



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1816 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

RICHARD NYASOKO KIYONDI.....1ST CLAIMANT

THOMAS MBOYA OWINO.....2ND CLAIMANT

PAUL NJOROGE KIBUCHI.....3RD CLAIMANT

AND 67 OTHERS

VERSUS

BRITISH AMERICAN TOBACCO (K) LIMITED.....RESPONDENT

JUDGMENT

The Claimants in their Memorandum of Claim dated 25th October 2011 and filed in Court on 28th October 2011, allege that the Respondent herein wrongfully and unlawfully terminated their employment and failed and/or refused to pay their terminal benefits. The Claimants seeks for the following remedies:

- i. The accumulated sum of Kshs.23,824,650.00 as particularized in the Claimants' Memorandum of Claim
- ii. Costs of the Suit
- iii. Interest on (i) and (ii)
- iv. Any other relief that this Honourable Court may deem fit and just to grant

The Respondent filed a Memorandum of Defence dated 23rd May, 2012 in which it is alleged that the Claimants were employed by the Respondent as casual workers until 26th February 2006.

The Respondent avers that operations in its Thika Green Leaf Threshing Plant were shut down on 26th February, 2006, to resolve some anomalies and as a result there was no work for its casual employees at the plant which affected 107 workers.

The Respondent further avers that the dispute was reported by the Kenya Union of Commercial Food and Allied Workers Union to the Ministry of labour and an investigator appointed to resolve the issue.

That parties agreed to have a conciliation meeting in place of the investigations and where an agreement was reached in the terms indicated in appendix 4 of the Memorandum of Defence and that the Respondent did make full payments to all the affected workers in terms of the said agreement.

It is further contended that the Claimants' Memorandum of Claim has no basis and that the Claimants are not entitled to the reliefs sought in their Memorandum of Claim. The respondent urges the court to dismiss the claim with costs.

On 5th March, 2015, the 1st Claimant (CW1) testified on his behalf and on behalf of 69 other Claimants. In his testimony he stated that he

was employed by the Respondent in April 2003 in the quality assurance department. That on 28th February, 2006 he reported to work for the morning shift but found the Respondent's premises locked and guarded by police and G4S Security guards.

CW1 further testified that the matter was reported to the labour office and a meeting between the Respondent and the Claimant's union was arranged to solve the dispute. It was his evidence that following the meeting it was agreed that the Respondent pays all the affected employees and re-absorb them back to work in 2 months. However, the claimants were never recalled back to work.

CW1 testified that he was paid Kshs.3,900/- as his terminal dues and that all Claimants were paid but in different amounts.

CW1 further testified that the prayers in the Memorandum of Claim are supported by the CBA that was in place for all unionisable employees of the Respondent. Further that the Claimants were all employed as casuals and were supposed to be permanent as they worked continuously for the Respondent.

On cross examination on 11th November 2015, CW1 admitted having received some money following the conciliation meeting in which he and the other claimants were represented by the Union, Kenya Union of Commercial Food and Allied Workers (KUCFAW).

The Respondent's case was heard on 2nd May 2018, RW1 **Peter Ndegwa**, the Processing Manager at Green Leaf Threshing Plant of the Respondent Company in Thika gave evidence on behalf of the Respondent.

It was his evidence that there was a quality issue forcing the Respondent to shut down its operations on 26th February, 2006. That the shutdown took about 2 weeks and its upshot was that production stopped for maintenance check to be done from 26th February 2006.

On cross examination RW1 stated he had worked for the Respondent for 22 years. He confirmed that the quality issue caused the factory shut down. He further stated that he was not aware of a lock-out.

RW2 **Edith Kivenze**, Head of HR and Operations at the Respondent Company testified on 17th July 2018 that all the Claimants were casual employees and they did not work through-out the year as operations of the Plant do not run throughout the year.

She further testified that there was conciliation at the Ministry of Labour following report of the dispute by the union (KUCFAW) on behalf of the claimants.

Further that the Claimants were paid their terminal dues as per the agreement arrived at the conciliation meeting. The payments were made through G4S.

RW2 testified that after the payments were made there were no outstanding issues and in fact the union did not return to make any claim for the affected employees. Further that out of good industrial relations the claimants were paid two weeks' notice.

On Cross examination RW2 confirmed having joined the Respondent Company in 2014 and was not present at the time when the alleged lock out took place but was relying on records kept by the respondent company.

On further cross examination, RW2 stated that the claimants were casuals who were issued with gate passes at entry to the Plant and that following the conciliation all affected employees were paid.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and the oral evidence of CW1.

The Claimants submitted that the Respondent's action of locking out the Claimants and subsequent refusal to pay was unjust and unfair.

They relied on the provisions of Sections 44(1) and 45 of the Employment Act, 2007.

The Claimants further submitted that the Court takes notice that the amount paid as terminal dues by the Respondent was two weeks wages which is not disputed. They urge the Court to allow the Claim as itemised in the submissions.

Respondent's Submissions

It is submitted that the Claimants' prayer for accumulated sum of Kshs.23,840,650/- being two months' notice, house allowance, transport allowance, shift allowance, service pay and increment arrears cannot stand as the Claimants were casual workers engaged through fixed term contracts not exceeding 3 months and were paid daily wages as per clause 40 of the CBA (appendix 25).

The Respondent further submitted that it is trite law that parties are bound by their pleadings. The Respondent further submitted that the written authority dated 25th October 2011 gave the 1st Claimant authority to represent the 2nd and 3rd Claimants. There is no list of the remaining 67 Claimants nor evidence adduced during the hearing on the 67 other Claimants.

It is submitted that the Claimant cannot at submissions stage list the names of the individual claims of persons not contained in the pleadings. They rely on the case of **High Court Civil Appeal No. 152 of 2011** wherein Jairus Nyaga J. determined that:-

“What this boils down to is that the learned magistrate’s award for loss of user was based on speculation and his own hypothesis of the trade customs in the motor cycle transport business. By taking this path the learned magistrate erred in law and arrived at the wrong conclusion. Special damages, as noted must be specifically pleaded and proved; they cannot be awarded on the basis of speculation and conjecture.”

The Respondent further submitted that the Claimants’ case is speculative. An agreement having been entered between the Respondent and KUCFAW, the claims before court are vexatious and an abuse of court process. The Respondent relied on the authority of **Bangue Indosuez Vs DJ Lowe and Company Limited (2006)2KLR 208** where the Court held inter alia that:

“It is trite law that special damages must not only be claimed specially but proved strictly for they are not direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”

The Respondent submitted that the instant claim be dismissed with costs.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the Court has Jurisdiction to entertain the instant Claim.
2. Whether the Claimants termination was wrongful and unlawful.
3. Whether the Claimants are entitled to the reliefs sought.

Jurisdiction

The respondent has put in lengthy submissions on the issue of the court’s jurisdiction to entertain the instant claim. The issues of jurisdiction was raised vide the respondent’s Preliminary Objection as follows:

- i. That the Suit offends the provisions of Section 90 of the Employment Act, 2007 in that the same was filed outside the period of three (3) years next after the cause of action arose
- ii. The Suit is incompetent since three Claimants have not identified the 67 others
- iii. The suit on behalf of 67 others is incompetent since it is not supported by authority from them; and
- iv. The suit is in violation of Section 68 of the Labour Relations Act, 2007.

Nderi J. in his Ruling delivered on 3rd May 2013 dismissed the Preliminary Objection and directed that the suit proceeds to full hearing on merit. The issue of jurisdiction is therefore *res judicata* as no appeal was filed by the respondent nor did it obtain an order either setting aside or varying the said ruling.

The Respondent cannot therefore successfully raise the same issues again. I opine therefore that this Court is properly positioned to hear and determine this Claim.

The Law

In view of the fact that the employment of the claimants was terminated in 2006, the applicable law is the repealed Employment Act (1976). Was there a lock-out and if so, did the lock-out amount to wrongful and unlawful termination? The Claimants submits that their termination was wrongful and have invoked the provisions of Section 44 as read with section 45 of the Employment Act on summary dismissal.

The Respondent on the other hand insists that there was a shutdown of the factory and it did give the Claimants adequate payment in lieu of notice of two weeks as opposed to one week’s notice that they were entitled to as the Claimants were casuals.

The law applicable at the time the claimants’ employment was terminated did not provide for unfair termination of employment. The employer at that time did not have any obligation to comply with the requirements of natural justice and termination was at the pleasure of the employer provided he either gave notice or payment in lieu of such notice.

Reliefs Sought

The claimants have prayed for the following reliefs –

- i. The accumulated sum of money Kshs.23,824,650 particularized as below
 - (a) Two months’ salary in lieu of notice Kshs.1,110,610.00

(b) House allowance for one month	Kshs.364,000.00
(c) Transport of their household goods	Kshs.4,160,000.00
(d) Shift allowances	Kshs.9,687,800.00
(e) Service	Kshs.6,575,040.00
(f) Increment arrears	Kshs.1,927,200.00
Total	Kshs.23,824,650.00

- ii. Costs of this suit
- iii. Interest in (i) and (ii) above
- iv. Any other relief as the Court may deem fit.

In the collective agreement filed in court vide claimant's additional list of documents dated 17th March 2015, Clause 40 provides for non-permanent employees as follows –

“40. NON-PERMANENT EMPLOYEES

Non-permanent employees will constitute the following:-

a) Relief Employees

These shall be temporary employees who are engaged to relieve employees in established jobs who are on official absence from work. They will be paid salary at one grade lower than the job they are relieving. With effect from 1st August, 1996, relief employees will be paid house allowance one grade lower than the job they are relieving.

Relief employees will be entitled to lunch allowance and will be paid day safari allowance or accommodation/subsistence allowance applicable to the grade they are appointed to while travelling on company business.

b) Temporary Employees

These shall be employees who are engaged during tobacco buying and processing period in Leaf Centres, LPP, Thika and any other areas where work is of seasonal nature for at most six (6) months.

Moreover, employees services may be extended depending on the volume of work. Temporary employees will be paid 100% of minimum notch of Grade A basic salary. All temporary employees will be informed in writing of rules governing their employment.

c) Casual Employees

These shall be employees who are engaged whenever necessary to supplement regular workforce or on jobs that are non-recurrent in nature to justify permanent employment. They will be engaged for a period not exceeding three (3) months or 90 intermittent days in any one calendar year.

Casual employees will be paid at the agreed rates, on daily basis, but may opt with the agreement of the Company to be paid at the end of the week, fortnightly or monthly.

d) Casual Employees Rates of Pay

Casual employees will be paid as below with effect from 1st April 2003:-

Category	Amount (Kshs.)
Skilled	300.00
Semi-Skilled	235.00
General (Unskilled) Urban	195.00
General (Unskilled) Rural	160.00

From the foregoing I find that the claimants are not entitled to any benefits under the CBA besides what had already been agreed upon and paid at the Labour Office. They are further not entitled to any benefits under the Employment Act 2007 as it was not in force at the time of their termination.

The result is that the entire claim fails and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE