



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 307 OF 2015**

**BETWEEN**

**CHARLES OKUNGU ODHIAMBO**

**ELIAS OMONDI OBUYA**

**GILBERT YAURA SHIVAKALE**

**HAJI CHITA JUMA**

**JAMES MUENDO MWETU**

**ONESMUS MUOKA KITUMBI**

**JOHN KIMWILI**

**PATRICK SAKWA NAMAKHABWA**

**JOSEPH PUDO AKENG'O**

**DAUDI ODHIAMBO OKETCH**

**ANDREW ANYANGU ANGAYA**

**TOM NYONGESA MBANGA**

**JOSECK OKACHI ALELA**

**MOURICE OTIENO WINYO**

**JOSEPH ONYONG'O MUSAMBAI**

**THOMAS OCHIENG' ODHIANBO**

**NZIOKA MAITYHA**

**LIVINGSTONE MAKHOHA SHIUNDU**

**STEPHEN KANJA CHIIRA**

**LIVINGSTONE CHIEMA ANJERE**

**KENEDY OCHIENG' AWINO**

**FELIX OTIENO OBADE**

**FREDRICK ODHIAMBO HADULO**

**DICK ODHIAMBO OMOLO**

**JAMES NAMENGE OKONGO**

**EMMANUEL ODHIAMBO OMBUORO**

**ERICK OTIENO OMONDI**

**EDWARD OKWLLO OBIERO**

**KITHEKA MBOTO.....CLAIMANTS**

**VERSUS**

**JUJA COFFEE EXPORTERS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Otieno Asewe & Company Advocates for the Claimants*

*Murriu Mungai & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimants filed their Joint Statement of Claim, on the 8<sup>th</sup> May 2015. They state they were employed by the Respondent as Tea Blenders on diverse dates ranging from the year 1994 to 2012. They all had their contracts terminated by the Respondent on 18<sup>th</sup> September 2014. They claim there was no notice of termination given to them; and they were not heard. They earned a daily rate of Kshs. 800 as of the date of termination. They ask the Court to find termination was unfair and unlawful, and grant Judgment against the Respondent as follows:-

**1<sup>st</sup> Claimant** [employed in 1994]: 1 month salary in lieu of notice at Kshs. 20,800; annual leave pay for 21 days per year for 21 years, at Kshs. 352,800; service pay at 15 days' salary for each completed year of service at Kshs. 252,000; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 249,600- total Kshs. 875,200.

**2<sup>nd</sup> Claimant** [employed in 1995]: similar prayers as the 1<sup>st</sup> Claimant above, based 20 years of service, totaled at Kshs. 846,400.

**3<sup>rd</sup> & 4<sup>th</sup> Claimants** [employed in 2000]: similar prayers as the 1<sup>st</sup> Claimant, based on 15 years of service, computed at Kshs. 702,400.

**5<sup>th</sup> Claimant** [employed in 2001]: similar prayers as the rest, based on 14 years of service,

computed at Kshs. 673,600.

**6<sup>th</sup> & 7<sup>th</sup> Claimants** [employed in 2002]: similar prayers based on 13 years of service, totaled at Kshs. 1,289,600.

**8<sup>th</sup> & 9<sup>th</sup> Claimants** [employed in 2003]: similar prayers based on 12 years of service, at a total of Kshs. 1,232,200.

**10<sup>th</sup> to 20<sup>th</sup> Claimants** [employed in 2005]: similar prayers based on 10 years of service, calculated at Kshs. 6,142,400.

**21<sup>st</sup> & 22<sup>nd</sup> Claimants** [employed in 2006]: similar prayers based on 9 years of service, computed at Kshs. 1,059,200.

**23<sup>rd</sup> to 28<sup>th</sup> Claimants** [employed in 2010]: similar prayers, based on 5 years of service, totaled Kshs. 1,609,600.

**29<sup>th</sup> Claimant** [employed in 2012]: similar prayers as claimed by the Co-Claimants, based on 3 years of service, at Kshs. 356,800

2. In total the ***Claimants pray for a sum of Kshs. 16,433,800; a declaration that termination was unfair and unlawful; the Respondent to release Claimants' Certificates of Service; with costs and interest paid by the Respondent.***

3. The Respondent filed its Statement of Response on 23<sup>rd</sup> June 2015. Its position is that it did not terminate Claimants' contracts at all. Its business does not allow it to have full time Employees. It has never employed the Claimants save for the 1<sup>st</sup> Claimant, either on regular or casual terms. It never paid a daily wage to the Claimants. It only paid the 1<sup>st</sup> Claimant an agreed amount per every blended bag of tea. The Respondent could never pay strangers the sums claimed. If at all the Claimants were engaged by the Respondent, they completed given tasks, were paid and went home. Substantial portions of the Claim are in any case time-barred under Section 90 of the Employment Act 2007.

4. Claimant Number 16, and Number 1, gave evidence on their own behalf, and on behalf of their Co-Claimants. They gave evidence on 28<sup>th</sup> October 2015 when Claimants' case closed.

5. Respondent's Advocate applied to have all other Claimants called explaining that he wished to cross-examine them. The Court, in a ruling the Respondent expressed its wish to appeal against, overruled the Respondent, holding that:

a. The approach adopted by the Respondent is not suited to the proceedings of the Court.

b. We have many Claims with a collective number of Employees, and the Rules of the Court have never insisted all Claimants in such Claims, are called to give evidence individually.

c. Rule 9 of the Industrial Court [Procedure] Rules 2010, then in force, allowed the institution of 1 Claim against same Employer, by multiple Claimants.

d. The Claim could even be proved by the Labour Officer, or by one Claimant authorized to prosecute the Claim by the Court.

e. The Rules granted the Court the mandate to manage its proceedings which included placing a limit on the number of Claimants or Witnesses to testify in any collective Claim.

f. Lastly, it was for the Claimants' Advocate to determine the best way to prosecute the Claim.

6. There is nothing in the record to indicate if the intended Appeal was lodged. There was no order staying proceedings pending Appeal. It is important to note that the Civil Procedure Rules are not Rules of universal application. There are Courts which are not regulated by those Rules. Unfortunately there are Lawyers who apply Civil Procedure Rules everywhere, and whenever they review proceedings where such Rules were not applied, are quick to find that the Employment and Labour Relations Court, or its predecessor the Industrial Court, engaged in a litany of procedural errors. There is always a presumption that Civil Procedure Rules in general, apply, or have always applied, uniformly across our different Courts.

7. The Respondent's case was due to be heard on 30<sup>th</sup> June 2016. Respondent's Advocate sent another Advocate to apply for adjournment. The Court was informed that the Respondent was undergoing restructuring, and its Witnesses had been laid off. Respondent's Advocates would, it was told to the Court apply, to cease acting for the Respondent, if unable to replace laid-off Witnesses.

8. The Court allowed adjournment to the Respondent as prayed, rescheduling hearing to 11<sup>th</sup> October 2016. Neither the Respondent nor its Advocates attended Court on 11<sup>th</sup> October 2016. The Claimants applied and were allowed to have proceedings closed. It was directed that the Claimants file their Closing Submissions which the Court confirmed to have been filed at the last mention on 7<sup>th</sup> November 2016.

**Claimants' evidence:-**

9. Thomas Ochieng' Odhiambo, 16<sup>th</sup> Claimant told the Court he worked with his Co-Claimants at the Respondent. He was employed in 2005. Some Claimants preceded him. Others anteceded him. All had their contracts terminated by the Respondent on 18<sup>th</sup> September 2014.

10. They blended different grades of tea for export market. They worked at Chai Street in Shimanzi, Mombasa. They were paid Kshs. 800 per day, and compensated Kshs. 36 per day for every excess hour worked. They were supervised by the 1<sup>st</sup> Claimant Charles Okungu Odhiambo, who also paid their daily wages.

11. Director Osman visited the factory at Chai Street. He called Okungu aside, and informed him the Claimants were no longer needed at the Respondent. Osman said he had employed other persons to take over from the Claimants. The Claimants left as advised. When they returned to the workplace the following day, they were thrown out by Security Guards.

12. Odhiambo told the Court attendance records exhibited by the Respondent in the bundle of documents filed on 2<sup>nd</sup> July 2015, related to T.S.S Flour Mills. Juja Coffee the Respondent herein, was a subsidiary of T.S.S. Group. The Flour Unit dealt with wheat. Some Employees from the Tea Unit would be taken to work at the Flour Mills occasionally, therefore finding their way in the Flour Mills attendance register. Odhiambo agreed with the Witness's Statement of Francis Okoth Otieno, that Claimants were treated as Casual Employees, and never signed letters of regular employment.

13. Odhiambo testified on cross-examination that he worked from the year 2005. He was recruited by Okungu. Okungu kept the attendance register. The blending machine was mounted in 2005. Okungu worked there from the year the machine was mounted. Manager Idriss fixed the daily rate at Kshs. 800.

14. Odhiambo's name did not appear in the attendance register of the wheat section. There were 36 Employees doing tea blending. They worked daily. The register from the wheat section did not have a bearing on Juja Coffee.

15. Charles Okungu Odhiambo confirmed the other Claimants worked with him at Juja Coffee. He was initially employed in 1994. At the time, the Respondent dealt with cereals. Tea blending started in 2005 when the blending machine was mounted.

16. He supervised the Blenders. He was assigned supervisory role by the Director. Most Co-Claimants

were recruited after Okungu. They would clean and blend tea. Okungu ensured this was properly done. He would receive voucher from Idriss for day's work. Idriss was the go-down Manager. The voucher would then be passed on to the Director. Cashier received the voucher from the Director, released the money to Okungu, who in turn paid each of the Claimants Kshs. 800 daily. Overtime would be paid the following day. 36 Employees worked under Okungu.

17. Okungu was listed in the attendance register for T.S.S. Flour Mills. The register for Juja Coffee was retained by the Respondent. The attendance register for T.S.S. Flour Mills goes back to 2004, before the tea blending machine was installed in 2005.

18. Questioned by Counsel for the Respondent, Okungu testified the blending machine was installed in 2005. He did not work for the Flour Mills after 2005. He recruited all the other Co-Claimants from other tea factories. He prepared their registration with the Respondent. He was accountable to the Director Osman. The rate of Kshs. 800 was agreed to between the Claimants and Director Osman. Between 1994 and 2005, Okungu worked for other entities within the T.S.S. Group. Juja dealt with tea in 1994 manually, before mechanization. It is not true that Okungu recruited Employees and paid them piece rate. He did not agree that any Employee missed duty for a year. Employees approached Okungu on annual leave. They did not make their requests in writing. Blending of tea was continual. The Respondent has Clients outside the Country. Export was done monthly. Redirected, Okungu testified he had worked at T.S.S Mills twice after 2005. It was not possible that any Employee was missing for 1 year at Juja Coffee. The go-down Manager and the Director consulted. The Claimants pray the Court to allow the Claim.

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

19. The evidence given by the 2 Witnesses above, is, in the absence of any evidence from the Respondent, sufficient to establish the Claim.

20. The evidence of Charles Okungu Odhiambo in particular was detailed, consistent and truthful. He was at the Respondent's workplace, working for other entities within the larger T.S.S. Group, from the year 1994.

21. He was elevated to the position of Supervisor. He was entrusted the role of recruiting the Co-Claimants, all who joined the Respondent after, and through Okungu. He paid their daily wage rate of Kshs. 800 as agreed between the Claimants and Director Osman. The Respondent made a general denial about employing the Claimants, while conceding to have employed the 1<sup>st</sup> Claimant Okungu. Okungu was not only an Employee of the Respondent; he testified he recruited the Co-Claimants for the Respondent. They all were Employees of the Respondent. In the absence of evidence from the Respondent, the Court agrees entirely with the evidence of the Claimants, that they were employed for the periods stated in the Claim, and on terms and conditions of employment given by them in their Claim.

22. Service was continuous. The 29<sup>th</sup> Claimant worked the least number of years -3. All worked for 3 to 21 years in continuity. Tea blending is not a seasonal business; it was even at the time, carried out day to day. Exports were made monthly. The nature of Respondent's business does not support the view that it would only need labour intermittently. There was similarly no support for the idea that Okungu was some kind of a human resource agency, supplying the Respondent with casual labour as and when needed. He was a full-time Employee of the Respondent, entrusted recruitment role. He recruited the Claimants who worked for sufficient number of aggregate years to merit conversion into regular terms and conditions of service.

23. Termination was abrupt, without notice and procedural niceties. Osman just called Okungu aside and dismantled the entire labour force Okungu had created over the past 21 years. He was told Employees, 36 of them who worked as Tea Blenders under Okungu, were no longer needed. Fresh faces had been brought in. Termination was without reason at all, never mind valid reason. It was against Section 43 and 45 of the Employment Act 2007. There was no hearing of any kind. There were no allegations against any Employee. Section 41 was ignored.

24. Okungu confirmed that, although Claimants approached him to utilize their annual leave days at different times, they were not allowed to do so by Management. There are no records availed by the Respondent showing any Claimant took annual leave, or was paid in lieu of leave. There is no record showing the Respondent subscribed the Claimants to the N.S.S.F or any another Social Security Plan under the law. Termination was without notice. The Court is satisfied the Claimants have established their Claim to the required standard.

25. They are each granted 1 month salary in lieu of notice; annual leave pay for the respective years served based on 21 days per year; service pay at 15 days' salary for every year completed in service; and the equivalent of 12 months' salary in compensation for unfair termination. They shall also have their Certificates of Service forthwith; costs; and interest from the date of Judgment.

IN SUM, IT IS ORDERED:-

- a) It is declared termination of the Claimants' contracts was unfair and unlawful.***
- b) The Respondent shall pay to the Claimants a total amount of Kshs. 16,433,800 as detailed at paragraph 1 of this Judgment, and paragraph 12 of the Statement of Claim.***
- c) The Respondent shall release to the Claimants their Certificates of Service forthwith.***
- d) Costs to the Claimants.***
- e) Interest granted to the Claimants at 14% per annum from the date of Judgment till the Judgment is satisfied in full.***

Dated and delivered at Mombasa this 16<sup>th</sup> day of June 2017

James Rika

Judge