



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 119 OF 2015

(TEST SUIT FOR CAUSE NO. 120 OF 2015, 121 OF 2015, 123 OF 2015, 124 OF 2015, 125 OF 2015, 126 OF 2015, 127 OF 2015, 128 OF 2015, 129 OF 2015, 130 OF 2015, 131 OF 2015, 132 OF 2015 AND 133 OF 2015)

(Before Hon. Lady Justice Maureen Onyango)

JACKSON OBALE TEBAKOR CLAIMANT

-Versus-

ALLIANCE ONE TOBACCO (K) LTD RESPONDENT

JUDGMENT

The Claimants in this and all other suits for which this is a test suit are all former employees of the Respondent. They allege that they were each employed by the Respondent as follows:

The Claimant **JACKSON OBALE TEBAKOR** alleges he was employed by the Respondent from 16th February 2011 as a tree nursery attendant stationed at Lichota. He was paid a monthly salary of Kshs.7920.

The Claims by the Claimants in the other suits for which this is a test suit are as follows:

JAMES ONDIBA MAKORI alleges he was employed on 15th January 2010 as a day forest guard at stationed at Burimagongo Woodlot at a monthly salary of Kshs.7920.

SAMSON MWIKWABWE MOHERAI alleges he was employed on 16th March 2008 as a day forest guard at Ngisiru Woodlot at a salary of Kshs.7920 per month.

STEVEN OTIENO OTIENO alleges that he was employed on 10th October 2008 as a day forest guard at Marabiko Woodlot at a salary of Kshs.7920 per month.

MAURICE OKINYI OTIENO alleges that he was employed on 11th October 2011 as a day forest guard stationed at Giribe Woodland at a monthly salary of Kshs.7920

JOHN OLUOCH OGAKO alleges that he was employed on 1st May 2010 as a forest guard stationed at Chunguni Woodlot at a salary of Kshs.7920 per month.

PHILIP OGORA MAGAIWA alleges that he was employed on 19th April 2011 as a night watchman stationed at Lichota at a salary of 10,980 per month.

MARTIN ODHIAMBO OJWALA alleges that he was employed on 10th October 2008 as a day forest guard stationed at Obembo Woodlot at a monthly salary of Kshs.7920.

BATEL MUTUKI NYAMOHANGA alleges that he was employed on 10th October 2008 as a headman stationed at Lichota at a monthly salary of Kshs.14,010.

DUNCAN NYAMOHANGA SAMUEL alleges that he was employed on 10th October 2008 as a day forest guard stationed at Nyancho Woodlot at a monthly salary of Kshs.7920.

PAULINE BOKE TARAGA alleges that she was employed on 16th October 2012 as a nursery attendant stationed at Lichota at a monthly salary of Kshs.7920.

ANNA GATI RIOBA alleges that she was employed on 16th August 2012 as nursery attendant stationed at Lichota at a monthly salary of Kshs.7920.

NELSON KEROKO MARWA alleges that he was employed on 15th January 2012 as a day forest guard stationed at Kimumwamu Woodlot at a salary of Kshs,7920 per month.

BONIFACE ODIWUOR JUMA alleges that he was employed on 24th April 2011 as a day forest guard stationed at Pinyoyie Woodlot at a monthly salary of Kshs.7920.

All the Claimants allege that their employment contracts were unfairly terminated by the Respondent on 31st July 2014. They allege that the termination was verbal and without notice. They pray for payment of 3 months' salary in lieu of notice, terminal benefits and severance pay at the rate of one months' salary for every year worked, annual leave, compensation for unfair termination of employment, costs and interest.

The Respondent filed a Response to each of the Claims denying the claim. The Respondent avers that the Claimants were employed intermittently on casual basis for a period not longer than 3 months depending on the availability of work. The Respondent further denies owing the Claimants the sums claimed by each one of them or at all and prays that the Claims be dismissed with costs.

When the case came up for hearing the parties agreed to use file number 119 as a test suit.

The test case was heard on 26th July 2016 when the Claimants' evidence was taken and on 20th September 2016 when the Respondent's witness testified. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant called three witnesses. **CW1 Jackson Obale Tebakor** testified that he started working with the Respondent on 16th February 2011 at Lichota tree nursery. He was paid Kshs. 7920 per month and the payment was made monthly. The payment was made by the cashier in the station at Mabera in Migori and he signed in a register. He was not issued with a payslip. He worked continuously from Monday to Monday, 7 days a week for 3 years. He worked with Batel Nyamohanga, Anna Gati and John Oluoch. There were 4 of them at the nursery. He testified that there were other nurseries at Mabera Station, Aramu and Karamiti. He testified that there were in total 4 nurseries and all of them had workers.

CW1 testified that on 31st July 2014 Mr. Moses Ochol, the supervisor made a phone call to Mr. Batel to inform him that there was no more work for them. Mr. Ochol told Batel to inform the rest but Mr. Batel was afraid to relay the message to them. Mr. Ochol came later with the Area Manager Mr. John Kimata and told them that there was no more work for them. He testified that they were told to go home. He testified that the property of the company that was in their possession which included wheelbarrows, spades, water cans, drums for water storage and seedlings were transported to Mabera Station and they signed for the delivery of the equipment. He testified that there was no work from that day.

CW1 testified that they were not informed earlier about the termination and became aware about the

decision on 31st July 2014 when they were also paid salary for July. He testified that they were unhappy with the termination and reported to the County Labour Officer, Migori who called the Respondent's Human Resource Manager Mr. Babori and they held a meeting later that afternoon. He testified that the Human Resource Manager informed the Labour Officer that there will be a meeting to discuss the matter.

CW1 denied that they were casual employees. He testified that they worked continuously and had produced NSSF membership card and statement as proof of continuous employment. He testified that they were not given or paid in lieu of annual leave or overtime. He testified that he received the same salary of Kshs.7920 for the entire period he worked.

Under cross examination he stated that they were not issued with letters of appointment or payslips. He stated that he knew all the other Claimants as they met at the station. He stated that he worked with Batel, Anna Gati, John Oluoch and Pauline Boke. He stated he was aware that the salary for Batel who was their supervisor was Kshs. 10,400 while all the rest of them earned Kshs. 7920 every month. He stated that they worked every day because if they did not work or if they complained they would be sacked.

CW2 Batel Mutuki Nyamuhanga testified that he worked with the Respondent from 18th April 2006. His first salary was Kshs.6000 which was increased to 9000, then again to 10,980 and finally to Kshs.14,010 and he was paid monthly. He testified that he was a headman at Lichota Tree Nursery which was under afforestation section of the Respondent. He testified that there was a total of 8 nurseries or woodlots at Mabera Centre, Lichota, Aramu and Taraniti. In Suba East there were 4 nurseries/woodlots. His job was to supervise workers and to issue and receive seedlings and other materials. He reported to Mr. Choge, the Forester or Mr. Eliud Papoi, the MR. The workers under his supervision were Jackson Obare, Anne Gati Rioba and Pauline Boke. Philip Ogola was the night watchman while the rest were nursery attendants. They worked every day because if they did not water for even one day the trees would dry up. Although they worked on public holidays and rest days they were not paid overtime. He further testified that they did not go on annual leave and were not paid in lieu of leave.

CW2 testified that they signed daily in a master roll which was delivered to him daily and he returned to the station after marking the employees who were present. He testified that the master roll was kept by the cashier. The first cashier was George who was later promoted to accountant and replaced by Peter. He testified that once he returned the master roll he had no access to it.

CW2 testified that on 31st July 2014 at around 9.35 am he received a call from Mr. Ochoge Moses the Field Assistant/Forester who told him that from that day there was no more work. When he informed the workers they did not believe him. After about one hour at around 10.40 am Mr. Ochoge's Manager whose name is Mr. John Kimata came with him to the nursery, each of them on a motor bike, and again told him about the termination. He told them that he cannot tell the workers so he called them and they were informed about the termination. He was told to return all equipment. He did a return of 1 jembe, 6 water cans, 2 spades, 1 wheelbarrow, 1 slasher and 1 rake. A vehicle came to collect the equipment and he handed them to the driver who took them to the store.

He testified that it was a very painful experience, that they asked for a letter from Mr. Papoi the Manager but he refused. They went to the District Officer and then to the Labour Officer Migori County Mr. Kodiye who wrote a letter to the company and they had a meeting where the company promised that they will look into the matter.

CW2 denied that they were casual workers. He testified that he was the one who established the nursery and worked continuously until 31st July 2014. He testified that the company paid NSSF at Kshs.400 monthly for him for the entire period that he worked. He testified that the Respondent's NSSF Number is 200269999 and his number is 2004784495. He referred to the NSSF statements on record. CW2 testified that he knew all the Claimants in the different stations as he used to supervise them when their supervisor was on leave. He testified that they were all terminated on the same day and were paid salary for July on 8th August 2014 without notice, terminal benefits or a letter of recommendation.

Under cross examination CW2 stated that he was not issued with a letter of appointment. He stated that

there were 8 nurseries and he knew all the employees in the nurseries and was aware they were employed at different times but could not recall the exact dates. He stated that he worked daily without leave and that he never applied for leave as that would be viewed as incitement of the workers.

CW2 denied that they were casuals or were paid every 6 days. He stated that they worked up to 7pm daily but were not paid overtime.

In the written submission filed on behalf of the Claimant it is contended that it is clear from the Claimant's NSSF card that the Respondent engaged the Claimant for more than one year and should have given him notice as provided in section 35(1)(c) as read with 37(1)(b) of the Employment Act. It is further submitted that the Respondent kept all records of engagement and nothing would have been easier than to produce the records. It is further submitted that by virtue of section 35(5), 49 and 50 of the Act the Claimant is entitled to the remedies sought. It is also submitted that the respondent failed to give contrary evidence to what the claimants have pleaded in their statement of claim with regard to Notice, Compensation, Annual/Leave terminal Benefits and severance Pay. It is submitted that the same be awarded as prayed in the statement of claims as follows:-

i) Jackson Obale Tebakor – Kisumu/cc No.119 of 2015	166,320/-
ii) James Ondiba Makori – Kisumu/cc No.120 of 2015	182,160/-
iii) Samson Mwikabe Moheria – Kisumu No.121 of 2015	213,840/-
iv) Steven Otieno Otieno – Kisumu cc No.123 of 2015	213,840/-
v) Maurice Okinyi Otieno Kisumu/cc No.124 of 2015	166,320/-
vi) John Oluoch Ogoko – Kisumu/cc/No.125 of 2015	182,160/-
vii) Philip Ogora Magaigwa – Kisumu/cc No.126 of 2015	230,580/-
viii) Martin Odhimabo Ojwala – Kisumu/cc 127 of 2015	229,680/=
ix) Batel Mutuki Nyamohanga – Kisumu/cc No.128 of 2015	434,310/=
x) Dancan Nyamohanga Samwel – Kisumu No.129 of 2015	150,480/=
xi) Pauline Boke Taraga – Kisumu/cc No.130 of 2015	150,480/=
xii) Anna Gati Rioba – Kisumu/cc No.131 of 2015	150,480/=
xiii) Nelson Kroko Marwa – Kisumu/cc No.132 of 2015	150,480/=
xiv) Bonface Odiwour Juma – Kisumu/No.133 of 2015	166,320/=
TOTAL	2,636,970/=

It was further submitted that the claimants are entitled to costs and interest from the date of unlawful termination of employment on 31st July 2014 until payment is made.

Defence Case

EVANS ENGOKE LUNGA, RW1 testified that he worked with the Respondent as Assistant Human Resource Manager. He testified that he did not know Jackson Ebale Tebakor, James Ondiba Makori, Steven Otieno Otieno, John Oluoch Ogako, Philip Ogora Magaigo, Martin Odhiambo Ojuang, Jackson Nyamuhanga Samuel, Pauline Boke Taranga and Bonface Oduor Juma. He however knew Maurice

Okinyi Otieno, Batel Nyamuhanga Batuki and had heard the name Samson Mwikwabe Moheri and Anne Gati Rioba. He testified that Batel Nyamuhanga, Duncan Nyamuhanga, Nelson Kirako Malu worked as casuals but he used to meet the rest. He testified that casuals used to work for not more than 3 months, that they worked mostly in nurseries and as guards and were paid on daily basis. He testified that they worked on seasonal basis as tobacco is grown seasonally, maybe twice a year. He testified that the Respondent had permanent employees whose terms were very different from the casuals. He testified that contracted workers were on payroll and were issued with contract letters with specified designations. They were entitled to leave allowance and were on medical scheme but for casuals only NSSF and NHIF was paid. He testified that casuals were never employed so the company did not terminate their employment.

He testified that since the Claimants did not work for more than 3 months they are not entitled to notice or gratuity. He prayed that the claims be dismissed.

Under cross examination RW1 stated that he did not carry his identity card or any identification to court. He denied that he was employed as an Assistant Security Manager. He stated that he was employed as assistant Human Resource Manager from 2009 and his immediate boss was Mr. Eliud Papoi. He testified that the company closed down and some employees were laid off including Mr. Papoi and that at the time of trial he was stationed in Thika. He testified that he knew Mr. Papa who was a Security Manager of the Respondent and was stationed both in Nyanza Region and in Thika.

RW1 testified that the company had records of employees, that there were 16 zones and the headmen were recording the particulars of the technician in every zone. He stated the nurseries were at Lichota, Piny Oyie, Opembo, Komomwamu, Chungni, Girimpe, Nyisiru and Mirimagongo. He stated that he did not recall if there was a nursery at Marabiko. He testified that each nursery had more than 20 casual employees overseen by technicians and that the company contracted around 88 technicians. He stated that it was the technicians who were in direct contact with the casuals and he personally did not see the casuals. He testified that before hiring casuals there was a budget and requisitions with the names of the casuals which were approved for 3 months but he did not bring them to court as he did not anticipate that they would be required.

RW1 testified that he knew some of the casuals like Batel who was a headman in charge of a nursery but could not recall which one. He identified Batel in court. He testified that the work of a headman was to oversee the planting and watering of seedlings. They were given seedlings, jembes, gumboots, watering cans and polytops. The technician and headman took care of the materials issued to the nursery.

He stated that he signed a witness statement in which he admitted that all the Claimants were dismissed. He stated that there was no need for a recommendation as all operations in the region were being closed down and all staff were dismissed enmasse. He stated that it was clear that the company was having difficulty in the growing business and had to close down.

RW1 stated that all employees were registered with NSSF immediately upon engagement. RW1 was referred to the witness statement of Davies Papa signed in June 2015. He stated that Davies Papa was no longer in the employment of the Respondent and that the information he gave to the court was given to him by the Security Officer. He confirmed that the information in the witness statement signed by Davies Papa was correct.

In the written submissions filed on behalf of the Respondent it is urged that it was incumbent upon the Claimant to prove that he was indeed employed by the Respondent, and that the Claimant did not produce any document to show that he was a regular employee of the Respondent. The Respondent referred to section 107 of the Evidence Act which provides that *whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*. It is submitted that in the absence of any proof that the Claimant was employed on 16th February 2011 this court cannot assume that the Claimant worked for all those years continuously.

It is submitted that the Claimant produced a statement from NSSF Claiming that it was proof of

employment by the Respondent but it does not show any proof of employment nor did the Claimant prove that the NSSF number on the Statement belongs to Alliance Tobacco. It is further submitted that the Claimant did not prove that he did not go on leave and in any case the said claim is statutorily barred. It is further submitted that the Claimant is not entitled to 3 months' notice claimed or to severance pay by virtue of section 35(6)(d) of the Employment Act as he was a member of NSSF.

The Respondent prayed that the claim be dismissed with costs.

Determination

From the evidence on record it is not in dispute that the Claimant and the Claimants in all the files in which this is a test suit worked for the Respondent in what the Respondent refers to as casual employment. It is admitted at paragraph 4 of the Response to Claim that:

4. The Respondent in further reply to paragraph 3 of the Statement of Claim avers that the Claimant was a casual worker employed on intermittent basis depending on the availability of casual jobs available and at no time did the Claimant hold a permanent and pensionable job.

The only issues for determination are therefore whether or not the Claimant and all the Claimants in the suits for which this is a test suit was a casual employee, whether he and the other Claimants were declared redundant and if he and the rest of the Claimants are entitled to the remedies sought.

1. Casual Employment

Section 2 of the Act defines a casual employee as *a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.*

Section 35(1) provides that

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

RW1 testified that the Claimant used to work for not more than 3 months and that all the Respondent's employees were registered with NSSF immediately upon recruitment. He however stated that he could not recall whether the employers number on the NSSF statements and cards produced by the Claimants in the documents filed with the statements of Claim was that of the Respondent. CW1 and 2 testified that they both worked continuously together with all the other Claimants.

Section 9 of the Act provides that:

9. General provision of contract of service

(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be

expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

10(3) and 74 require employers to keep records including records that provide for the following:

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) incapacity to work due to sickness or injury, including any provision for sick pay; and

(iii) pensions and pension schemes;

(b) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;

(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Section 10(7) provides that if in any proceedings an employer fails to produce any prescribed records of employment it shall be the burden of the employer to prove or disprove an alleged term of employment. In this case the Claimant has produced NSSF records which he states is proof that the Respondent paid his NSSF contributions for the period he was in its employment and therefore it is the burden of the Respondent to disprove this fact by either proving that the employer's number on the NSSF card does not belong to it or that the Claimant was not in its employment for the alleged period. Having failed to do so I find and hold that the Claimant and all the other Claimants were in the employment of the Respondent for the period set out in the NSSF statements and in their various claims.

Whether the Claimant was Declared Redundant

CW1 and 2 testified that they were informed by the Field Assistant/Forester Mr. Ochoge and his Manager Mr. John Kimata that from 31st July 2014 there was no more work for them. RW1 in his testimony confirmed that the Respondent closed its operations in Migori in July 2015. There is also a letter on record dated 3rd June 2015 in which the Respondent notified the County Labour Officer Migori about its intention to declare employees redundant. The letter states that the employees would be paid redundancy benefits in accordance with the CBA effective from 1st April 2013 as follows:

1. Salary/wages up to the date of termination;
2. Severance dues at the rate of forty eight (48) days pay for every year served;
3. Any payment due in lieu of notice being there (3) months;
4. Transportation of household effects;
5. Entrepreneurship training at the expense of the company; and

- ii) Annual leave (16/2/2011-31/7/2014) 123 months
at 1.75 days per month Kshs. 56,826
- (iii) Severance pay 5 years Kshs.126,720
- Total** **Kshs.207,306**

5. **MAURICE OKINYI OTIENO** employed on 11th October 2011 as a day forest guard stationed at Giribe Woodland at a monthly salary of Kshs.7920

- (i) Notice Kshs. 23,760
- ii) Annual leave (16/2/2011-31/7/2014) 66 months
at 1.75 days per month Kshs. 30,492
- (iii) Severance pay 3 years Kshs. 63,360
- Total** **Kshs.117,612**

6. **JOHN OLUOCH OGAKO** employed on 1st May 2010 as a forest guard stationed at Chunguni Woodlot at a salary of Kshs.7920 per month.

- (i) Notice Kshs. 23,760
- ii) Annual leave (16/2/2011-31/7/2014) 87 months
at 1.75 days per month Kshs. 40,194
- (iii) Severance pay 4 years Kshs. 88,704
- Total** **Kshs.152,658**

7. **PHILIP OGORA MAGAIWA** employed on 19th April 2011 as a night watchman stationed at Lichota at a salary of 10,980 per month.

- (i) Notice Kshs.32,940
- ii) Annual leave (16/2/2011-31/7/2014) 28 months
at 1.75 days per month Kshs.17,934
- (iii) Severance pay 2 years Kshs.35,136
- Total** **Kshs.86,010**

8. **MARTIN ODHIAMBO OJWALA** employed on 10th October 2008 as a day forest guard stationed at Obembo Woodlot at a monthly salary of Kshs.7920.

- (i) Notice Kshs. 23,760
- ii) Annual leave (16/2/2011-31/7/2014) 123 months
at 1.75 days per month Kshs. 56,826

(iii) Severance pay 5 years Kshs.126,720

Total Kshs.207,306

9. **BATEL MUTUKI NYAMOHANGA** employed on 10th October 2008 as a headman stationed at Lichota at a monthly salary of Kshs.14,010.

(i) Notice Kshs. 42,030

ii) Annual leave (16/2/2011-31/7/2014) 123 months
at 1.75 days per month Kshs.100,521.75

(iii) Severance pay 5 years Kshs.224,160

Total Kshs.366,711.75

10. **DUNCAN NYAMOHANGA SAMUEL** employed on 10th October 2008 as a day forest guard stationed at Nyanchabo Woodlot at a monthly salary of Kshs.7920.

(i) Notice Kshs. 23,760

ii) Annual leave (16/2/2011-31/7/2014) 123 months
at 1.75 days per month Kshs. 56,826

(iii) Severance pay 5 years Kshs.126,720

Total Kshs.207,306

11. **PAULINE BOKE TARAGA** employed on 16th October 2012 as a nursery attendant stationed at Lichota at a monthly salary of Kshs.7920.

(i) Notice Kshs. 23,760

ii) Annual leave (16/2/2011-31/7/2014) 21months
at 1.75 days per month Kshs. 9,702

(iii) Severance pay 1 year Kshs. 12,672

Total Kshs.43,134

12. **ANNA GATI RIOBA** employed on 16th August 2012 as nursery attendant stationed at Lichota at a monthly salary of Kshs.7920.

(i) Notice Kshs.23,760

ii) Annual leave (16/8/2012-31/7/2014) 23 months
at 1.75 days per month Kshs.10,626

(iii) Severance pay 2 year Kshs.25,344

Total Kshs.59,730

13. **NELSON KEROKO MARWA** employed on 15th January 2012 as a day forest guard stationed at Kimumwamu Woodlot at a salary of Kshs,7920 per month.

(i)	Notice	Kshs.23,760
ii)	Annual leave (16/2/2011-31/7/2014)	
	41 months at 1.75 days per month	Kshs.18,942
(iii)	Severance pay 3 years	Kshs.38,016
	Total	Kshs.80,718

14. **BONIFACE ODIWUOR JUMA** employed on 24th April 2011 as a day forest guard stationed at Pinyoyie Woodlot at a monthly salary of Kshs.7920.

(i)	Notice	Kshs.23,760
(ii)	Annual leave (24/4/2011-31/7/2014)	
	39 months at 1.75 days per month	Kshs.18,018
(iii)	Severance pay 3 years	Kshs.38,016
	Total	Kshs.79,794

The Respondent will also pay Claimants' costs for the suit and interest shall accrue at court rates from date of judgment.

Dated, Signed and Delivered this 22nd day of September , 2017

MAUREEN ONYANGO

JUDGE