



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1297 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> December, 2015)**

- 1. JOSEPH MUSYOKA MUNYAO.....1<sup>ST</sup> CLAIMANT**  
**2. KINYAMAU MUINDI .....2<sup>ND</sup> CLAIMANT**  
**3. FRANCIS MWANGI.....3<sup>RD</sup> CLAIMANT**  
**4. SILAS MWERERIA.....4<sup>TH</sup> CLAIMANT**  
**5. JEDIEL MUCHUI.....5<sup>TH</sup> CLAIMANT**  
**6. MALIMI MUSINZI.....6<sup>TH</sup> CLAIMANT**

**VERSUS**

**SDV TRANSAMI KENYA LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimants filed their Memorandum of Claim through the firm of Ngala Morara & Advocates on 31.07.2012 and later an Amended Memorandum of Claim on 21.01.2013, seeking dues accrued while they were in employment after they were declared redundant. The Claimants allege that they were in the employment of the Respondent in various capacities and duration as follows:-

1. Joseph Musyoka Munyao - Welder Plumber - 16 years
2. Kinyamau Muindi - Machine Operator - 13 years
3. Francis Mwangi - Mixer driver - 13 years
4. Silas Mwereria - Machine Operator - 12 years
5. Jediel Muchui - Machine Operator - 10 years
6. Malimi Musinzi - Painter - 9 years

2. The Claimants all allege that for the whole time they worked for the Respondent they were on duty on a daily basis for nine (9) hours a day without any off days or payment in lieu thereof. The Claimants aver that for the period that they were in employment the Respondent did not provide housing and neither did the Respondent pay them in lieu thereof which in their view ought to have been 20% of their basic pay.

3. The Claimants also state that the Respondent never remitted any of their NSSF dues. The Respondent, according to the Claimant, purported to terminate the services of the Claimant by way of redundancy and only paid them one month's salary in lieu of notice, two months pay in lieu of accrued leave and gratuity at the rate of 17 days for each completed year of service for only two years.

4. The Claimants aver that they had been in the employ of the Respondent for a longer period than two (2) years and they are therefore entitled to more gratuity than was paid to them at termination. The Claimants state that they raised the issue of past years not reflected in their letters of employment but they were assured that the letters were a promotion of some sort and they would not lose any of their accrued benefits.

5. The Respondent filed a preliminary objection in response to the claim raising the issue that the Respondent sold its interest to Kenya Clay Products and as a result the Claimants among others lost their jobs. In their termination letters the Respondent indicated the Claimants' terminal benefits in respect of accrued leave, pay in lieu of notice and severance pay. These benefits were credited into the Claimants' respective accounts.

6. The Claimants and other workers apparently worked on and off basis prior to 1.10.2007 until they were given permanent contracts. The Respondent relies on the payment voucher summary sheets attached as Claimants' exhibit JMN1 to prove this assertion.

7. The Respondent further states that the suit by the Claimants seeks benefits for an alleged served period before they were made permanent that is 18<sup>th</sup> April and 1<sup>st</sup> October, 2007, and backwards. The Claimants raised the issue more than three (3) years after they were made redundant. They therefore state that the Claim is an afterthought geared to raise money from the employer while they knew that the period as demanded by the law to keep employment records had expired.

8. The Respondent's preliminary objection also raises the issue that the Claimants' were declared redundant with effect from 31.10.2010 and they filed this suit in Court on 31.07.2012, the claims are for periods prior to 18<sup>th</sup> April and 1<sup>st</sup> October, 2007. The Respondents allege that time begins to run on the first date on which the Claimants' cause of action arose.

9. For the reason that the claims by the Claimants were raised more than three (3) years after the cause of action arose the suit ought to be dismissed.

10. The Respondent has framed issues for determination as follows:

***1. Whether the reasons for redundancy were justified***

***2. Whether for the purposes of this Claim the Claimants worked for 16, 13, 13, 12, 10 and 9 years respectively***

***3. Whether the Claimants' prayers for the period prior to October, 2007, are sustainable***

***4. Whether the Claimants' prayer for overtime is sustainable***

***5. Whether the prayer for Gratuity is sustainable***

***6. Whether the prayer for underpayment is sustainable***

***7. Whether the assertion for a 7 days service is true and practical***

## **8. Whether the Claimants are entitled to their claim for NSSF unpaid contributions**

11. The Respondents sum up their submissions stating that there was a valid reason that led the Claimants being declared redundant and they followed fair procedure to effect the redundancies which process has not been faulted. That the letters seeking dues alluded to by the Claimants in their submissions were in respect to dues as casuals which were resolved together with 117 other casual employees. The various job specifications referred to by the Claimants did not require them to work each and every single day and that there were other welders and plumbers.

12. The Respondent prays that the Claim be dismissed with costs.

13. Having considered the evidence and submissions of both parties, the issues for determination is in my view whether the Claimants are entitled to payments for redundancy dues before October 2007 and other prayers sought.

14. From the evidence submitted by the claimants they worked for the Respondent way before 2007 and this is evidenced from the documents presented in court showing a relationship between the Claimants and Respondents way before 2007 going as far back as 1995. What is not clear however, is the nature of the engagement as no letters of appointment were issued. The Claimants were however treated as casual employees, the position they have accepted in their pleadings.

15. What the Claimants pray though is that though they were treated as casuals, they were casuals of permanent nature terming themselves as permanent casuals. It is for this reason that they seek to be paid their redundancy dues for periods before 2007.

16. The Respondents had raised a preliminary objection to the effect that, that part of the claim was time barred, the claim being filed after 3 years from the time the cause of action arose.

17. According to the Respondents, the cause of action arose before 2007. Hon. Lady Justice Ndolo heard the preliminary objection and decided it was not a point of law and needed to be determined after hearing evidence from the parties.

18. Having heard the parties, I do find that the Claimants worked for Respondents before 2007 and I do not understand the claim that they became permanent in 2007 as they were not provided with any appointment letters. They worked on until October 2010 when they were served with notices of redundancy.

19. To allege that the cause of action arose in 2007 and not 2010 is to miss the point as there is no clear distinction between what happened before 2007 and what occurred after 2007. This is because no letters were issued to them in 2007 to explain their apparently new position. It is therefore my view that the cause of action arose in 2010 when they were declared redundant and paid for 3 years without the Respondents referring to the period worked before 2007.

20. I would also like to state that the said periods are period that Respondents should have taken into consideration while calculating the redundancies and in 2010, they still had the records of the Claimants as the law obliges the employer to keep employment records for upto 3 years.

21. The question then is for how long each of the Claimants worked before 2007?. Indeed 1<sup>st</sup> Claimant's names appear in the Respondents list way back in 1995 and for 2<sup>nd</sup> Claimant in 2003 and so do others appear. The cumulative period cannot however be described given that the documents produced are not adequate.

22. They have each stated the periods they worked and it would have been prudent for Respondents being the custodians of the documents to produce documents rebutting their claim. Given that none of the parties have led evidence to prove the exact periods worked, and given that the Claimants indeed need to be rewarded for periods served before 2007, I revert back to the Employment Act Cap 226 (now

repealed). Section 16A of the repealed Cap 226 states as follows:

***“A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with -----:***

***(a) The Union of which the employee is a member of the labour office in charge of the area where the employee is employed shall be notified of the reason and the extent of the intended redundancy.***

***(b) The employee shall have regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.***

***(c) No employee shall be placed at a disadvantage for being or not being a member of the trade union.***

***(d) Any leave due to any employee who is declared redundant shall be paid off in cash.***

***(e) An employee declared redundant shall be entitled to one months notice or one months wages in lieu of notice.***

***(f) An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay”.***

23. I have considered that Section 2 of Cap 226 also and a casual employee is defined as follows:

***“A casual employee” means an individual the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”.***

24. The Claimants informed Court that they worked for longer periods as enlisted in the Memorandum of Claim. They also stated that they were being paid weekly. This is also evidenced by the payment vouchers summary attached. It is therefore evident that they were not casuals as submitted in the pleadings as per the law. It is therefore my finding that they were entitled to payment of their severance pay as per Section 16(a), (f) of Cap 226.

25. As for the other claims I do not have any basis of awarding them anything. I award them 15 days severance pay for each year worked as follows:

**1. Joseph Musyoka Munyao**

$$15/30 \times 12,446 \times 13 = 80,899/=$$

**2. Kinyamau Muindi**

$$15/30 \times 9,510 \times 10 = 47,550/=$$

**3. Francis Mwangi**

$$15/30 \times 9,510 \times 10 = 47,550/=$$

**4. Silas Mwereria**

$$15/30 \times 9,510 \times 9 = 42,795/=$$

**5. Jediel Muchui**

$15/30 \times 9,510 \times 7 = 33,285/=$

**6. Malimi Musunza**

$15/30 \times 9,510 \times 6 = 28,530/=$

26. This amount will attract interest at Court rates from the date of this Judgment.

27. The Respondents will pay costs of this suit.

Read in open Court this 14<sup>th</sup> day of December, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngala for Claimants – Present

No appearance for Respondent