REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 157 OF 2013

(Originally Nairobi Cause No. 1558 of 2011)

DANSON GICHANGI WANGAI.....1ST CLAIMANT

PAUL MWAI OKOTH.....2ND CLAIMANT

THOMAS WESONGA.....3RD CLAIMANT

DENIS KWEYU OMURULI.....4TH CLAIMANT

JOHN ODUOR ALUSO.....5TH CLAIMANT

LABAN MWANGI WANJIRU.....6TH CLAIMANT

JOHN KIMAWACHI NYONGESA.....7TH CLAIMANT

v

THE DIRECTOR, LESIOLO GRAIN HANDLERS LTD.....RESPONDENT

JUDGMENT

1. Danson Gichangi Wangai (1st Claimant) and Paul Mwai Okoth (2nd Claimant were employed by Lesiolo Grain Handlers Ltd (Respondent) on 1 August 2007 (certificate of service gives date as 2 April 2007). Thomas Wesonga (3rd Claimant), Denis Kweyu Omuruli (4th Claimant) and John Oduor Aluso (5th Claimant) were employed on 1 December 2009, while Laban Mwangi Wanjiru (6th Claimant) and John Kimawachi Nyongesa (7th Claimant) were employed on 1 August 2010.
2. All the Claimants were on term contracts and the last such written term contracts were to expire on 31 May 2011.
3. On or around 31 May 2011, the Respondent issued a notice to all its Term Employees informing them of restructuring and the resultant outsourcing of non-core functions to a contractor due to rising costs of doing business.
4. As a result of the restructuring, the notice informed the employees that certain term contracts would not be renewed, but the affected staff would be seconded to a contractor if they decided to continue offering services.
5. The Claimants were aggrieved, and on 13 September 2011, they commenced legal proceedings in a needlessly verbose Memorandum of Claim, (this overloading of pleadings with facts leads to the danger of a party assuming the pleaded facts are proven when actual evidence is not led to prove the facts- this type of pleading should be avoided and facts constituting the cause of action should

be precisely/concisely pleaded), stating the issue in dispute as *unprocedural redundancy/unfair termination* and seeking *underpayments, overtime* (Saturdays, Sundays, public holidays, rest days/off) and *gratuity/severance pay* and *compensation* pursuant to section 49(1)(c) of the Employment Act, 2007.

6. The Respondent filed its Memorandum of Defence and Documents to be relied on, on 30 September 2011.
7. On 14 March 2012, the Respondent filed a Supplementary Memorandum of Defence and List of Documents, pursuant to leave granted on 21 February 2012.
8. On 4 December 2013, Ndeda & Associates filed a Notice of Change of Advocates to come on record for the Claimants, instead of Gordon Ogola & Associates Advocates.
9. On 24 February 2014, the Claimants filed a Response to the Memorandum of Defence.
10. On 6 October 2014, the Court directed that only 3 of the Claimants would give testimony on behalf of the other Claimants. This directive was pursuant to rule 9 of the Industrial Court (Procedure) Rules, 2010, with a view to economical use of judicial time.
11. The Cause was heard on 6 October 2014 and 10 December 2014. The Claimants filed their written submissions on 22 December 2014 while the Respondent filed its submissions on 16 January 2015.
12. Because of the nature and way the parties pleaded, the Court has decided to identify the issues for determination before setting out each party's case.
13. From the pleadings, documents, testimony of witnesses and submissions and the authorities cited therein, the Court has identified the issues for determination as, *when were the Claimants employed and in what occupations, validity/nature of the Claimants contracts, whether Claimants were underpaid, whether the Claimants worked overtime, whether the Claimants positions were declared redundant unfairly or contracts expired* and *appropriate relief.*

Commencement of employment relationship

14. According to the Memorandum of Claim, the Claimants employment relationship commenced as follows

1st Claimant	1 August 2007
2nd Claimant	1 August 2007
3rd Claimant	1 December 2009
4th Claimant	1 December 2009
5th Claimant	1 December 2009
6th Claimant	1 August 2010
7th Claimant	1 August 2010

15. The Respondent admitted that the employment relationship commenced on these dates save for 2nd Claimant who was employed on 2 April 2007.
16. Although the Claimants had pleaded that the 1st and 2nd Claimants were employed on 1 August 2006, and submitted that these Claimants were employed in November 2006, this submission is not supported by evidence.
17. This issue therefore does not fall for determination.

Occupation (General labourers or Machine Attendants)

18. The Claimants pleaded that they were employed as *Process Minders* and that this should have been grouped with miners, stone cutters, turn boys, waiters, cooks, loggers and line cutters instead

of being categorised as general labourers, cleaners,sweepers,gardeners,day watchmen, messengers, children's ayah and house servants.

19. The Claimants further pleaded that they should have been classified with *Machine Attendants* under column 4 of the Regulation of Wages (General) (Amendment) Orders.
20. The Claimants asserted that their classification with general labourers was to facilitate their underpayment and the pay was not commensurate with the actual work they were doing.
21. The 4th Claimant was the first to testify. He stated that he was a *Machine Attendant.*
22. On cross examination, he referred to his contract which was annexed to the Memorandum of Claim. The contract indicated that he was a *Process Minder* (initial contract for this Claimant was not annexed but a Certificate of Service). He confirmed that his title was *Process Minder* and duties were those stated in the Certificate of Service.
23. The duties indicated in the Certificate of Service were, *taking samples from trucks, silos, driers etc and collecting rubbish from chutes, cleaners etc, loading trucks, sweeping, cleaning, collecting spillages, manning the process and other general duties.*
24. The 3rd Claimant was the second to testify. He stated that he was employed as a *Process Minder/Machine Attendant* and that the duties included drying/cleaning/separating wheat/barley using a drier machine and sealing bags. He would also determine the moisture content. All the other Claimants had same duties.
25. In cross examination, he stated that the Respondent operated an automated plant which required human intervention in certain operations such as changing sieves and switching on directional valves. He admitted signing a written contract with duties indicated.
26. The 2nd Claimant was the Claimants third and last witness. He gave similar testimony as the other 2 witnesses and stated and added that they used hopper machines to clean the wheat/barley.
27. The Respondent's pleaded case was that the Claimants were employed as *Process Minders* and the duties included *taking samples from trucks, silos and driers; collecting rubbish from chutes and cleaners; loading trucks, sweeping; manning the process; collecting spillages and other general duties.*
28. The Respondent called its Human Resources Manager to testify on its behalf. He stated that the Claimants were *Process Minders* and their duties were set out in their individual contracts.
29. He also stated that the Respondent's machines were fully automated and controlled from a central place. He denied that the Claimants were attending to machines.
30. The term or occupation of *Process Minder* is not listed in any of the several Regulation of Wages (General)(Amendment) Orders or the specific Industry/Trades Wages Orders.
31. To resolve the puzzle of the Claimants occupation(s), the Court must therefore examine the Claimants day to day duties.
32. But before the examination, it is necessary to consider who is a *Machine Attendant*. Paragraph 3 of the Regulation of Wages (General)(Amendment) Order defines a machine attendant as (an employee) who

> sets ups and operates automatic or semi-automatic machines for cutting, punching, pressing or moulding materials (such as wood, textiles, rubber or plastic), or spinning weaving and blending textile fibres; he feeds machines with materials to be processed, starts machines and observes proper flow of materials, examines products and stops machines when products do not meet certain standards and adjusts and cleans machines to ensure that products meet the standards set for mass production;

33. The Respondent's case that its plant is fully automated was not challenged.
34. The testimony was in tandem with that of the 3rd Claimant who stated that the Respondent operated an automated plant but with a rider that human intervention was necessary such as when switching on the directional valves and changing the sieves.
35. From this evidence, the Court finds as a fact that the Claimants in one way or the other had an intervention with a machine but in the same vein the Court is satisfied that the core duties of the Claimants did not involve operation of machines. The interaction with the machines was not so substantial so as to render the Claimants *Machine Attendants* or operators.
36. The Claimants were *Process Minders* carrying on duties more easily classified as general labour, and the Court so finds.

Nature of the contracts (Legality/validity)

37. The Claimants hotly disputed the categorisation of their contracts as term contracts. They contended they were in regular employment and the categorisation was meant to deny them their statutory entitlements.
38. The Claimants argued that the nature of the work they were doing was on a day to day basis, year in year out and did not rely on availability of material during any particular period. The work was not meant to last for a short time and that some of them served for over 4 years.
39. In submissions, the Claimants took the position that there was discrimination (the issue of discrimination was not made an issue during the hearing or in the pleadings and the Court declines to address it).
40. It is not in dispute that the Claimants were on fixed term contracts which were renewed severally. The real dispute is as to whether the nature of the contracts was to deny them certain minimum statutory/contractual entitlements and therefore the contracts were invalid or constituted an unfair labour practice.
41. The Respondent on the other hand contended that the nature of its business was seasonal, but admitted that the Claimants worked continuously from engagement till separation on 31 May 2011.
42. The law envisages contracts of a limited duration. This can be discerned from the definition of *contract of service* in section 2 of the Employment Act, 2007, the *general provisions of contracts of service* in section 9 of the Act, the *employment particulars* in section 10 and the conversion of casual employment into term contract in section 37 of the Act. All these, to my mind, point to the lawfulness and legality of employment contracts of a limited duration such as were issued herein.
43. I would also add that the right to associate in Article 36 of the Constitution would underpin the party autonomy of employees and employers to enter into mutually agreeable employment contracts of such duration as they agree.
44. But the Court must not lose sight that in the employment equation, the parties do not have the same or equal bargaining power, which is the reality of the working sphere.
45. This means that there may be circumstances where the stronger partner (employer) may use limited term contracts to deny an employee the minimum statutory rights or entitlements and in such a case, the Court may appropriately intervene on the basis of the right to fair labour practices.
46. Certain provisions in the Claimants contracts have bothered the Court. More so the part titled *Continuity of Employment* which had provisions that

> 2.1 No part of your previous service with LGHL (if any) or any previous employer will count as part of your temporary employment under this contract.
>
> 2.2 This contract, renewable at the expiry upon the discretion of the management, supersedes any previous agreement with Lesiolo Grain Handlers and renders such contracts null and void. At expiry, should your services be required, renewal of this contract may be done automatically for a specified period and that shall by no means imply change of employment from term to a permanent contract.
>
> 2.3 It is also clearly understood that by signing this contract you have no outstanding claims whatsoever of whatever nature against the Company.

47. Another disturbing provision is the clause on *Period of Contract* which provided that

> Your employment is for a period….On expiry of this contract you will not be entitled to claim for
>
> a) Any redundancy payment; or
>
> b) Any severance payment

48. The difficulty the Court has with these clauses should be obvious. The contracts are silent to such

entitlements as annual leave or pro rata leave as may be applicable, maternity leave, service pay or other terminal dues and out rightly ousts payment of severance pay which is a statutory right in cases of redundancy.

49. In the view of the Court, several provisions in these contracts were couched in such a way to deny the employees both statutory and contractual entitlements.
50. The Court finds that although the term contracts herein were lawful and legal, those provisions meant to curtail the employees entitlements were invalid and amount to an unfair labour practice.
51. The Court will say a little more when discussing appropriate relief.

Underpayments

52. The pillar of this contention was that the Claimants were *Machine Attendants* and not *Process Minders* (general labourers).
53. Because the plank has been removed and after examining the relevant Regulation of Wages (General) Orders, this question has become moot.

Overtime

54. The minimum working hours are normally set out in statute and they vary from 52 hours spread over 6 days to 45 hours spread over 6 days.
55. The Claimants pleaded that they worked on Saturdays, Sundays, during public holidays and their rest days. Work on any of these days would qualify for payment of overtime.
56. On the working hours, the 4th Claimant testified that these were from 8.00am to 5.00pm but sometimes they would work upto 6.00pm. Sometimes there was night shift from 6.00pm to 6.00am but for which they were paid overtime but at a lower rate.
57. On the days of work, he stated that they worked Monday through to Sunday, and take an off the Monday day next and report for night shift. He said he was seeking 36 days off but he was not sure of the exact dates.
58. In cross examination, he confirmed that the pay slips indicated he was getting paid for overtime, but again he faulted the rate used.
59. The 3rd Claimant's testimony was on similar lines on working hours except that some employees would rest on Sundays. Work was from Monday to Saturday and Saturdays they worked until 2.00pm or 4.30pm.
60. He stated that they worked during public holidays.
61. In cross examination, he confirmed that his pay slip indicated he was being paid overtime, and that in March 2010 he received overtime of Kshs 5,067/-.
62. The pay slips annexed to the Memorandum of Claim show the Claimants were paid overtime. They admitted the same. The records produced by the Respondent also show overtime (both normal and during Sundays/public holidays) were being paid.
63. The Claimants did not make any reference to any statutory provision on working hours over the week. Agreed contractual hours were also not proved. Without evidence of the contractual or statutory working hours and how the same were spread over the week, the Court is unable to determine the issue of *underpayment overtime*.
64. On the basis of the testimonies and records, the Court is satisfied that the Respondent was paying the Claimants overtime (normal and work on Sundays and public holidays).

Redundancy or expiry through effluxion of time

65. The Claimants case is that their services were terminated through redundancy on 31 May 2011, without complying with the conditions outlined in section 40 of the Employment Act, 2007.
66. The Respondent on the other hand contends that the Claimants were employed on term contracts for specific durations which contracts lapsed but were not renewed. According to the Respondent, the renewal was at its discretion.
67. The Respondent also contended that each Claimant was paid one month pay in lieu of notice.
68. The Claimants annexed to the Memorandum of Claim the contracts of the 2nd Claimant (expiring on 30 May 2011), 6th Claimant (expiring on 30 April 2011) and 7th Claimant (expiring on 30 April

2011).

69. The Respondent filed contracts in respect of the 3rd Claimant (expiring on 31 May 2011), 4th Claimant (expiring on 31 May 2011), 5th Claimant (expiring on 31 May 2011), 6th Claimant (expiring on 31 May 2011) and 7th Claimant (expiring on 31 May 2011).
70. The Respondent's notice on 31 May 2011 to the Claimants was clear that it was restructuring and it would outsource non-core functions to a contractor.
71. This indicates that the day to day duties of the Claimants were not superfluous but only the business model was changing.
72. The notice informed the Claimants that those who wished to continue offering services would be seconded to a contractor and would be given first priority.
73. On the basis of the contracts produced and the testimony, the Court finds that though the Claimants contracts expired, the real reason for non-renewal, which was at the discretion of the Respondent was because of restructuring to outsource the functions to a contractor. The Respondent was declaring redundancy because of rising costs.
74. This is so because it is the Respondent/employer who knew the real reasons for bringing the relationship to an end the way it did.

Appropriate relief

Underpayments

75. This head of claim was anchored on the contention that the Claimants were *Machine Attendants*. That contention has been rejected by the Court and this claim fails.

Overtime (Saturdays/Sundays/public holidays/rest days)

76. The Court has reached the conclusion that the Claimants were paid overtime whenever they worked over and above the hours. This head of claim also fails.

Gratuity/Severance pay

77. All the Claimants sought gratuity. The Claimants in testimony and in submissions did not disclose whether the foundation for the claim for gratuity was contractual or statutory.
78. But the Court has also faulted various clauses in the contracts which appeared to suggest that the Claimants had waived their right to claim certain statutory entitlements such as severance pay.
79. The Court has concluded that the Claimants contracts were terminated through redundancy. Pursuant to section 40(1)(g) of the Employment Act, 2007, the Claimants would be entitled to severance pay.
80. The Court would pursuant to section 49(4)(h) and (i), in lieu of severance pay make appropriate awards for compensation for unfair termination

Compensation for unfair termination

81. The Court reached a conclusion the real ground/reason for non renewal of the Claimants contracts was redundancy. The Respondent did not comply with the requirements and such termination through redundancy would be unfair.
82. The Court would therefore award each of the Claimants the equivalent of 4 months gross wages as compensation in lieu of severance pay.
83. Before concluding, the Court once again wishes to observe that parties should endeavour as much as possible to utilize the Labour Officers to compute for them alleged underpayments where there are claims of wrong classification of jobs. It is usually a herculean task for an employee to prove on the dock the correct job classification and underpayments. The Labour Officers have all the expertise needed in these areas.
84. Further, this would be an appropriate case for the Court to order the Commissioner for Labour through the County Labour Officer responsible for the area where the Respondent operates to move in and examine and carry out inspection to verify whether the Respondents labour practices

are in compliance with the various labour laws.

Conclusion and Orders

85. From the foregoing, the Court finds and holds that the Claimants contracts were unfairly terminated through redundancy and awards them and orders the Respondent to pay them the amounts indicated herein (based on May 2011 gross wages)

1st Claimant

Kshs 44,000/-

2nd Claimant

Kshs 50,288/-

3rd Claimant

Kshs 42,400/-

4th Claimant

Kshs 34,780/-

5th Claimant

Kshs 44,768/-

6th Claimant

Kshs 44,768/-

7th Claimant

Kshs 42,400/-

86. The heads of claim for underpayments and overtime are dismissed.
87. Claimants to have costs of the Cause.

Delivered, dated and signed in Nakuru on this 27th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimants Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Tombe instructed by Mukite Musangi & Co. Advocates