting statutory dues in the year 2014 up to the time of termination. That all employees were called to work during weekends when there was a lot of work. That they were not paid in lieu of leave days not taken.

20. CW3 Ann Vusevwa Indiasi testified as CW3 that she was from Busia and now was a small business woman. That she worked for Foam Mattresses previously as a cleaner. That she was employed on 3rd March 2015 and worked until 28th February 2017. CW3 corroborated evidence by CW1 and CW2 in respect of all the claimants. CW3 produced the witness statements and list of documents filed in all the consolidated causes to be adopted as evidence in the consolidated matter.

21. CW3 stated that she earned Kshs. 13,702 per month. She stated that she and others were supervised by the 2nd respondent. CW3 stated that her employment was terminated together with Everline Adhiambo Okuda; Christine Anna Olero; William Indiasi; Everlyne Odhiambo and Brian Owino Onyang on the same date and in the same manner.

22. CW3 stated that the termination of employment was unlawful and unfair and that they be compensated and be paid terminal benefits. CW3 denied that they absconded duty under cross examination. She asserted that they were verbally told to go home and would be recalled. CW3 stated they had no letters of employment. CW3 said that they did not work on Saturdays and Sundays unless there was excessive work and they would be summoned to work. CW3 insisted under cross examination that they were all told on Monday morning to go home since there was no enough work but would be recalled. That they were not recalled. That they all worked on similar terms and worked continuously and on permanent basis.

Defence

23. The 1st respondent filed a reply to memorandum of claim on 21st June 2017. The 1st respondent denied having employed the claimants through the 2nd respondent. The 1st respondent averred that the claimants were employed by the 2nd respondent and not by the 1st respondent. The 1st respondent denies the reliefs sought by the claimants. RW1 Joab Okulo Aloo testified that he worked for Foam Mattresses Limited, the 1st Respondent. That the cases before court involve their former employees who were discharged from their duties. RW1 stated that the claimants were their employees and joined the company on different dates. That they did different jobs at the plant and were involved in manufacturing of plastics. That some were machine operators.

24. That on 1st March 2017, government banned production, sale and use of plastics and the company was affected by the ban. That the company had to give some of their employees a break to address the situation. That the company notified the employees that there was reduction of work due to the ban and therefore would give them a break and call them back if work increases. That the company did a general notice to all the workers. That they were paid to help them put food on their table. RW1 stated that the respondents did not terminate the employment of the claimants. RW1 stated that the company could not recall the claimants since that was overtaken by events when the claimants filed cases in 2017. RW1 stated that the claimants were permanent employees and some were general workers. That the 2nd respondent was a service provider of the 1st respondent. That the 2nd respondent handled part of the manpower of 1st respondent.

25. That the claimants were paid their salary and they signed discharge vouchers which RW1 produced as exhibit before court. Under cross examination by M.C Ouma for the claimants, RW1 confirmed that the claimants were employees of the 1st respondent. RW1 also confirmed that the claimants were stopped from work due to reduction of work. RW1 stated that the 1st respondent did not give each claimant a written notice. RW1 confirmed that the claimants were not paid terminal benefits because they were to be recalled when work increased. RW1 confirmed that the 1st respondent did not recall the claimants because they came to court. RW1 stated that the 1st respondent contacted a few of the claimants. RW1 did not have any notice of termination before court. RW1 stated that the claimants were informed of the matter during morning parade. That the notice was verbal. RW1 confirmed that 1st respondent paid salaries for the claimants. RW1 stated that the 1st respondent paid the claimants for days worked and in lieu of accrued leave days. RW1 stated that 1st respondent did not have work still for the claimants due to the plastic ban which is still in place. RW1 stated that he was the Human Resource Officer and was well versed with these matters.

26. RW2 Dennis Ludenyo Abeva also testified for the respondents. He stated that he worked for the 2nd respondent, Jokali handling services. That the 2nd respondent is contracted by the 1st respondent to manage some of the employees of the 1st respondent. That the 30 claimants were managed by the 2nd respondent. That the 2nd respondent did not hire all of them. They had hired those employed in May 2014. That when production of plastics was banned, employees in the plastic department were stopped from working. RW2 wrote a general notice informing the workers of the stoppage due to reduced work. The notice is dated 23rd January 2017 and was produced in court. RW2 stated that the notice is not addressed to Foam Mattresses employees. It is also not addressed to any particular person. RW2 stated that the 2nd respondent did not pay any employee. That the employees were paid by the 1st respondent. That the 2nd respondent only provided oversight and management of the employees. RW2 stated that he was aware of the law of redundancy and that they had complied with it.

Determination

27. The issues for determination in the consolidated suit are:

- (a) Who between the 1st and 2nd respondent is the employer of the claimants.
- (b) Whether the stoppage of work amounted to termination and if so, if it was lawful and fair.
- (c) Whether the claimants are entitled to the reliefs sought.

Issue (a)

28. The overwhelming evidence by CW1, CW2 and CW3 coupled with the testimony by RW1 and RW2 is that the 1st respondent was the employer of the claimants. The 2nd respondent was simply a recruitment agent with oversight and management authority from the 1st respondent. The control, and payment of remuneration of the claimants was under the 1st respondent.

29. It is without hesitation that I find that the 1st respondent was the employer of the claimants in law and fact to the exclusion of the 2nd respondent.

Issue (b)

30. The testimony by CW1, CW2 and CW3 and that by RW1 and RW2 is not at variance as to the manner in which the employment of the claimants came to an end. It is common cause that a general notice was given to the claimants in the morning parade upon reporting to work on various stated days. The claimants were informed that they could no longer continue to work because of reduction of work following the ban of plastics production, sale and use by the government. The claimants were asked to go home upon being paid salary for days worked only with a promise that they would be recalled. The testimony by RW1 was corroborated that by CW1, CW2 and CW3 that the claimants were not recalled back to work. In the words of RW1, their recall had been overtaken by events upon their filing these suits. RW2 went further to state that work had not increased because the plastics ban by the government was still in place and therefore work had not increased to warrant recall of the claimants.

31. Section 2 of the Employment Act, No. 11 of 2007 defines redundancy as follows:

“Redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”

32. The evidence before court has clearly established that the 1st respondent declared the claimants redundant on diverse dates following the ban of production, sale and use of plastics by the government of Kenya. All the claimants worked in the plastics factory of the 1st respondent. The claimants had become superfluous due to reduction of the job they did in that it was no longer lawful for the 1st respondent to continue to manufacture plastics. It is evident therefore that the claimants had been declared redundant by the respondent and asked to go home with the promise to be recalled if work increased notwithstanding.

33. The respondent was duty bound to follow the provisions of section 40 of the Employment Act, 2007 in separating with the claimants who had become redundant and had been declared as such by the respondent.

34. Section 40 of the Act Provides:

“(1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash.

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

35. The evidence by the claimants as corroborated by that by RW1 and RW2 has demonstrated on a balance of probabilities the following:

(a) The respondent had declared the claimants redundant.

(b) The respondent did not provide a notice of not less than a month of the intended redundancy to each of the claimants individually and to the Ministry of Labour as mandated by *Section 40(1) (a) and (b)* above.

(c) The respondent did not demonstrate the selection criteria applied in terminating the employment of the claimants as required under *subsection 40(c)* above.

(d) The pay slips provided by the respondent show that the respondent paid the claimants one month salary in lieu of notice in terms of *subsection 40(f)*.

(e) The pay slips also show that the respondent paid the claimants gratuity referred to as 'gratitude' in the respective pay slips. The claimants have not claimed for payment of severance pay in the memoranda of claim probably in recognition of this separation payment.

(f) The respondent did not pay the claimants in lieu of leave days not taken.

36. The court is satisfied that the 1st respondent had a valid reason in terms of *Sections 40 and 43(1) and (2) of the Employment Act, 2007* of declaring the claimants redundant.

37. It is however manifestly clear that the 1st respondent did not follow the mandatory statutory procedure under *Section 40(1) (a), (b) and (c)* before separating with the claimants on the grounds of redundancy.

38. Therefore the termination of the employment of the claimants on grounds of redundancy was procedurally flawed, and unfair and in violation of *Sections 40, 41 and 45 of the Employment Act, 2007*.

39. Accordingly, the claimants are entitled to compensation in terms of *Section 40(1) (c) and (4) of the Employment Act, 2007*.

40. In this respect, all the claimants faced termination under similar circumstances. The claimants had worked for relatively similar periods between the years 2013 to 2017. The claimants were paid some terminal benefits upon being declared redundant. The claimants' employment was terminated for no fault of their own. The respondent terminated the employment of the claimants for operational reasons beyond their control. The respondent however violated mandatory statutory procedure in effecting the termination of the claimants on grounds of redundancy. The claimants were not compensated for their sudden loss of work without notice. They suffered loss and damage. The court has considered a similar case of ***James Kiburi Mutia vs Governor Meru County and another (2018) eKLR*** in which claimant was awarded 3 months salary in compensation for unprocedural and unfair termination of employment. The court awards each of the claimants the equivalent of three (3) months salary in compensation for the unprocedural and unfair termination of employment.

41. In the final analysis judgment is entered in favour of all the claimants in the consolidated suit as against the 1st respondent as follows:

- (a) The equivalent of three (3) months salary in compensation for the unprocedural and unfair termination of employment.
- (b) Payment in lieu of leave days not taken.
- (c) The award to be computed and filed by the claimants, and served on the respondent within 30 days of the judgment.
- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit.

Judgment Dated, Signed and delivered this 5th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. M.C Ouma for the Claimants

Mr. Wangonda for the Respondent

Chrispo – Court Clerk