



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 95 OF 2014

[Formerly Industrial Court at Nairobi Cause Number 1005 of 2012]

**BETWEEN**

KENYA PETROLEUM OIL WORKERS UNION..... CLAIMANT

**VERSUS**

FRANCIS KIARIE KINYANJUI t/a SUNCOR GAS &

PETROLEUM ..... RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Raphael Olala Industrial Relations Officer for the Claimant*

*Mr. Njoroge Advocate instructed by Njoroge & Katisya Advocates for the Respondent*

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ISSUE IN DISPUTE: REDUNDANCY

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. This Claim was initiated by the Claimant Union on behalf of its 7 Members who were alleged to have been employed by the Respondent. The 7 Employees [Grievants] are Horkins Mogwasi; Charles Muchiri; Samuel Ituka; Mulhat Abdallah; Julius Bundotich; Faith Ndunda; and Masika Kalama. The Statement of Claim was filed on 14<sup>th</sup> June 2012. The Claimant alleges the Respondent was a Dealer engaged by Kenya Oil Company Limited, licensed to operate Kenol Changamwe Service Station, in Mombasa. The dispute arose after the Respondent's dealership came to an end on 23<sup>rd</sup> April 2012. The Claimant states the Respondent exited without meeting the redundancy obligations to the Grievants. This Claim therefore seeks to have the Grievance redressed by the following orders:-

- a. The Respondent to pay the Grievants their full terminal benefits.
- b. Certificates of Service to issue.
- c. The Sum Awarded paid through the Claimant's Bank Account.

d. Costs; and any other suitable relief.

2. The Respondent filed his Statement of Response on 28th July 2014. Francis Kiarie Kinyanjui explains he traded as Suncor Gas & Petroleum. He was licensed in his individual capacity by Kenya Oil Company Limited to operate Kenol Changamwe Service Station, which was an ongoing business. He found all the Grievants working for Kenya Oil Company at the Service Station, and left them working there at the end of the dealership. The Kenya Oil Company continued to pay the Grievants their salaries during the dealership, and had operational control of the Business. The dealership was terminated by Kenya Oil Company without notice to the Respondent. The Respondent left immediately on termination, leaving behind the Grievants as he found them. No Employee left employment at the time of the Respondent's exit. The Claim is misplaced and the Respondent urges the Court to dismiss it with costs.

3. The Claimant presented to the Court one of Grievants Samuel Ituka, who gave evidence on 29<sup>th</sup> October 2014. The Respondent gave evidence on the same date, bringing the hearing to a close. The Parties confirmed the filing of their Closing Arguments in Court on the 28<sup>th</sup> November 2014, and Award was reserved for 6<sup>th</sup> February 2015.

4. Ituka testified the Respondent took over from the previous Dealer on 27<sup>th</sup> March 2008. There were 7 Employees, the Grievants herein, at the takeover. Ituka was a Pump Attendant. He earned a gross monthly pay of Kshs. 11,280.

5. The Employees' contracts were terminated on 23<sup>rd</sup> April 2012. Ituka had worked for 4 years. No reasons were given to the Employees for the decision. KenolKobil said it was repossessing the Business. Ituka did not know why it was repossessed. The Grievants were not given any notice of termination. They were not paid terminal benefits; just the salary for 23 days worked in April 2012. He went on annual leave only twice during the 4 years; he seeks annual leave pay for the balance of the 2 years. All Grievants, except for Muchiri, only utilized 2 years of annual leave. All the 7 Employees left. They were not issued the Certificate of Service. Termination was unfair. The Grievants were not paid for the years of service. Relying on Statements from the N.S.S.F, Ituka testified N.S.S.F contributions on account of the Grievants were deducted, but not remitted.

6. Cross-examined, Ituka testified that the Dealer in place before the Respondent was one Dhanji. The Respondent did not issue the Grievants letters of employment. The employment contracts between the Respondent and the Grievants were sealed verbally. KenolKobil repossessed the Business from the Respondent. Ituka did not know if the Respondent was notified by KenolKobil that the dealership was being terminated. The Grievants continued to work for 1 week after the Respondent left.

7. The Respondent operated Changamwe Service Station under his own name Francis Kiarie Kinyanjui for 1 year after the start of his dealership. Suncor was registered as a business name, 1 year after the dealership. The Grievants salaries were banked in the individual Employee Bank Accounts. There were times the Grievants were paid in cash by Mulhat Abdallah the Manager. The Respondent found the Grievants already in employment, and left them in employment momentarily. The N.S.S.F records dated 8<sup>th</sup> November 2011 showed the Employer as Changamwe Service Station, not Francis Kiarie Kinyanjui. Ituka agreed the Station belonged to KenolKobil, and that the Manager Mulhat Abdallah reported to KenolKobil.

8. Redirected, Ituka testified that when Dhanji's dealership ended, he paid the Grievants their terminal dues. The Grievants were taken over by the Respondent through oral contracts. The name Kenol Changamwe Service Station was used by all the Dealers. Ituka did not have the details of the dealership. The Respondent signed the salary voucher. Mulhat Abdallah was there even during the Dhanji dealership. She was a Member of the Claimant and left at the same time with the other Grievants.

9. Francis Kiarie Kinyanjui testified he entered the dealership with KenolKobil in 2008. The Company would supply products to him. The Company would give a price to its products, which the Claimant would adjust marginally. The difference between the price stated by the Company and that marginally

adjusted by him, was his earning. All tools of the trade, including furnishings and stationery were owned by the Company.

10. The Manager was Mulhat Abdallah. The Respondent was introduced to her by the Company. All the Grievants were already in employment at the time the Respondent came in. They continued working after he exited. He was called by the Manager and told KenolKobil Officers were at the Station, taking stocks. He rushed there, and was asked by these Officers to sign the termination of dealership. He was told he had no choice. The issue of Employees did not arise. They continued working. Julius Bundotich and Charles Muchiri are still working at the Station. The Grievants' salaries were processed and paid by the Manager. The Respondent reclaimed what was paid in salaries from KenolKobil. This Company was initially known as Kenya Oil Company. Statutory deductions from the Grievants' salaries were done by the Manager. The Respondent had nothing to do with the deductions.

11. Mulhat dealt with KenolKobil, the Respondent testified on cross-examination. The Respondent did not oversee the daily operations. The Manager was paid a salary of Kshs. 18,000 per month. The Respondent signed payment vouchers and was required under the dealership, to pay certain bills such as the bill for electricity. Regulatory Authorities dealt with Kenol Changamwe Service Station. The Respondent did not meet Mr. Olala at any time, and did not even know the Employees belonged to the Claimant Union. The Manager kept custody of the employment records. The dealership agreement referred to Licensee's staff. Kinyanjui did not have his own staff. Clause 1 [a] of the Fifth Schedule in the License Agreement stated that the Licensee would at all times, operate and manage the Petrol Station on full time basis, and in default authorize the Company to enter and repossess the Station. Clause 7 of the Third Schedule required the Licensee to comply with any requirement which may be properly made under an Act of Parliament or by- laws and regulations of the local or other authority in relation to the Premises or works or alterations thereon. Clause 3 of the Third Schedule required the Licensee to observe all statutory provisions - environmental, safety, and other regulations. KenolKobil was on the ground 100%. The Dealer had his own targets, while KenolKobil had its own. Mulhat Abdallah acted as the Supervisor to Kinyanjui; she even had a larger Office area than Kinyanjui.

12. Kinyanjui underlined on redirection, that there were 7 Employees at the Service Station; he found them there, and left them there. Trade Licenses were paid for by KenolKobil. The Single Business Permit was in the name of Kenol Changamwe Service Station.

13. The Claimant submits it has sufficiently established an employment relationship between the Grievants and the Respondent. The Dealer Francis Kinyanjui was required under the dealership to observe all statutory provisions. He was required to comply with the Employment Act 2007. Clause 5 and 6 of the dealership agreement referred to Employees of the Licensee. The Claimant's Witness testified the Grievants only knew Kinyanjui as their Employer. He paid their salaries, effected deductions, and finally terminated the Grievants' contracts on account of redundancy. The Grievants served the Respondent diligently for 4 years, and deserved to be paid their benefits upon their positions falling redundant.

14. The Respondent submits that the Employees and all else at the Service Station, belonged to KenolKobil Company. He found the Employees there, and left them there at the end of his dealership. The Manager Mulhat Abdallah was the real power, and could even bring down the Dealers. She reported directly to KenoKobil. The Respondent did not have notice of termination of the dealership. It was abrupt, and he exited as he had entered. He left the Employees behind as he found them. The Grievants went on working after the Respondent was out of the scene. The equipment belonged to KenolKobil. There was nothing in the dealership requiring the Respondent to comply with the Employment Act 2007 and the Labour Relations Act 2007. These were Acts read into the dealership by the Claimant.

15. Basing his submissions on the control test; the integration test; the economic or business reality test; the mutuality of obligation test; and the multiple test, the Respondent urges the Court to conclude that the Grievants were not Employees of the Respondent. They were under the direction and control of KenolKobil, represented by Mulhat Abdallah at the Service Station; the Grievants were integrated to the KenolKobil business, the Respondent having found and left them there; their statutory deductions were paid by KenolKobil and Changamwe Service Station; the Respondent did not promise to employ the

Grievants over a long period of time; and broadly, the Dealers all found and left the Employees at the Service Station. All the tools of trade belonged to KenolKobil Company.

*The Court Finds:-*

16. The 7 Grievants were Members of the Claimant Union, and employed in various positions at the KenolKobil Service Station. The main dispute is who employed them. Francis Kiarie Kinyanjui took over the Kenol Changamwe Service Station under the dealership agreement made on the 27<sup>th</sup> February 2008. The dealership was terminated by KenolKobil on 23<sup>rd</sup> April 2012. These facts are not disputed.

17. According to the Claimant, the Grievants' positions were rendered redundant. The Respondent ought to have paid them redundancy benefits. The Claimant holds the Respondent was the Employer, having complete control and direction of the Grievants. The Respondent disputes he employed the Grievants. According to him the Grievants were on all tests, Employees of KenolKobil, whom he found at the Station and left at the Station. He owes them nothing. There are 2 main issues that fall to be considered: one, whether the Respondent employed the Grievants; and two, whether he should pay them redundancy benefits.

18. To resolve the impasse, the Court has carefully looked at the past decisions of the Industrial Court, the Employment Act 2007, the Labour Statutes enacted in 2007 alongside the Employment Act 2007, and the Industrial Court Act 2011, on the definition of the terms 'Employer' 'Employee' and 'Contract of Service.'

19. In the unreported case of ***the Industrial Court at Nairobi Cause Number 684 of 2011 between Child Welfare Society of Kenya v. Margaret Bwire & Isiolo Children's Home- Isiolo County***, the Court emphasized the control test, stating that an Employer is a person, *who has the power or the right to control and direct how work is to be performed...the Employee contributes labour and expertise to an endeavour and is in return, paid a salary at an agreed interval...the Employer retains managerial control and apportions the Employee duties packaged into a job...other employment sources define an Employer as a person having control or custody of any Employment, Place of Employment, or of any Employee.*'' The latter decisions of the Industrial Court such as ***Christine Adot Lopeiyo v. Wycliff Mwathi Pere [2013] e-KLR, Stanley Mungai Muchai v. National Oil Corporation of Kenya [2012] e-KLR, Mwalimu Kalimu Gamumu & 35 others v. Coastline Safaris & 2 others [2013]e-KLR***, all endorse the control test.

20. Consequently the main question in determining whether Mr. Kinyanjui employed the Grievants for the period between 2008 and 2012, is not whether he found them there, or left them there at the Service Station; the determinative factor is whether he was, for the duration of the dealership agreement, in custody of the Employment, Place of Employment and the Employees.

21. This can be answered principally from the document titled 'Licence Agreement' at page 3 of the Respondent's List of Documents filed on 16<sup>th</sup> October 2014.

22. The Agreement conferred on Kinyanjui the right to use the KenoKobil Trade name, to sell its products; the right to use the Premises; and the Right to use the equipment belonging to KenolKobil. The Third Schedule to the Agreement Clause 3 required the Respondent to observe all statutory provisions and safety standards at the Premises. He would be required as the Occupier, which term, under the Occupational Safety and Health Act 2007, includes Employer, be responsible for the safety and health of the Employees and Customers at the Service Station. Clause 7 of the same Schedule obligated the Respondent to assume responsibility for any works or alteration of the premises. He was in custody of the Place of Employment.

23. Was he in custody of Employment, the Employees and did he exercise managerial control over the Grievants, directing them how to do their work? The Court is of the view that Mr. Kinyanjui was. He was required to indemnify KenolKobil for his acts or omissions, or those of any person employed by him or under his control. He was under Clause 16 of the Third Schedule required to take out insurance in his and

KenolKobil names, covering equipment, stocks and workmen's compensation. Why would a stranger, a non-Employer, take out insurance cover for workmen's compensation?

24. The Respondent was a successor Employer from the date he took over the Service Station. He succeeded the previous Dealer, named Dhanji. The dealership presumed he was taking over the business as a going concern. He assumed responsibility over the business infrastructure, including the labour force, which he found in place. He did not employ any new Employee at the beginning of his dealership. How was he to run his business and make profits, without a labour force or with a labour force over which he exercised no control? It would not be possible to implement the dealership without having Employees. The Respondent did not recruit anyone at the beginning of the dealership. If he did not intend to inherit the Employees from the previous Dealer, he could have included such a Clause in the Agreement with KenolKobil. The License was for an initial period of 1 year. Thereafter, it was renewable every January of each year, subject to contrary advice given by KenolKobil Company. Kinyanjui operated for 4 years, with the Grievants under him. At no time did he express any reservation in the 4 years, that the Grievants were not his Employees.

25. He was in control and custody of the Employees and the Employment as shown in his instructions to Equity Bank Limited, to credit the Grievants' Bank Accounts with various employment dues. The evidence of Grievant Ituka, that the Respondent was the Employer they answered to, between 2008 and 2012, was convincing. Payment Vouchers issued the Employees on various dates had the endorsement of the Respondent. It may well be that he would claim reimbursements for these payments from KenolKobil. Such an arrangement however was not shown to be contained in the dealership document.

26. The argument by Mr. Kinyanjui that he was under the supervision of Mulhat Abdallah was unpersuasive. It is highly improbable that a Dealer would invest millions of Kshs. to work under the supervision of a Service Station Manager. The submission that Mulhat occupied a larger Office than Kinyanjui does not take away Kinyanjui from being in control and custody of the Employment, Employment Place and the Employees.

27. The Court has had the opportunity of hearing and determining disputes in the past, involving Trade Unions and Service Station Dealers. Dealership Agreements particularly those involving KenolKobil tend to be standard documents. In cases such as the ***Industrial Court at Nairobi Cause Number 85 of 2011 [unreported] between the Transport and Allied Workers Union v. Excel Petroleum Agencies***, the Court found Employees' positions became redundant after a dealership agreement came to an end, and ordered the Dealer to pay redundancy dues. The place of Employees working under these dealership arrangements is therefore not a novelty.

28. The Respondent correctly feels that he was not treated well by KenolKobil Company on termination of the dealership. He was not given any notice of termination and consequently, was not in a position to sort out his relationship with his Staff of 4 years. Clause 4 and 6 of the Agreement suggest the Company had an obligation to notify the Respondent before termination. Dispute or difference between KenolKobil and Kinyanjui however, is not the subject of this Court's determination, and under Clause 19 of the Agreement, such dispute or difference would be the subject of negotiations and arbitration.

29. The Respondent was the Grievants' Employer for the years 2008 to 2012.

30. Once the dealership agreement was over, it meant the Grievants were rendered jobless. Their positions with the Dealer became redundant. They were left at the mercy of the subsequent Dealer if any. The Respondent had an obligation to pay all the employment obligations due to the Employees at the end of his relationship with the KenolKobil Company. It was wrong to expect KenolKobil Company to meet his obligations to the Grievants, accrued over the 4 years the Respondent had control and custody of the Employment, Employment Place, and the Employees. If the Respondent felt that KenolKobil Company should assume the obligations, perhaps he should have asked the Court to have the Company joined to the proceedings. What are these obligations?

31. The Claimant listed these as 1 month notice pay; annual leave pay; severance pay; underpayment

from 1<sup>st</sup> May 2011; and unremitted N.S.S.F dues. These can be gleaned from the Claimant's appendix S.G.P 3.

32. The Respondent concentrated on arguing the case that he was not the Employer, and paid little regard to the obligations attributed to him, in event he was the Employer. He did not give adequate explanation why for instance the N.S.S.F dues for Samuel Ituka for the period 2008 to 2012, are shown in S.G.P 4, to have been unremitted. He administered the pay roll. He did not bring the Grievants' annual leave records to contradict their claims on annual leave pay. It is not disputed that the Grievants worked under the Respondent for 4 complete years. 3 of the Grievants- Bundotich, Ndunda and Kalama- are shown to have earned salaries below the minimum wage contained in the Wage Order of 1<sup>st</sup> May 2011. Section 40 of the Employment Act 2007 lays down the minimum redundancy standards: where annual leave is due, it shall be paid off in cash; the Employer shall pay the Employee not less than 1 month salary in lieu of notice; and the Employer shall pay the Employee severance pay, at a rate of not less than 15 days' salary for each completed year of service. The Respondent as discussed above was not given notice at all by the KenolKobil in termination of the dealership and could not notify his Employees about the termination of their contracts with him. The law requires the Employer however to respect the minimum redundancy standards, and it is open to the Respondent to pursue any grievances he may have with KenolKobil under the terms of the dealership.

33. The Court has carefully examined the terminal dues as tabulated in the Claimant's S.G.P 3. The Claimant seems to have based its calculations on a 30 day working month, rather than 26 day working month. The Court makes the following Award:-

***[a] The Grievants shall within 40 days of the delivery of this Award be paid by the Respondent, through the Claimant Union, terminal benefits as particularized hereunder-***

- **MULHAT ABDALLAH: 1 month salary in lieu of notice at Kshs. 18,000; annual leave pay at Kshs. 25,200; severance pay at Kshs. 36,000; unremitted N.S.S.F dues at Kshs. 19,200 – total Kshs. 98,400.**
- **CHARLES MUCHIRI: 1 month salary in lieu of notice at Kshs. 11,280; annual leave pay at Kshs. 18,424; severance pay at Kshs. 22,560; unremitted N.S.S.F dues at Kshs. 19,200 – total Kshs. 71,464.**
- **SAMUEL ITUKA: 1 month salary in lieu of notice at 11,280; annual leave pay at Kshs.15,792; severance pay at Kshs. 22,560; unremitted N.S.S.F dues at Kshs.19,200- total – Kshs. 68,832.**
- **HOPKINS MOGWASI: 1 month salary in lieu of notice at Kshs. 11,280; annual leave pay at Kshs. 15,792; severance pay at Kshs. 22,560; unremitted N.S.S.F dues at Kshs. 19,200 – total Kshs. 68,832.**
- **JULIUS BUNDOTICH: 1 month salary in lieu of notice at Kshs. 10,000; annual leave pay at Kshs. 13,896; severance pay Kshs. 19,980; underpayment of salary at Kshs. 14,080; unremitted N.S.S.F dues at Kshs. 19,200- total Kshs.77,246.**
- **FAITH NDUNDA: 1 month salary in lieu of notice at Kshs.9,500; annual leave pay at Kshs. 13,314; severance pay at Kshs. 19,020; underpayment of salary at Kshs. 19,580; unremitted N.S.S.F dues at Kshs.19,200- total Kshs. 80,614.**
- **MASIKA KALAMA: 1 month salary in lieu of notice at Kshs. 8,400; annual leave pay at Kshs. 11,760; severance pay at Kshs. 16,800; underpayment of salary at Kshs. 20,680; unremitted N.S.S.F dues at Kshs. 19,200.**

**TOTAL MONETARY AWARD.....KSHS. 542,228**

***[b] The Respondent to supply the Grievants with their Certificates of Service forthwith; and***

***[c] No order on the costs.***

Dated and delivered at Mombasa this 6<sup>th</sup> day of February 2015

James Rika

Judge