



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1636 OF 2015

MBOO WAMBUA.....1ST CLAIMANT
JOHN KITHEKA.....2ND CLAIMANT
MBUVI MWALIMU.....3RD CLAIMANT
KIMANZI MULEI.....4TH CLAIMANT
KYALO NDEKE.....5TH CLAIMANT
BENSON MUTINDA MWANIA.....6TH CLAIMANT
MWEMA NDUMI.....7TH CLAIMANT
KAVWELE MWILU.....8TH CLAIMANT
JUSTUS MUSEMBI MUSAU.....9TH CLAIMANT
STEPHEN M. MUTUKU.....10TH CLAIMANT
MINDU MUSEMBI.....11TH CLAIMANT
MUTHIANI KASUNGU.....12TH CLAIMANT
SHADRACK M. NGOMBALU.....13TH CLAIMANT
BENSON KITHUKU.....14TH CLAIMANT
BONFACE M. WAMBUA.....15TH CLAIMANT
MWENWA MULI.....16TH CLAIMANT
SYENGO MWANGANGI.....17TH CLAIMANT
SIMON KIMWELE.....18TH CLAIMANT
JOSHUA MUTUKU MULEI.....19TH CLAIMANT
MUTUA AKUNGA.....20TH CLAIMANT
JAMES NZOMO KILUMBUTU.....21ST CLAIMANT
ERICK KING'OO MBONI.....22ND CLAIMANT

MURIUKI G. STEPHEN.....23RD CLAIMANT
JOSEPH KALUKO KYALO.....24TH CLAIMANT
MICHAEL M. KYALO.....25TH CLAIMANT
JULIUS MUSEE MALINGA.....26TH CLAIMANT
BONFACE MUNYOKI WILLY.....27TH CLAIMANT
WAMBUA KASYUNGU.....28TH CLAIMANT
MWENDWA NDUMI.....29TH CLAIMANT
MUSYOKA NDITE.....30TH CLAIMANT

- VERSUS -

EXPORT TRADING COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The claimants filed the memorandum of claim on 18.09.2015 through Namada & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) A declaration that the respondent's action to lock out the claimants from its premises amounted to constructive summary dismissal of the claimants' employment, which dismissal was unfair, inhumane and unlawful.
- b) A declaration that the claimants are entitled to payment of terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay each of the claimants their due terminal benefits and compensatory damages as pleaded and tabulated in paragraph 9 of the memorandum herein above.
- d) Interest on the awards above from the date of filing suit till payment in full.
- e) Costs of the suit plus interest thereon.

The respondent filed the memorandum of defence on 12.05.2016 through Grace Kanyiri Advocates, for Federation of Kenya Employers. The respondent prayed that the suit be dismissed for lack of merit with costs awarded to the respondent.

The claimants' case is that they were employed by the respondent on diverse dates stated in the memorandum of claim (ranging between 2001 and 2013). They pleaded that they worked diligently without a break in their service and the pay was Kshs.600.00 per day. Further it is the claimant's case that on 15.07.2015 they reported to duty as usual only to be locked out and chased away from employment on allegation of having stolen a horse pipe – and they state the dismissal was unfair because the reason was invalid and they were not accorded due process of a notice and a hearing. It is their case that the dismissal was constructive on account of the lock out and it was unfair. Each claimant made claims for payment of a month's salary in lieu of termination notice; untaken and untaken annual leave throughout service; service or gratuity for each completed year of service; and compensation for unfair termination at 12 months' pay.

The respondent has denied that it employed the claimants as claimed. The respondent's case is that it engaged the services of the 26th claimant, Julius Musee Malinga, and the respondent would instruct him and give piece rate contracts of work. The work entailed offloading or loading trucks of the respondent to enable the respondent to transport goods to its customers. Upon receiving the instruction, it was the respondent's case that the said Julius avail loaders based on the work load available. The respondent would then pay the said Julius the agreed piece rate amount per full job done and it was his duty to pay his availed loaders (employees). Thus the employer of the claimants was the said Julius because he had the discretion to avail the claimants to work as per the available work that was to be performed. He worked independently and he engaged loaders at his sole discretion so that there was no privity of contract between the claimants and the respondent in a contract of employment as was alleged.

The 1st issue for determination is whether the parties were in a contract of service. The claimant's witness (CW1) was Julius Musee Malinga, the 26th claimant. His evidence was that the respondent employed the claimants as loaders. In his case he was employed in 2001. The claimants did the job of loaders and once employed by the respondent each worked without a break in service. CW1 testified that the claimants were amongst the 40 loaders employed by the respondent and issued with relevant medical certificates and uniforms and working from January to December of each year. CW1 further testified that the respondent imported cereals such as maize and rice and the claimant's job was to off load the cereals for sieving and repacking and thereafter reload for transportation. CW1 denied that he had an agreement with the respondent to provide loaders and that each loader was paid by the respondent Kshs.600.00. CW1 stated that effective 2011 he supervised

60 loaders. He stated that as a supervisor he worked with loaders as already recruited and identified by the respondent.

Claimant witness No. 2(CW2) was Shadrack Mwendwa(13th claimant) and testified that CW1 was their supervisor.

The respondent's witness (RW) was Geoffrey Likhabila Mate, a supervisor at the respondent's inputs stores and also supervising loading and off loading. His evidence was that the loaders were paid per bags loaded or off loaded and therefore it was a piece rate engagement. He testified that CW1 was employed by the respondent in 2001 and then contradicted himself that only CW1 would know if and when he was employed. RW further thought that CW1 was not employed by the respondent because CW1 had no letter of appointment.

The Court has considered the evidence. It is clear that the respondent employed each of the claimants as a loader. For purposes of organisation at work, it could be that the respondent in an arrangement with the loaders designated one of the loaders as a team leader known to the parties generally as a gang leader. The Court returns that such designation of one of the loaders as a gang leader for a work group known as a gang did not vitiate the individual contracts of employment between the parties and including the gang leader's individual contract of service. The gang leader was also a loader just like the other claimants. As a leader the respondent could have relied upon him to deliver to the other loaders the daily pay but that did not, in the findings of the Court, create a contract for service between the gang leader and the respondent or vitiate the contracts of service in issue. It is clear that CW1 as the gang leader as the respondent referred to him did not work for himself for profit. It is clear that the claimants were subject to the respondent's operational systems and policies. The Court finds that the parties were in employment and the claimants were employees within the definitions in the Employment Act, 2007.

While making that finding, the Court distinguishes this case from Safari Joseph Ngala & 2 Others –Versus-Rapid Kate Services Ltd [2017]eKLR (Rika J) where the Court found that there was nothing wrong with an arrangement whereby a person engages an independent contractor to provide labour to perform on piece work basis – in which case the independent contractor employs his own staff to perform the task under agreements to which the beneficiary of the contracted services has no privity. In this case, the Court finds that it was not established that the 26th claimant had entered into such contract for services with the respondent and the Court further finds that the 26th claimant was, like the other claimants, the respondent's employee but having designated role of a team leader or supervisor generally known to the parties as the gang leader. Similarly, the present case is distinguishable from Joseph Otieno Ogutu & 24 Others –Versus- Allied Wharffage Ltd & Another [2016]eKLR (O.N.Makau J) where the Court found that the claimants were independent contractors and they were not employees within the meaning of the Employment Act, 2007.

It was suggested and urged for the respondent that since there was a piece rate or work arrangement, the parties were not in a contract of employment. The Court holds that piece work arrangements are not inconsistent with the contract of employment. Under section 2 of the Employment Act, 2007 **“piece work”** means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. Thus the Court finds that Piece work or piece rate arrangements are justifiable as a pay structure in a contract of employment. The Court follows its opinion in Amalgamated Union of Kenya Metal Workers –Versus- Kenya Vehicle Manufacturers Limited [2015]eKLR, thus, **“While making that finding, the court has considered that “piece work” as used in the Employment Act, 2007 is facilitative of the unique payment system as defined in the Act and as further amplified in section 18 of the Act thus, “18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled?(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.” It is the opinion of the court that piece work arrangements are pay arrangements between the employer and the employee, such terms are capable of inclusion in the collective agreement, such terms do not bar the affected employee from union activities and such arrangements do not make the other minimum terms of service in the Act inapplicable. The arrangements only serve a pay for labour system within the provisions of the Act.”**

Thus, in piece work arrangement, parties will set targets. The employee despite being paid at the piece rate, the employer has a legitimate expectation that the employee will attain the minimum productivity targets or performance targets. Conversely, the employee has a legitimate expectation that the employer will provide sufficient work to enable the employee meet the agreed minimum targets of performance. It is the opinion of the Court that as long the work is available, within the piece work arrangement the employer would need to follow due process and show a reasonable justification where the employment is to be terminated. It is the further Court's opinion that if indeed the work becomes genuinely unavailable, then the employer in such arrangement will be entitled to terminate the contract of service within the minimum statutory contractual terms.

The extent to which the Employment Act, 2007 will apply in event of the termination of the contract of service in piece work arrangements will vary from case to case based on the parties agreement, practice and circumstances of the individual cases. One clear position is that time based claims may not be available. Thus in Nyevu Sibya Maithya & 14 others –Versus- Krystalline Salt Limited [2017]eKLR (Rika J) stated held, **“23. The prayers they seek are all time-based. They seek the equivalent of 12 months' salary in compensation for unfair termination; 1 month salary in lieu of notice; house allowance based on a percentage of their monthly salary; overtime; severance pay; and underpayment of wages. Without establishing a rate of pay per day, week, or month, it is impossible for the Court to have a reasonable assessment of the prayers sought. How is the Court to know the hourly rate in computing overtime; daily or monthly rate in considering compensation, notice pay, severance pay and underpayment of wages?”** In that case the Court further opined, **“24.It does not appear right, that a worker, who has worked on piece rate for 25 years, for the same employer, in continuity, leaves employment without recognition and reward for the years of service, and without other routine benefits due to regular Employees. This is a gap in legislation which cannot be cured by the Courts. It can be cured by Parliament through review of the current law, or mitigated through robust collective bargaining in the salt industry. Unfortunately, there does not seem to be strong Trade Union representing the industry. It will take time before this labour market imbalance in the salt industry is corrected. There is need to have legislative focus on the Salt Industry, without which some players in the industry, will continue to manipulate wage compensation mechanisms and exploit Workers, as Courts look on helplessly.”**

The Court considers that the challenges facing employers and more particularly the employees in the Salt Industry as referred to by the Court in the cited case are true of the other employees on piece work or rate arrangements and time has obviously past for legislative intervention

towards balancing the rights and obligations of the employees and the employers in the piece work or rate contracts of service. For that purpose, the Court considers that this judgment will be served upon the Attorney General, the Cabinet Secretary for the time being responsible for labour matters, COTU, and FKE, towards appropriate legislative intervention in that regard.

The 2nd issue for determination is whether the termination of the claimant's contracts of service was unfair. The evidence is clear. On 13.07.2015 two nozzles of fire horse reels went missing and the respondent surcharged the claimants Kshs.1, 950.00. The claimants raised a grievance in that regard that they were not culpable and that the surcharge was unfair. The claimants protested on 14.07.2015 by blocking the gate to the respondent's premises. A meeting between the management and the claimants' representative was held on 15.07.2017 and it was resolved that the loaders form a business entity with which to render their services to the respondent (in the Court's view confirming once again that the parties had been in a contract of service) so that the loaders' services would be outsourced or contracted in that way. The claimants were also locked out thereby losing their employment.

The Court finds that in view of the surcharge in circumstances whereby the individual claimants had not been directly or indirectly associated to the loss, the claimant's had a justifiable grievance in terms of section 46(h) of the Employment Act, 2007. In such situation, the Court returns that the termination by way of a lock out amounted to a constructive termination which in the circumstances was unfair. In any event, the individual claimants were not subjected to due process of a notice and a hearing as per section 41 of the Act and in view of the protests of 14.07.2015 which the respondent considered to have amounted to misconduct.

The Court returns that the termination was therefore unfair. While making that finding the Court follows the holding by the Court of Appeal in Garama Karisa Masha –Versus- Krystalline Salt Limited [2016]eKLR that under the Employment Act, 2007, it is the responsibility of an Employer to justify termination at all times.

The 2nd issue for determination is whether the claimants are entitled to the remedies as prayed for. The Court makes findings as follows:

a) As already found they are entitled to a declaration that the respondent's action to lock out the claimants from its premises amounted to constructive summary dismissal of the claimants' employment, which dismissal was unfair.

b) The Court has considered the claimants' protests of 14.07.2015 and finds that such conduct amounted to unfair labour practice towards resolution of the grievance at hand. The Court considers that by that behaviour the claimants substantially contributed to their dismissal by the lock out that followed. To balance justice, each claimant is awarded one months' pay in compensation under section 49 of the Act plus a further one month pay in lieu of the termination notice making **Kshs.36, 000.00** per month at Kshs. 18,000.00 per month at Kshs.600.00 pay per day as pleaded and testified for the claimants. The Court returns that in this case there is no reason to doubt that each claimant earned Kshs. 600.00 per day as per the claimants' evidence. While making the award, the Court has further reckoned that in the piece work arrangement, each claimant was a master of his income based on the work performed and there was no legitimate expectation for continued earning except by performing the piece work for the commensurate agreed pay. Thus, the Court considers that other than the respondent's promise to assign the piece work and pay as agreed, the claimants' future earning time was within their own control. The award as made should therefore meet the ends of justice. The Court has carefully considered the piece work arrangement. The parties agree to render time at work immaterial and instead focus on pay per piece assigned and performed. It appears that the Kshs. 600.00 per day was to ensure the relevant target was met – so that an employee who did not meet the target would not have been retained. The employee had a legitimate expectation that the employer will freely avail sufficient work and the employer legitimately expected that the employee will reasonably be available to work. It is a complex arrangement but in all, other than the piece work pay arrangement, the minimum statutory terms and conditions would appear not thereby vitiated.

c) The evidence was that the parties were in a piece work arrangement in terms of pay. If “**piece work**” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance, then it is clear that the time each claimant spent at work or was absent from work was immaterial. The Court considers that in that sense the prayers for pay in lieu of annual leave will fail because the claimant was at liberty to regulate and determine the hours of work including leave, rest or off day, whether to work on holiday, or similar time bound matters. Similarly the prayer for gratuity will fail, the piece work arrangement being that the time served is immaterial and the only material thing being the piece of work done for the agreed pay. The Court holds that once the parties in a piece work arrangement have agreed on the amount payable for given amount of work, the pay is all inclusive and the purpose is to remove the employer from any further remunerative liability or benefits attached to or flowing from time served such as service pay or gratuity as parties may agree or as per statutory provisions. The parties must therefore, in the opinion of the Court, when entering the piece work arrangement, negotiate the pay as being all inclusive – the employee being conscious that no further pay will flow from the arrangement other than the agreed rate of pay per piece of work done. Thus, it is true that employees on piece work arrangement tend to earn relatively higher than the regular employees because in piece work situation, productivity of the employee is more accurately linked to the rate of pay.

In conclusion, judgment is hereby entered for the claimants against the respondent for:

a) The declaration that the respondent's action to lock out the claimants from its premises amounted to constructive summary dismissal of the claimants' employment, which dismissal was unfair.

b) The respondent to pay each claimant **Kshs. 36,000.00** by 01.09.2018 failing interest to run at Court rates from the date of the judgment till full payment.

c) The parties to serve this judgment, within seven days, upon the Attorney General, the Cabinet Secretary for the time being responsible for labour matters, COTU, and FKE, for consideration of appropriate legislative intervention towards balancing the rights and obligations of the employees and the employers in the piece work or piece rate contracts of service.

d) The respondent to pay the claimants costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.

BYRAM ONGAYA

JUDGE