



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 367 OF 2013**

**BETWEEN**

- 1. ABDUL MAJID MOHAMMED**
- 2. AHMED MOHAMED**
- 3. ALI ATHMANI**
- 4. AQUILLA MBITHI**
- 5. AUGUSTINE MWANIKI**
- 6. BANZI MURANGA**
- 7. BENSON KIMANZI**
- 8. DAVID MWADENA**
- 9. DENNIS MWAKAI**
- 10. DUNCAN MBEVA**
- 11. ELIJAH MOTTO**
- 12. ELIJAH NJUE**
- 13. EVANS WABILI**
- 14. EZEKIEL MATAGARO**
- 15. FRANCIS KALERA**
- 16. GEOFFREY MWAKAZI**
- 17. HARRISON CHAMIA**
- 18. JAMES NZILI**
- 19. JOSPHAT KORIR**
- 20. JAVAN MWALUDA**

21. JOHN KITHEKA
22. JONATHAN MANGALE
23. JOSEPH OYUGI
24. LAWRENCE LEWELA
25. LEONARD NYAMBANE
26. LUCAS MAUNDU
27. MAKAYA WAMBUA
28. MARTIN TSUMA
29. RUWA MWERO
30. THADIUS APAT
31. ZEPHANIA BORAMBO
32. JUSTUS MBATHA
33. ALEX MWATHOME
34. SIMEON MASABO
35. ONESMUS MWAEKE
36. PHYLISTON FONDO
37. PATRICK KARISA
38. PAUL KOMBO
39. PETER MUTISYA
40. PATRICK MWASI
41. RAMADHAN MWAKUPHA
42. WALTER OTIENO
43. OMAR JUMA
44. GIBSON MJOMBA
45. THOMAS KEYA
46. VITALIS MBOGHOLI
47. WILLIAM KASUKU
48. MASOUD MWAHANJE

49. MOGAKA ONSONGO
50. NELSON MWANGWAI
51. MATUKU MBITHUKA
52. SHABAAN RASHIB
53. STEPHEN KATANA
54. MWINYI BADI
55. ALI SWALEH
56. TUNE MWANJE NDAA
57. TITUS NZIOKI
58. WILSON JUMA
59. ELIJAH KIKUYU
60. CHARLES MUSAU
61. SOLOMON LENGU GORI..... CLAIMANT

VERSUS

MAERSK KENYA LIMITED..... RESPONDENT

*Rika J*

*Court Assistant: Benjamim Kombe*

*Mr. Oduor Advocate instructed by Okumu & Company Advocates for the Claimant*

*Mr. Sitonik Advocate instructed by Ndegwa Muthama Katisya & Associates, Advocates for the Respondent*

**ISSUE: TERMINAL BENEFITS**

**AWARD**

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

1. The Claimants filed their joint Statement of Claim on 5<sup>th</sup> November 2013. They state they were employed by the Respondent Shipping Company on various dates. They worked as Tally Clerks, Bay Clerks, Yard Clerks, Chief Tally Clerks, Supervisors, and Bay Planners. They worked for 1 to 8 years.

2. The dispute arose on 24<sup>th</sup> May 2011. The Respondent notified the Claimants that at 0700 hours on the 1<sup>st</sup> June 2011, their employment with the Respondent would cease. They would become Employees of Spica Marine Inspections Limited. The Respondent had transferred its tallying and associated services to Spica. The Employees were advised they would continue to work for Spica under the same terms, in the same premises and same system. The Respondent paid to the Claimants certain amounts of money, described as tokens of appreciation

3. The Claimants were not appeased by these tokens. They filed this Claim in which they seek from the Respondent the following:-

- a. 1 month salary in lieu of notice.
- b. Annual leave pay for the years worked.
- c. Overtime pay for work done during the Public Holidays over the service period
- d. House rent allowance for the years served.
- e. Costs, Interest and any other suitable relief.

4. The Respondent filed its Statement of Response on 19<sup>th</sup> December 2013. It denies the Claimants were its Employees. Its Tally Clerks had Port Passes. Alternatively, the Respondent states the Claimants were Casual Employees. The Respondent was not obliged to issue notice of termination under Section 35 [1] [a] of the Employment Act 2007. Some of the Claimants had served for one year, and would not be entitled to annual leave pay under Section 28[1] [a] of the Act. Service pay is not payable because the Claimants were not paid salaries periodically at intervals exceeding 1 month; they were paid wages on daily basis. Their wages incorporated the housing element. These claims are time-barred under Section 90 of the Employment Act 2007.

5. Mr. Ezekiel Matagarro was authorized by his Co-Claimants to pursue the Claim on their behalf. He gave evidence on the 15<sup>th</sup> October 2014, as did one other Claimant Mr. Patrick Karisa, and Respondent's Human Resource Supervisor Ms. Sheila A. Jarabi, bringing the hearing to a close.

6. Matagarro testified he worked for the Respondent for 8 years. He moved on to work for Spica from 1<sup>st</sup> June 2011, but today no longer works for Spica. Tally Clerks worked in shifts of 8 hours. They were paid after every week. They were paid overtime when they worked excess hour. The Respondent transferred its Tally Business to Spica. Employees were asked to move to Spica. They were not given notice. They were asked to collect token payments on termination. Matagarro received Kshs. 32,000. He never went on annual leave. The Respondent never remitted N.S.S.F deductions. The Employees has Port Passes. Public Holiday overtime was paid as normal overtime. The Employees had been offloaded from another Company called Spears, before joining Maersk. The Claimants made a demand for remedial action from the Respondent before the filing of the Claim, to no avail.

7. The Witness testified on cross-examination that the normal working week went from Monday to Saturday. Overtime on Sunday and Public Holiday was paid at 1.5 the normal hourly rate. Spica took over from Maersk. Matagarro continued working for Spica. The notice issued to the Employees on the changeover dated 24<sup>th</sup> May 2011, states the principles and system of employment obtaining under Maersk would be retained under the new Company. The rates of remuneration paid to Employees by Spica were higher than those paid by Maersk. Some of the Employees, including Matagarro, have since left Spica. The Witness denied that he signed the Summary of Workers' Disposition attached to the Response. His signature is as captured in the Discharge Voucher, in this Summary. The notice of change dated 24<sup>th</sup> May 2011 was just placed on the notice board; there were no individual notices issued the Employees. He did not read the Discharge Voucher before signing. The Voucher does not give details of payments.

8. Karisa testified he still works for Spica. He worked for Maersk between the years 2003 and 2011.

Matagaro and the 59 other Employees were his Colleagues at the Respondent. They prepared goods for shipping. Karisa was paid Kshs. 320 per day at the time of the changeover. He never went on annual leave. The Respondent did not remit N.S.S.F and N.H.I.F contributions. In the end, Employees received only tokens in terminal benefits. They were not given details of the tokens. Notice on the changeover was placed on the notice board. Employees did not receive notices of termination. House rent allowance was not paid. Annual leave pay was not paid. Overtime for Public Holidays worked was compensated at 1.5 of the normal hourly rate. Karisa testified on cross-examination that he started tallying with Spears Limited in 1995. Spears offloaded the Employees to Maersk. Spica offers superior terms to those under Maersk. Operations remained the same. Premises remained the same. Containers at Spica still belong to Maersk. Karisa rested 1 or 2 days in a week. Employees were paid weekly. He signed on payment. He emphasized on redirection that he did not receive the benefits claimed.

9. Ms. Jarabi testified she joined Maersk in 2011. She familiarized herself with the Claimants' employment records. It is true the Claimants were employed by Maersk, and taken over by Spica. They worked for 8 hours a day, Monday to Saturday. They were compensated at the rate of 1.5 the normal hourly rate, for excess hours worked on Sundays. They were notified they would become Employees of Spica. Terms and conditions of service would not change. They were paid tokens based on their years of service. These tokens represented service pay. Not all completed 6 days in any given week. They do not merit the prayers sought. They discharged Maersk from further obligations.

10 She agreed on cross-examination that individual notices did no issue to the Employees. Attendance records availed to the Court related to only 2 weeks, while the Claimants worked from 1 to 8 years. Matagaro was employed in 2005, Karisa in 2003. They were apportioned 4 years of service respectively. This is not the correct number of years they served. Some of the Employees are with Spica today. N.S.S.F contributions were not paid. There was no obligation for the Respondent to show details of payments made on termination. The notice referred to tokens, not terminal benefits. The Witness did not have any annual leave records. The records did not specify overtime paid on Public Holidays. No reasons were given for the shortened years of service. Jarabi testified on redirection that the Vouchers have the name of Maersk. Notices were directed to all Tally Clerks. The Discharge Vouchers were signed and witnessed. Tokens represented service pay. She could not say if N.S.S.F contributions were remitted.

11. Although Parties were directed by the Court at the end of the hearing, and subsequently, to file their Closing Arguments, there is no indication from the record that they did so. The Court's appreciation of the dispute must therefore be restricted to the Pleadings, Documents on record and the testimony of the 3 Witnesses.

#### *The Court Finds and Awards:-*

12. The 61 Claimants were employed as Tally Clerks of various designations. They worked for 1 to 8 years. The Respondent Shipping Company transferred its tallying business to Spica Limited on 1<sup>st</sup> June 2011. The Claimants' services were similarly transferred. Before this, the Claimants had worked for another Company Spears Limited and were transferred to Maersk. This seems to be a common occurrence in the shipping industry.

13. The Claimants were not Casual Employees. They worked in aggregate for 1 to 8 years. They cannot be Casual Employees under Section 37 [1] of the Employment Act 2007. The Respondent ought to have treated them as Regular Employees, and extended the benefits available to Regular Employee under the Act, in full measure, to the Claimants.

14. Their contracts with the Respondent were terminated through a Collective Notice dated 24<sup>th</sup> May 2011. They were informed their contracts would be terminated effective 1<sup>ST</sup> June 2011. Spica Limited would take over as the Employer, on the same terms and conditions.

15. The only question raised by this dispute is whether the Claimants received the rightful terminal benefits from Maersk, on transfer to Spica. There is no claim for compensation for unfair termination.

16. The Claimants seek notice pay; annual leave pay; public holidays' overtime; service pay; and house allowance.

17. From the evidence of Matagaro, Karisa and Jarabi, it is the finding of the Court that the Claimants were not given adequate notice of termination. The notice was pasted on the notice board, and is dated 24<sup>th</sup> May 2011. Termination was effective a week later, on the 1<sup>st</sup> June 2011. The Claimants deserved at least 1 month individual and written notices or payment of 1 month salary in lieu of such notice, in accordance with Section 35 [1] [c] and 36 of the Employment Act 2007. ***The Respondent shall pay to each of the 61 Claimants 1 month salary in lieu of notice.***

18. The Respondent's Witness was not able to show to the Court any of the Claimants' annual leave records. Section 28 of the Employment Act entitles an Employee to fully paid annual leave of at least 21 days, after every 12 consecutive months of service. All the 61 Claimants had completed at least 12 consecutive months of service and merited annual leave, or annual leave pay. The law states accrual is after the completion of 12 consecutive months. Once an Employee has worked for 12 months consecutively, the Employee merits annual leave, or pay in lieu. ***The Respondent shall pay to each of the Claimants, 21 days' salary for each year completed in employment, as annual leave pay.***

19. The Parties appear in agreement that the Respondent paid overtime for Public Holidays, but at the wrong rate of 1.5 the normal hourly rate. The prescribed rate for compensating overtime work done on normal rest day and Public Holidays, under the Regulation of Wages (General Order) is 2 times the normal hourly rate. ***The Respondent shall pay the difference of 0.5 times the normal hourly rate to all the Claimants, for work done during the Public Holidays.***

20. With regard to service pay, there is conclusive proof that the Respondent deducted N.S.S.F contributions from the Claimants' salaries, but did not remit to the Fund. In effect, there were no social security benefits available to the Claimants on termination. The Statements from the N.S.S.F. show no contributions were remitted. The Court has concluded the Claimants should have been treated as Regular Employees. The position that they were paid wages weekly and not entitled to service pay has no merit. Under Section 37 [4] of the Employment Act, the Court is empowered to hold Employees such as the Claimants, to have been employed on terms consistent with the Act. If the Court upheld the position of the Respondent on service pay, it would mean the Claimants are denied social security benefits under the N.S.S.F regime, and the statutory service pay regime.

21. The tokens paid to the Claimants did not meet the minimum statutory standards on recognizing and rewarding years of service. Matagaro and Karisa, who had served from 2005 and 2003 respectively, were paid tokens based on 4 years of service. There was no explanation why their years of service were discredited. ***The Respondent shall pay to each of the 61 Claimants, service pay calculated at 15 days' salary for every year completed in service.***

22. The Claimants did not persuade the Court that arrears of house rent allowance are payable. They were paid a daily rate of Kshs. 320 which the Respondent argues, comprised the housing element. Ordinarily, wages paid under this rating comprise the housing element. The Claimants did not raise this issue throughout their service with the Respondent. There is no good legal and factual foundation to this item, and the item is declined.

23. The Respondent's argument on limitation of time is rejected. Once termination of employment has occurred, and the Claim made within the time given under Section 90, disparate claims under the main Claim, cannot be severed and subjected to separate dates of accrual. If house rent allowance has not been paid over the years; if annual leave pay was not paid; or if there were salary arrears in the Employee's record, these must be paid at the point of exit. They are accrued benefits, earned over the continuous years of service. The only limitation is on the main Claim, not the disparate claims, accrued to the Employee over time. The Discharge Vouchers attached to the Response are unacceptable. They do not give details of the payments made. Secondly, an Employer cannot be discharged from fulfilling a statutory obligation. The Vouchers are not legally enforceable. The tokens paid to the Claimants were not made in accordance with the law, but were meant to cloud the rightful terminal benefits, which the Claimants were entitled to.

The Discharge Vouchers aimed at legitimizing the illegal tokens.

24. Finally the Court is of the view that the Respondent should have settled this Claim outside the Court. There were occasional adjournments granted to the Parties to allow the search for voluntary settlement. Unfortunately the Respondent stood by the tokens paid to the Claimants, even when there was no justification to do so. The service years adopted by the Respondent in computing the token payments to Matagaro and Karisa for instance, were clearly inconsistent with the actual years served. ***The Respondent shall pay the Claimants the costs of this litigation.***

25. There shall be no order on the interest.

IN SUM, IT IS ORDERED:-

- a. ***The Respondent shall pay to each Claimant, within 30 days of the delivery of this Award, 1 month salary in lieu of notice; 21 days' salary for each completed year of service as annual leave pay; 0.5 times the normal hourly rate for overtime work done on Public Holidays; and service pay at 15 days' salary for each completed year of service.***
- b. ***The sums paid to the Claimants as tokens shall be deducted from the total sums payable under [a].***
- c. ***Costs to the Claimants.***
- d. ***No order on the interest.***

**Dated and delivered at Mombasa this 13th day of May, 2015**

**James Rika**

**Judge**