



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 926 OF 2010

1. JONATHAN KARANJA THUO

2. PATRICK WAMALWA MASUNGO

3. STEPHEN ORIMA OCHIENG

4. ELIUD MUNENE NG'ANG'A

5. EMMANUEL NATO WAKHUNGU

6. GEORGE MAKENZI

7. JOASH MACHOKA.....CLAIMANTS

VERSUS

BATA SHOE COMPANY LTD..... 1ST RESPONDENT

FAST TRACK COMPANY LTD.....2ND RESPONDENT

JUDGMENT

1. The Claimants filed suit against the 1st and 2nd Respondents on 17th August 2010 seeking various reliefs against the Respondents. The Claimants averred that they were employees of the Respondents and that they were employed on different dates jointly and severally by the Respondents. They claimed service pay, notice pay, leave allowance, house allowance and compensation as well as payment for holidays worked. The 1st Respondent filed defence on 1st December 2011 and denied the averments by the Claimants. The 1st Respondent denied that the Claimants were its employees. The 2nd Respondent filed its defence on 29th September 2010 and averred that it employs an average of 300 employees on short term basis and that the employees are mostly seasonal. The 2nd Respondent categorically denied employing the Claimants and put them to strict proof. The 2nd Respondent denied having any collective bargaining agreement with the Claimants union or with any union for that matter.
2. The hearings commenced on 17th February 2014. The 4th Claimant Eliud Munene Nganga testified that he was formerly an employee of the Respondents and was employed in September 2008 till March 2010 as a machine operator. He worked at Bata Show Company in Limuru town

- and earned Kshs. 240/- per day later increased to 300/- per day. He knew the other Claimants who worked in the same department. They were summoned in a group of 5 persons, given a paper by a lady accompanying Mr. Giathi and told to leave and if they returned they would be trespassers. Mr. Giathi was the HR Manager. The witness testified that he was not called to a disciplinary hearing on 29th March 2010 nor did they receive any letter specifying reasons why they were to be sent home. He testified that his employer was Bata but his salary was paid by Fast Track. The Bank statement showed Fast Track paid his salary. Fast Track did not issue him with a letter of employment. There was no notice prior to termination hence the claim for compensation and 2 months' notice. He was referred to the agreement between the employer and union which provided at page 21 that all disputes are to be dealt with in accordance with the recognition agreement. He never went for annual leave since joining till when the time he ceased being in employment. The leave was 24 working days. When one is going on leave one is entitled to some pay by employer being leave travelling allowance. He worked on shifts and even worked on Sundays and the pay was the same. He never rested and thus sought pay for rest days. There was no house allowance. He sought Kshs. 12,210/= because he was paid 300/= as a machine operator. The employer paid NSSF dues and except NSSF, there were no other schemes. NHIF was paid as well. Regarding service pay, he testified that there was no money paid to him for the period he worked there till he left a duration of 1 year and 8 months. He thus sought service. He stated that there should be a procedure for dismissal. He sought the certificate of service which is necessary, costs and interest.
3. In cross exam by Miss Bonyo he testified that he was employed by Bata but Fast Track is the one which paid and that he did not know the relationship between them. He was employed by Mr. Giathe a HR Director at the 1st Respondent Bata. He worked in Limuru, in the Department of Sandak. He did not question why Fast Track was paying his wages. He operated a machine for cutting gumboot tops and the gumboot was a product of Bata. He worked along conveyor, cut the top and others did more work on the boot and the process was continuous. He testified that there were salary issues and they did not see officials of Fast Track. He was referred to Appendix 1 a pass to the 1st Respondent's premises and stated that he could not recall when the pass was issued. He indicated he was a shift worker and allowed him to enter factory. He denied that he was employed on 20th September 2008. He did not remember the name of the union but stated that he was a member and used to contribute. He however did not have the papers to prove membership of the union. He was referred to the CBA between Bata Shoe Company and Kenya Shoe & Leather Workers Union. He conceded that the agreement did not include Fast Track the 2nd Respondent. He claimed notice under CBA. He confirmed that he worked for less than 3 years and would be entitled to 1 month's notice though he had claimed 2 months. He was referred to Appendix 2 on the claim and confirmed that the amount used is used 329/- for calculations and indicated that the figures are not accurate and that they are not correct. He did not understand the meaning of redundant. He did not recall how he arrived at the 17 days for service. He testified that he was a shift worker and that his shift changed from time to time. At times he would work from 7.00am to 3.00pm. Different groups would take over after shift and he never worked continuously from day to day. He testified that he had no idea the 2nd Respondent was providing manpower services and that he never saw the agreement. He could not tell who employed him and so he sued both. He was not sure the leave allowance was wrong and that he had no contract from 1st Respondent or a badge from it. He confirmed that the 2nd Respondent paid his salary.
 4. In cross exam by Mr. Avedi, he testified that he never took a break. He stated that the 1st Respondent would close in August and not all staff would close. He testified that for the time he worked, his department did not close. He stated he was paid fortnightly and due to shift, the amount was not constant. Some shifts were short others longer. There were times he would earn less than other months and there were weeks he worked a shorter period. His pay per day was constant but per month it would vary. He confirmed that his annual leave claim is Kshs. 16,350/- and he did not recall how it is calculated to arrive at that figure. He demanded Kshs. 46,080/- for rest day is because he never rested. The CBA gave guidance but he could not calculate the figure. He indicated that they calculated public holidays as they were not paid for public holidays. He conceded that he did not work on all public holidays. He was not sure on pay for public holidays and conceded that he should not have claimed all the dues for public holidays. He claimed he was a member of union but had nothing to show he was a member. He did not have the exact figure he

- wanted from the 2nd Respondent. He admitted that he had never asked for his certificate of service. He testified that when he worked at Bata the dust coats were labeled Fast Track and payment was made by the 2nd Respondent. He confirmed that he did not produce any evidence connecting the two.
5. In re-exam by Mr. Nyabena he testified that the employer is the one to give the employee documents such as certificate of service. He stated that he worked in Bata Shoe Company Ltd and it was only Bata Shoe which was in the premises and that he had not seen any record showing he was not an employee of the 1st Respondent.
 6. The next witness to testify was Emmanuel Nato Wakhungu the 5th Claimant. He testified that he was employed by the 1st Respondent on 3rd March 2008 as a machine operator. He worked at Bata in Department for Sandak at Limuru making gumboots. He testified that he was not given a letter of employment and his basic was 320/- with piece rate which would cause it to fluctuate. He was paid fortnightly through Equity Bank. He did not get a payslip and that he had sued 2nd Respondent as he was employed by 1st Respondent but his salary was paid by 2nd Respondent. He testified that he knew the manager who was in-charge Mr. Giathe the Human Resource Manager. He testified that he had a shift card, Bank statement, NHIF card and NSSF card. He stated that he no longer worked with the Respondent as on 3rd September 2010 his services were terminated. He asserts that he was not given any letter of termination by Mr. Giathe. 7 of the employees were terminated. He testified that he knew the other Claimants and stated that Jonathan Karanja was a fellow machine operator, Musunga was trimming shoes and that he worked with all of them. And that all of them were dismissed. He was not called for disciplinary meeting and did not receive any letter to show cause. He was referred to page 6 of Appendix 1 in the claim and stated that it was the letter showing the Basic salary signed by Mr. Giathe the one who hired him. His basic was 320 per day and he was given a shift card. The shift card was given and used for a while. It was not given daily. He was referred to page 9 of Annexure 1 of the claim and confirmed that it was a shift worker card given to him by Fast Track management to enter the 1st Respondent's premises. He testified that one would not enter the premises if one did not have the document as the Askaris would check. It was given to staff not to visitors. He stated that he worked for Bata and he was sacked by Mr. Giathe is the one who dismissed us. He testified that he did not go on strike and that there is no letter or document stating they were dismissed. He sought 12 months compensation as he claimed he was dismissed without cause, 2 months' notice as he was not given any notice, leave allowance because he never went on leave. He testified that he was entitled to it and that they were not given travelling allowance. He testified that they worked daily and would rotate. He stated that they worked on each day of the week and did not get any other sum over and above the pay. He testified that they worked on rest days and sought payment on the same. He stated that he worked even on public holidays and there was no additional pay. He sought Kshs. 32,200/- as house allowance as he was not paid any. He was renting a house outside the premises because he was not given housing. He also sought service is because of the period he worked for the 1st Respondent. He stated that he had worked for about 2 years and was claiming 286,905/- in total. He testified that he was not given certificate to show he had worked there and stated that it had become difficult to be employed as there is no proof he was a machine operator at Bata. He testified that Giathe called them hooligans and told them if they are found there they would be considered trespassers. He also sought costs and interest as he had suffered a lot from 2010 till now.
 7. In cross exam by Miss Bonyo he testified that he was employed on 3rd March 2008 and was by the 2nd Respondent. He testified that there were overalls with Fast Track logo others had the Bata logo. He testified that he worked at Bata as there is no other shoe making company in Limuru. He testified that the machine he was operating was at Bata. Without the machine one would not make gumboots. He stated that when he was hired at Bata, he did not know the connection between Bata and Fast Track and did not know the relationship between the 2. He testified that what he knew is that he was employed by Bata and gave details of his account at Bata. He conceded that he had no

- document to show to whom he gave details. He testified that he got the shift card from the 2nd Respondent to access the premises of the 1st Respondent. He stated that he operated a machine at Bata. He was referred to page 11 of Appendix 1 of claim and stated that it shows Fast Track Human Resources Management. He conceded that the employer is the one who makes contribution of NHIF and only an employer can remit NHIF dues. He was referred to page 13 of Appendix 1 a letter from Fast Track seeking updating of his account with NHIF. He confirmed that it was written by Fast Track's Olivia Mole Mwachofi. He stated that the 2nd Respondent's offices were at Langata. He testified that he was paid by Fast Track and that it is the employer who pays NHIF dues. He stated that one cannot be paid by someone who is not their employer. He testified that he did not know if there was any connection between Fast Track and Bata. He testified that he went to Langat when he needed a loan. He went there because they were his payers. He stated that the one who gives you work is your employer. He was shown the machines and trained for 4 weeks and that the machines were at Limuru where he worked. All the manufacturing took place at Limuru, Bata. He was referred to page 15 of Appendix 1 of the claim and confirmed that this was the loan that took him to Fast Track offices in Langata. He was referred to paragraph 3(b) of letter which read that the facility would be secured by salary and personal guarantors and salary from Fast Track Management Consultants Limited would be passed through there. He conceded that they identified Fast Track as his employer. He stated that he took letter because Fast Track was dealing with his pay. His employer is the one who would process pay and ensure salary passed through loan account. He stated that he must be a unionisable employee and member of union for the CBA to apply. He did not know if there is a CBA or Recognition Agreement with Fast Track. He testified that he used to pay 140/- monthly at the union offices. He was referred to page 6 of Appendix 1 of the claim and he confirmed that his name was not on the document and neither could he see the names of his colleagues the 5 Claimants. He stated that the memo relates to all the employees and that he was not given the memo whose subject was Review of Outsourced Employees Wages. He stated that he was terminated on 29th May 2010 and claimed arrears of wages due to increase which was not reflected in pay. He testified that he did not go to Fast Track to complain when he was dismissed, if Bata had returned him to employment there would have been no issue and that he sued both Respondents they dealt with his account. He testified that he was not confused and that Fast Track paid salary and Bata was his employer. He stated that he did not report the case to the union.
8. In cross-exam by Mr. Avedi he testified that he was employed by Bata and did not have a letter of employment and he never got a letter of termination. He stated that he did not ask for one or get one. He testified that there is an office at Limuru for the union and that he did not know the name of the union and he had no documents in respect of the union. He confirmed that he earned Kshs. 320/- and was paid fortnightly but the pay would fluctuate because of the piece rate. He confirmed that he did not complain about the pay. He claimed 12 months compensation because he was improperly dismissed and notice pay. The notice of 2 months was from his understanding what was to be paid. He claimed annual leave because he never went on leave. He sought travelling allowance was because he travelled from far and had to go to work but he could not remember how he had calculated the travelling allowance. He testified that he worked daily - each day each month and that he worked daily without a break unless the machine broke. He claimed that he did not fall sick and thanked God. He sought payment for rest days are because one should not work from Monday to Monday and that in the week there are days you must rest.
 9. In Re-exam by Mr. Nyabena he testified that the factory is owned by Bata who were the sole owner of the property and machines. He testified that all Fast Track did was the salaries as the supervisor was from Bata. He testified that Bata and Giathe dealt with him and that Giathe was an employee of Bata. He stated that an employer cannot dismiss one who is not their employee and that he was not shown any document to indicate the connection with Fast Track. He reiterated that there is no document showing he went on leave, there is nothing to show he was paid for Public holidays. He testified that it was the duty of the employer to give a contract and bring to court and that there is no muster roll to show he did not work continuously.
 10. The next Claimant to testify was George Makenzi the 6th Claimant who testified that he was employed by Bata on 4th June 2004 as a machine operator. He stated that he was not given any

letter of appointment and that Fast Track paid his salary which was Kshs. 320/- per day. He stated that he was paid fortnightly into his Equity Bank account. He testified that he worked throughout but was no longer working for Bata as he was dismissed on 31st March 2010. He testified that he was not called to a meeting to be told of the intent, there was no show cause notice. He stated that he was terminated by Giathe who works at the 1st Respondent as HR Manager and that there was no reason given for the termination. He testified that he was not given any notice prior to termination and never went on annual leave nor was he paid any cash in lieu of leave. He stated that he was not paid house allowance and that he had rented a house. He worked for around 5 years and was aware there was a union and was a member of the union. He was referred to the CBA at Appendix 3 of claim and stated that it shows how one is to deal with company. The CBA was the bargaining agreement between employee and employer. He testified that under the CBA he was entitled to notice of 2 months. He sought pay for 12 months as he was dismissed without cause and was not given 2 months notice when dismissed. He stated that he never went on leave in the 5 years, was not given travelling allowance and that he worked for 7 days a week, there was no rest. He testified that he worked on public holidays and claimed the payments for working on public holidays. He sought a total of Kshs. 536,400/=.

11. In cross exam by Miss Bonyo he testified that he gave documents in supporting of his claim. He was challenged to show the documents in the bundle before court. He admitted that he did not have any papers before Court. He testified that his salary was paid to Equity Bank and that he had the statements but had not produced them. He stated that his services were terminated on 29th March 2010a and that Giathe is not mentioned anywhere in the statement of claim. He testified that he had sued both Respondents but the claim is against Bata and that the Fast Track and Bata nexus is unknown to me. He was categorical that he did not know what connection they had. He testified that he was employed by Bata and that he had a letter but did not see it in the bundle before Court. He stated that he was hired by Bata and asserted that one cannot sue a company he was not working for. It is not normal for one to pay salary to someone who is not employee and Fast Track only paid his salary. He admitted that he never asked why he was paid by Fast Track. He was shown the memo from Giathe and confirmed that it did not name him. He testified that he was member of Kenya Shoe and Leather Workers Union and paid Kshs. 140/- a month as subscription. He stated that he did not have documents to show he was a member.

12. In re exam by Mr. Nyabena he testified that the employer should have given him letter of employment and that Fast Track did not discuss payment terms.

13. The next witness was Patrick Wamalwa Masungu the 2nd Claimant. He testified that Bata hired him and Fast Track paid his salary and that he was employed on 5th January 2007 and was dismissed on 29th March 2010. He testified that he was in Department 251 Sandak, cutting shoes with a machine. He testified that he knew the other Claimants in the case who were co-workers. He testified that he worked for Kshs. 320/- per day and he was paid through Equity Bank after 2 weeks. He testified that he was not given any dismissal letter. He testified that he was not shown any letter but when he was dismissed, the department foreman Mr. Karanja told them to seek redress and they went to Peter Giathi who told them that they were hooligans and that they should go to Fast Track. He testified that they were not called for disciplinary case and that they never went on annual leave. He testified that he had no house allowance and rented a house in Limuru town. He stated that he did not receive any notice. He testified that there were 3 shifts per day and he worked for the entire week and just rotated shifts. He stated that he never rested. He sought Kshs. 358,350/-. He testified that he worked throughout from 2007 from 5th January 2007 till termination which was 3 years, even on public holidays. We worked for 320/- a day. He however did not know why he was seeking 12 months compensation as his advocate calculated the sums. He stated that the 2 months notice is for the termination and that annual leave was not taken, travelling allowance was not paid. He sought Kshs. 358,350/-, costs and interest and in addition was not given the certificate of service.

14. In cross exam by Miss Bonyo, he testified that he was paid through Equity Bank and that he had

no document to show this but if given time would get one. He conceded that there is no proof before the court that he was paid 320/-. He testified that the employer is the one who pays and conceded that he had not produced any document to show payment by Bata. He stated that he did not know if Fast Track make shoes. He testified that when he asked the lady who used to come to pay them the lady said her work was to pay. He took it that Bata employed them and Fast Track was to pay them. He stated that he was a member of union before dismissal and that he paid the 140/- was after 2 weeks. He confirmed that he had no documents to show he was a union employee. He testified that NSSF and NHIF dues were deducted from pay. He stated that Bata was his employer and Fast Track was only paying the salary.

15. In re-exam by Mr. Nyabena, he testified that Mr. Giathe was Personnel at Bata and that Mr. Giathe is the one who dismissed them. His salary was from Fast Track. He was categorical that Fast Track paid him though Equity Bank and Bata was his employer.

16. The next witness was Stephen Ochieng Odima who testified that the Respondents were his employers and that he was employed on 13th September 2003. He stated that he was employed by Giathe of the Personnel Department and worked for 6 years from 2003 to 2010 as a machine operator. He was not given a letter of employment and was paid 320/- per day on the 15th day of the month and at the end month. He stated that he worked with the other Claimants herein and ceased working on 29th March 2010 and did not know the reason he stopped working. He testified that they asked about salary increment and then they were laid off by Peter Giathe. He was not given any letter of termination and never got any warning and that he worked diligently and met targets. He was not notified of the intention to dismiss him and he was not given any notice nor was he paid any terminal benefits. He thus sought to have the same paid and claimed 2 months' notice, traveling allowance, leave allowance, pay for holidays and for compensation as he was just laid off like that with no reason. He sought one year's salary as compensation. He testified that he did not go for rest days and also sought house allowance. As CBA required the salary increment to be made, he sought payment as the company did not pay arrears. He testified that he had forgotten about the gratuity.

17. In cross-exam by Miss Bonyo he testified that he was earning 290/= in 2003 when he joined. By the time he left it was 320/= as there was an increment during that time. He worked as a machinist. He stated that he was trained for that position as one could not just come and operate a machine. He testified that he was dismissed on 29th March 2010 after night shift on 28th March, 2010 he heard the breaking news. He testified that he was not among those who went to agitate for pay. He met his colleagues as he left and was told he should not come to work that night. He left at 7.30 am and that the Managing Director (MD) was Mr. Rafik Nassir at the time. It was too hard to deal with the MD and there were supervisors. The complaints the staff had about the machine was to be dealt by supervisor who could only check quality of shoes. He was not aware of the operating policy of Respondent and they were required to deal with HR on employee issues. The story he heard is his colleagues who went to HR who said that he does not deal with hooligans. He was referred to page 8 of Appendix 1 of the claim which was NHIF Data Summary for Stephen Orima and confirmed that it was his NHIF data summary. He testified that Fast Track Human Resources Management Limited is listed as his employer and from the document it was Fast Track that submitted NHIF dues. He referred to the CBA exhibited to court and indicated that the CBA is between Bata Shoe Company and Kenya Shoe and Leather Workers Union. He testified that he was member of the Kenya Shoe Leather Workers Union and that he contributed monthly and got receipts. He had not brought any receipts to court through the memorandum. He stated that the union is aware of the dispute and that it chose not to represent them in the suit. He stated that he was dismissed without notice and there was no service paid. He did not raise the issue of arrears with employer. On rest day he testified that ordinarily, a person is to rest 2 days in a week. They were to work and rest and the CBA made provision for this but he did not know the exact clause for the 2 days' rest. He testified that a report was made to managers of Bata before he took the loan and the repayment was by deducting his salary. He reported to Bata who forwarded to Fast Track and that he did not contact Fast Track directly and got everything at Bata. He stated that remittances showed Fast Track remitted his pay and that it was done in an opaque manner. He stated that he was not aware Fast track had denied that he was its employee. He testified that he

was not declared redundant and that he worked diligently and had no reason why he was dismissed.

18. In cross exam by Mr. Avedi, he testified that he joined Bata on 13th September 2003 and dealt with Bata all along. He could not remember the exact year Fast track came on the scene. He insisted that his employer is Bata and that the 2nd Respondent is the one that paid his salary. He was not given any appointment letter and so he did not know his terms and conditions. The computations at appendix 2 of the claim was a calculation of what is to be paid and that these figures were as per the CBA. He testified that he worked from January to December on shift work. The production Section was on 24 hours and that only engineering stopped machines for service as they operated the machines. He testified that they worked 365 days a year. He was claiming from Bata and Fast Track and that Bata was his employer and Fast Track paid dues and that there was an agreement.
19. The next witness was Jonathan Karanja Thuo the 1st Claimant. He confirmed that he had sued the Respondents and that Bata was his employer. He testified that he was called on the first day by Peter Giathe who sought to know if they were healthy and they were asked to run to show their fitness. He stated that it was on 6th October, 2008 when he was employed and that he was not given a letter of appointment. He testified that he worked as a machine operator and that Fast Track were the ones who used to pay his dues at his account at Equity Bank. The pay was for his work at Bata. He testified that the relationship between him and the 2nd Respondent was only on payment and that all staff who supervised him were from Bata including the staff from Engineering. His basic was 320/- per day and he was paid half of the salary on 15th and the balance at end month. He testified that he no longer worked at the Respondents as Mr. Giathe sacked them on 29th March, 2010. They were not given any letters of dismissal or a show cause and that there was no disciplinary hearing. He testified that he never went on annual leave and they never got any off. He testified that he worked even on public holidays for the same pay. He stated that he was not paid house allowance and was not housed by the company nor was he given notice before termination. He sought compensation because he was dismissed without cause. He was not given notice sought payment in lieu of notice and travelling allowance. He stated that they were not paid for holiday and that the company would just be closed and they would not be paid. He testified that they worked on roster. He testified that they worked on public holidays and there was extra pay. They were not paid house allowance He sought service as he worked for almost 2 years. His claim was for 238,380/=. He also sought a certificate of service, costs and interest.
20. In cross-exam by Miss Bonyo he testified that he was employed by Giathe and he was not told how long he would work. Prior to Bata he did odd jobs like painting. He testified that he was paid fortnightly through Equity Bank and the payment was by Fast Track. He stated that usually the one who employs pays. He did not know how Fast Track came in. He testified that at the factory there were other staff with dust coats inscribed "Four M". The one he wore was inscribed Fast Track. During Christmas the factory was closed for 4 days. He sought pay for travelling allowance as he was from Mombasa. He testified that there was a shift from 7am till 3pm, another shift from 3pm till 11.00pm and then another from 11.00pm to 7.00am. The work involved standing and usually due to tiredness, they would rest. He was dismissed on 29th March when he been at work at night and as he left he knew he had been dismissed. He was told by Giathe that he should not return. He testified that he went to see the MD Rafiq before dismissal. He had gone to see the MD due to the delay in pay and payment in instalments. The MD sent the secretary who told them to see HR manager and they went to HR who heard them. They spoke to Giathe about pay and he did not refer them to Fast Track. When they went to Kiathe they were sent away. He personally did not know where the 2nd Respondent's offices are. He did not query why Fast Track was paying him and that he took his complaints to the foreman of Peter Giathe. He testified that rest days to his understanding is Sunday, public holidays and offs and that offs are not leave. He testified that his dismissal was not a redundancy. He testified that the problem they had was in delay and failure to pay full salary. He testified that he worked on all holidays and that the only time he rested was during Christmas and that the other times he worked from Monday to Sunday, January to

December and that he rested 4-5 days maximum. He sought to rely on the CBA as he was a member of the union. He testified that union dues were paid by them as Peter Giathe did not like unions. He asserted that he took his subscription in person and that he worked from 2008 to 2010.

21. In cross exam by Mr. Avedi he testified that he had sued Fast Track as Fast Track was involved in paying him and that the dust coat he wore had a Fast Track logo. He did not have any interest in knowing much because if he complained at Bata everything was sorted. He sued the 2nd Respondent because they paid him as his employer was Bata. He testified that there was no contract or letter of employment.
22. Miss Bonyo for the 1st Respondent called Peter Giathi. He testified that he worked with Bata Shoe Company as HR Manager. He denied knowing the 7 Claimants. He testified that the 2nd Respondent is a service provider to Bata Shoe Company and that it provided labour services to 1st Respondent and there was a written agreement. He testified that the 7 Claimants were not their employees. He confirmed that he was on duty on 29th March, 2011 which was a working day. He stated that he did not receive any complaint to best of his recollection and that Mr. Nassir Rafiq was MD of Bata Shoe Co. and was transferred to another country. He testified that the passes exhibited in the claim are shift gate passes issued for security reasons to persons permitted entry to the factory. The passes are issued by respective employers to the individuals. He testified that the pass would be given to the 2nd Respondent which would issue it to its employees and that the issue of passes is part of the agreement. Fast Track was responsible for the recruitment, discipline and issue of protective wear and all that relates to them as employer. He testified that Fast Track operated within the factory premises and that the labour service related to the making of shoes. Some of the roles are the seasonal roles and that the 2nd Respondent was involved in outsourcing employees who would mingle with 1st Respondent's employees. The protective wear given are distinct in colors and labelling at the back. He was referred to the CBA exhibited and stated that the CBA was between the 1st Respondent and Kenya Shoe and Leather Workers Union and that benefits accrue to members of the union who are employees of the 1st Respondent. The benefits were not extended to unionisable employees of 2nd Respondent. He stated that he had not received any complaint from union of the 7 Claimants and that the 2nd Respondent would be responsible for records keeping regarding the employees under it. He testified that the 2nd Respondent is an independent company, it is not an agent or subsidiary of the 1st Respondent. There is a fee payable to them which is 10% of the labour cost. The 2nd Respondent still provides the 1st Respondent with the service. The machines for footwear making are specialized and are not found everywhere. They have to use these and the 2nd Respondent has a physical office at Dam Estate off Langat Road, Box 58051 code 00200, Nairobi. They are on telephone 605737 and 605742. He testified that he was not aware of the manner of the Claimants termination and the Court should dismiss claim with costs.
23. In cross exam by Mr. Nyabena, he testified that he had worked with 1st Respondent for over 20 years and in HR from 2003 and thus was experienced in HR matters. He stated that one of the agreements referred to is stamped 1st October 2009 and on page 1 its only the year shown and both were signed by the Managing Director. He did not know if the Claimants were made aware of the agreements because they are not Bata employees. And he did not know if the 2nd Respondent discussed with them. He testified that he had documents prior to 2009 and those years predating 2009 are not in contention in this matter. He testified that the employees for 1st Respondent are recruited by the 1st Respondent itself and that Bata manufactures shoes. The machinery belongs to Bata, the factory belongs to Bata and the 1st Respondent paid indirectly. The money was paid for the service provided by the 2nd Respondent and the 1st Respondent did not pay the Claimants but 2nd Respondent. The 1st Respondent would be invoiced. He testified that he did due diligence on the 2nd Respondent though he did not have documents of that in court. When it was put to him that the 2nd Respondent is not registered he stated that they would answer that.

He testified that they entered agreements on the due diligence conducted. He stated that the 2nd Respondent is not a labour agent for Bata but a service provider. He was referred to the CBA and testified that the agreement provides that all unionisable employees are to be covered by the agreement and by implication, the agreement covers employees of the 1st Respondent. He denied that the Claimants were dismissed and not paid as the 1st Respondent was a responsible corporate.

24. In cross-exam by Mr. Avedi, he testified that he did not know if the agreement was registered and that he did not know what to look for to see if it is registered.

25. In re-exam by Miss Bonyo, he testified that the agreement was to commence 15th February 2009 till 14th February 2010 and it was signed by representatives of both the 1st and 2nd Respondent. It is signed by MD of 1st Respondent. He stated that the machines for footwear manufacture are specialized. He testified that the 2nd Respondent is not involved in manufacture of shoes and that he knew them as labour service providers. He testified that they did not pay to the 2nd Respondent to pay the Claimants on their behalf and that they paid invoices for professional services rendered. He was referred to Appendix 2 of the claim which is the CBA and stated that the agreement refers to unionisable employees who are members of staff of 1st Respondent and that the 2nd Respondent is not a party to the CBA as the 2nd Respondent has not signed it. He testified that he was not familiar with manner or date of dismissal of the Claimants as they were not Bata Shoe employees.

26. The 2nd Respondent did not call any witness and parties proposed to file written submissions. The Claimant filed written submissions on 17th February 2015 and the 1st Respondent on 15th April 2015. The submissions have been considered in coming to this decision.

27. The dispute is one on terminal dues. The Claimant's all asserted that they worked over the years in dispute for the Respondents. They claimed they never went on leave nor off. This was an outright lie as it is impossible to work all the days of the year without any break. They all narrated their dismissal which was that they were dismissed for agitating for more pay. They claimed membership of the union and most of the Claimants failed to name the union. They were clearly not members. They lied that they paid 140/- each month to the union. Under the Labour Relations Act, union membership is structured in a manner that ensures the union dues are remitted by the employer to the union. There was no such arrangement for the Claimants and they sought to benefit from an agreement between the Kenya Shoe & Leather Workers Union and the 1st Respondent. None of the Claimant's had a contract of employment with the Respondents. They did not prove employment with the Respondents. Due to the manifest failure to prove their claim on a balance of probability, I dismiss it but make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of **August** 2015

Nzioki wa Makau

JUDGE