



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 283 OF 2015

**BETWEEN**

1. NYEVU SIBYA MAITHYA
2. MARGARET KANZE KENGA
3. LOICE ZIRO WANJE
4. JANET PENDO KALAMA
5. RIZIKI CHARO MUNYAMBU
6. MARIAMU DAVID MATHANO
7. FEDIS KITUNGA JEFA
8. MARGARET WASHE GURO
9. ESTHER MENZA GONA
10. UHURU KAZUNGU ZIRO
11. JOYCE KINYAVU MARY
12. SALOME WANJE MLANDA
13. KATANA CHENGO MLEWA
14. JABALI M. JASPER
15. KAINGU BAYA MWARO.....CLAIMANTS

**VERSUS**

KRYSTALLINE SALT LIMITED.....RESPONDENT

*Rika J*

Court Assistant: Benjamin Kombe

JUDGMENT

1. The 15 Claimants filed their joint Statement of Claim, on 4<sup>th</sup> May 2015. They state they were employed by the Respondent Salt Manufacturer, mainly as Salt Packing Attendants. Jabali was a Pump Attendant, Katana Chengo a Taper, and Kaingu Baya Mwaro a Stekar. It was not made clear to the Court by the Claimants, what duty a Stekar performs. They were employed on diverse dates between 1996 and 2014, as shown in Schedule 1 of the Claim. 14 of them state their contracts of employment were unfairly and unlawfully terminated in July 2013. The Stekar's contract was terminated in 2014.

2. They state their positions were rendered redundant after the Respondent mechanized salt packing. Redundancy did not adhere to the law under Section 40 of the Employment Act 2007. They seek Judgment against the Respondent for:-

- a) 1 month pay in lieu of notice.
- b) Equivalent of 12 months' gross pay in compensation for unfair termination.
- c) Arrears of house allowance at 15% of basic pay.
- d) Annual leave pay.
- e) Overtime.
- f) Severance pay at 1 month salary for each completed year of service.
- g) Underpayment of wages.
- h) A declaration that termination was unfair and unlawful.
- i) Certificates of Service to issue.
- J) Costs, Interest and any other Relief.

3. The Respondent filed its Statement of Response on 8<sup>th</sup> July 2015. Its position is that the Claimants were piece rate Workers. Their role of packing salt was seasonal. They worked on need basis, and were paid at piece rate, for specific work they did, regardless of time taken in doing the work. The Respondent did not declare their positions redundancy; they just stopped going to work of their own volition. Packing machines were indeed introduced at the workplace by the Respondent. The machines were not intended to replace the Claimants. They were intended to fortify the labour force and increase production. The machines were manually operated. The Respondent did not do away with the Claimants. They were required to work with the new machines. They are not entitled to the prayers sought, as they were not regular Employees of the Respondent, but piece rate Workers. Wage Orders did not apply to them. Those who packed packets of 500g, into bales containing 40 packets, were paid at the rate of Kshs. 1.40 per bale. Those who packed 200g, into bales containing 30 packets were paid at the rate of Kshs. 0.75 per bale. At the time of mechanization, the Claimants were being paid at the rate of Kshs. 3.50 per bale. They demanded to be paid Kshs. 5.00 per bale. The Respondent found the demand unreasonable. The Claimants withheld their labour and ceased going to work. The Respondent prays the Claim is dismissed with costs to the Respondent.

4. Loice Ziro Wanje [Claimant Number 3] and Kaingu Mwaro [Claimant Number 15] gave evidence for

the Claimants, and closed Claimants' case on 9<sup>th</sup> September 2016. Respondent's Clerk, Ramla Salim Kalu, gave evidence for the Respondent on 29<sup>th</sup> November 2016, bringing the hearing to a close. The Cause was last mentioned in Court on 8<sup>th</sup> February 2017 when Parties confirmed the filing of their Final Arguments and Judgment scheduled for delivery.

5. Loice told the Court she was employed by the Respondent in 1996. She was a Casual Worker, earning Kshs. 300 per day as of the date of termination. The Claimants packed salt. Their contracts were terminated by the Respondent on 19<sup>th</sup> July 2013.

6. The Respondent introduced machines for packing. The Claimants had nothing to do. *They decided to quit.* Loice adopted the schedules of compensation and terminal dues attached to the Statement of Claim, in urging the Court to grant the Claim.

7. Cross-examined, she testified there were different categories of weights, in salt packing. These were quarter, half, one, and two kilogram packs. A quarter kilogram pack was paid at 50 cents, half at 90 cents, 1 kilogram at 1 shilling and 2 kilograms at 2 shillings. The Claimants were paid in accordance with the kilograms packed. They were not paid according to the days worked. If Loice did not report to work, she would not be paid, and there would be no disciplinary action. The Claimants did not strike. The machines were to be operated by Humans. The Claimants tried to go on strike, but there was no change on the part of the Respondent. The Respondent did not advise the Claimants not to report to work.

8. Kaingu Mwaro associated himself fully with the evidence of Loice. Claimants could not earn anything after the machines were introduced. Kaingu testified he was a Loader, earning Kshs. 350 per day. He emphasized that he was paid a daily rate. There was no compulsion to work.

9. Ramla Salim Kalu testified the Claimants packed salt. They were paid in accordance with the volumes packed. He relied on Receipt Production Note exhibited before the Court, which recorded quantities delivered and rates paid to the Claimants. The Claimants were not regular Employees. They reported to work when they were needed.

10. Kalu agreed on cross-examination that the Claimants worked for the Respondent. They left after the Respondent brought in packing machines. They refused to work with the machines because the machines reduced their piece rate. They withdrew their labour. They were to earn Kshs. 3 per bale. They wanted Kshs. 5 per bale. They rejected the lower rate. They were all salt packers. They were piece rate Workers and not entitled to the prayers sought. Receipt Production Note shows they were not working in continuity. Mechanization did not result in redundancy. The Claimants still packed manually, but on reduced capacity.

### **The Court Finds:-**

11. The 15 Claimants worked for the Respondent Salt Company, in the capacities stated in their Claim. They worked in the period between 1996 and 2014. They state their contracts were unfairly and unlawfully terminated by the Respondent. They seek compensation for unfair termination, and payment of terminal dues.

12. The Respondent's position is that the Claimants were not regular Employees. They were piece rate Workers. They were paid in accordance with their output. They were not paid daily, weekly or monthly rates. They were paid according to the number of kilograms of salt, they managed to pack. They were not obliged to work. Absence on any given day would not attract any disciplinary action. They walked away from the Respondent voluntarily, after the Respondent introduced salt packing machines, believing the machines reduced their earning capacities. The Respondent was not under obligation to treat them as regular Employees and extend to them statutory benefits under the Employment Act. They were piece rate Workers, who walked away voluntarily.

13. The evidence by lead Claimant Loice Ziro Wanje supports the position of the Respondent on the

manner of Claimants' exit from employment. She categorically testified 'we decided to quit.' She explained that the Respondent introduced salt packing machines, and Claimants felt there was nothing for them to do. They determined to leave. The decision to leave employment, going by this unequivocal evidence, was made by the Claimants.

14. Their decision to leave was explained further in the evidence of Respondent's Witness Ramla Salim Kalu. He told the Court the Claimants refused to work with the new machines, because it would result in them earning less money. They were at the time earning Kshs. 3 per every bale of salt packed. They wanted it raised to Kshs. 5. The Respondent declined. The Claimants withheld their labour. They eventually walked away from the workplace.

15. The Court does not think the Respondent can be held responsible therefore, for the decision made by the Claimants to quit. The Claimants did not establish that the Respondent terminated their contracts, let alone show that termination was unfair. They instigated termination because they found mechanization of salt packing, disadvantageous.

16. Loice made concession on cross-examination that the Claimants were paid in accordance with the Kilograms of salt packed. There were packs of quarter, half, one and two kilograms. These were compensated at 50 cents, 90 cents, 1 shilling and 2 shillings respectively. Pay, she testified, was determined by individual output, not on the time spent packing salt.

17. Although some of the Claimants may have done piece rate work for as much as 25 years, there is no mechanism for the conversion of their terms of service under the Employment Act 2007, into regular employment, so as to access the full benefits available to regular Employees. In ***Garama Karisa Masha v. Krystalline Salt Limited [2016] e-KLR*** and ***John Simiyu Wefwafwa v. Krystalline Salt Limited [2016] e-KLR*** this Court held the Employees were employed on pay-for-performance system, paid a specific rate for quantifiable deliverables. There was no leeway under the Act, to treat the Claimants' contracts as converted to regular terms of service, regardless of their long and continuous involvement in piece rate work, as they were not in casual employment.

18. The Court of Appeal sitting in Malindi, in a recent decision involving the Respondent and its former Workers [***Krystalline Salt Limited v. Kwekwe Mwakele & 67 others [2017] e-KLR***], held that there are 4 main types of contracts of service under the Employment Act 2007: for specified period; for unspecified period; for specified task; and for casual work. Piece rate work is performed under a contract for specified task, and cannot be regulated under Section 37 of the Employment Act 2007, which deals with casual work.

19. The Court of Appeal reaffirmed that, under the Employment Act 2007, it is the responsibility of an Employer to justify termination at all times.

20. The Claimants in the present dispute were not paid monthly, in proportion to the work done during the month under Section 18 [1] [b] of the Employment Act 2007. The Receipt Production Note shows they were paid daily on completion of specified tasks. In their endeavour to show they were not piece rate Workers, the Claimants gave somewhat conflicting evidence. Loice stated she was paid Kshs. 300 daily. She at the same time testified Claimants were paid in accordance with the quantities packed. Kaingu Mwaro stated he earned Kshs. 350 daily. In their Schedule 1 they give their monthly pay at Kshs. 10,466, except Claimant Number 14, whose monthly rate is stated at Kshs. 14,040. A daily rate of Kshs. 300 or Kshs. 350, in a working week of 30, 26 or even 22 days, cannot translate into the monthly rates indicated in the Schedule 1 of the Claim.

21. The Claimants did not show how they arrived at the monthly rates contained in their Schedule 1. These are the rates they adopt in pursuing their prayers. Where are these rates taken from? Piece rate Workers appear to have difficulty in stating what their monthly rate of pay should be, whenever it is argued they should be treated as regular Employees, and compensated under the time-based wage compensation system. In the Court of Appeal decision cited above, as in this case, the Workers did not have a clear daily or monthly rate of pay. It would not be reasonable therefore, to uphold the Claimants'

prayers that the monthly rates given under Schedule 1, are adopted as the base rates in considering their prayers.

22. At the heart of the difficulty, is that the Claimants were piece rate Workers, paid under the pay-for-performance system, and who wish to persuade the Court, to translate that system into time-based, fixed rate, wage compensation system.

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?

24. The Court is persuaded the Claimants were piece rate Workers, who ceased work after they apprehended the machines introduced by the Respondent at the workplace, reduced their potential to have maximum earnings from their piece rate work. The machines would take away a substantial amount of kilograms of salt, which the Claimants would otherwise have manually added onto their daily outputs, with higher compensatory yields. They rejected the co-existence of man and machine. This is the background against which they asked for a higher piece rate, when the machines arrived, failing which they withdrew their labour, and walked away from the workplace. The Respondent did not stop them from working. There was no evidence of redundancy to warrant severance pay, which as seen above, like the other items sought by the Claimants, is a benefit which is grounded on a time-based wage compensation system. 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 a 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.

25. Other than the prayer for Certificates of Service, the Court finds no merit in the other prayers.

IT IS ORDERED:-

*a) The Claim is hereby dismissed with no order on the costs.*

*b) Certificates of Service to issue.*

**Dated and delivered at Mombasa this 29<sup>th</sup> day of June 2017**

**James Rika**

**Judge**