REPUBLIC OF KENYA

IN THE INDUTSRIAL COURT AT MOMBASA

CAUSE NUMBER 281 OF 2014

[Formerly Mombasa High Court Civil Suit Number 187 of 2003]

BETWEEN

1. PHILLIP ATENG OGUK
2. STANLEY WANJOHI MWAI
3. FRANK MWADIME JUMA
4. KENNEDY M. WANJALA
5. KESI ALI SHEE
6. DAVID NYANGENA
7. PETER ADRIANO
8. BERNARD KITINGO
9. JACOB ODANGA AMOLO
10. ORINA AMWOMA OKOKO
11. RAMADHAN RAJAB KABUCHO
12. PETER MUTURI NYAGA
13. FRANK O. OBURU
14. AUGUSTIN KIBOR
15. JAMES NYAGAH
16. ERASTUS MWANGI
17. RODGERS PETERS MUNIALO
18. WINGSTONE OJAL ADERO
19. RAJAB ALI SHEE
20. JOSEPH MUTEMI KISAUMBI
21. WYCLIFFE OTIENO DOLA
22. MKINDO MOMNGO MWAKALUNGWA
23. NORMAN G. ISICHE
24. YUSUF AHMED MOHAMED
25. NICHOLAS JAMBO SHUME
26. JAMES NGARI YAA
27. GEORGE NJUE MBURIA
28. LEONARD K. KARANI……..

CLAIMANTS

VERSUS

1. WESTMONT POWER [KENYA] LIMITED [Claim withdrawn]
2. EAST AFRICAN POWER MANAGEMENT LIMITED ……

RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. Mutugi Advocate instructed by Munyithya, Mutugi, Umara & Muzna Advocates for the Claimants

Mr. Asige K. Advocate instructed by Anjarwalla & Khanna Advocates for the 2nd Respondent

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ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

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

1. This is one of the numerous, old Civil Claims, transferred by the High Court to the Industrial Court, on the basis of jurisdiction under Article 162 [2] of the Constitution of Kenya. It was filed way back in the year 2003, as High Court Civil Case Number 184 of 2003. The Amended Claim was filed on 8th June 2004. The 2nd Respondent filed its Amended Statement of Response and Counterclaim on the 23rd June 2004. The Claim against the 1st Respondent was withdrawn by the Claimants with the consent of the 1st Respondent, on 15th April 2004. This was after the High Court had allowed the 1st Respondent's demand, that the 28 Employees deposit Kshs. 5 million as security for costs. The 28 Employees were, expectedly, unable to raise the amount, and opted to withdraw the Claim against the 1st Respondent.

2. The dispute between the remaining Parties was partly heard in the High Court. The initial Trial Judge was transferred after hearing partly, the two Witnesses for the Claimants. The High Court subsequently directed hearing afresh. The matter was thereafter transferred to the Industrial Court on the 28th August 2013. Parties agreed at the Industrial Court to proceed with the hearing from the point at which the last High Court Judge left off. The 2nd Witness [3rd Claimant] Frank Juma Mwadime, completed giving his evidence, marking the close of the Claimant's case, on the 10th July 2014. The Trial Judge at the Industrial Court was transferred before he could complete the hearing. The Respondent closed its case on the 30th May 2015 without calling any Witness. Mr. Asige explained that his Client's sole Witness was untraceable. He sought to have that Witness' Statement adopted as his evidence. The Court ordered the Statement would be taken into account as part of the Respondent's Pleadings, rather than part of the evidence.

3. Parties confirmed the filing of their Closing Submissions on the 7th October 2015 and the decision of the Court reserved for the 9th December 2015. The persistent transfer of the Judicial Officers hearing the dispute; the transfer of the matter from one Court to the other; and the inaction of the Parties themselves, have had the effect of delaying finalization of the dispute. These factors have disorganized smooth flow of the proceedings.

The Claim

4. The Claimants state they were all employed by Westmont Power Kenya Limited, in or around April 1997. PWI Phillip Ateng Oguk testified he was employed as Auxiliary Operator. The letter which invited him for the interview leading to the employment, issued on the letterhead of Westmont Power Kenya Limited. The letter of appointment issued in the name of East African Power Management Limited. Both were signed by the same Group Human Resources Manager Mr. Ng Yip Sang. This was the case with the letters appointing the Co-Claimants.

5. The Claimants were upon recruitment issued Terms of Service for Non- Management Staff, issued in the name of Westmont. The workplace was within the Port of Mombasa. Employees were issued Port

passes. They were trained on recruitment and issued certificates dated 20th December 1998. These certificates issued in the name of East African Power Kenya Limited and Westmont. Job identity cards issued in the name of Westmont as did Certificates of Appreciation.

6. Mr. Oguk and Mr. Mwadime testified the Employees were told by Management the two Companies they worked for, were sister Companies. These were Companies within the same Group of Companies. Clause 2 [h] of the letters of appointment provided that Employees would not be transferred to other sister Companies on less favourable terms.

7. The Claimants state in June 1997, Westmont purported to enter into a Management Agreement with the East African Power Management Limited. The Management Company was to provide Westmont with Employees and manage these Employees. The Employees were not aware of the change and continued to do the same work, form the same premises, under the same Managers. The Management Company did not have its own separate premises, and the Directors of the two Companies were the same. Pay slips were henceforth generated on occasion in the name of Westmont, and on other occasions in the name of the Management Company.

8. On 6th November 2001, Westmont entered into a new Management and Operations Agreement with another Company, Cergas Senja SDN BHD [CSSB]. Westmont purported to terminate the previous Management Agreement. Employees were issued fresh offers of employment by CSSB. When the Employees received the letters from CSSB, East African Power and Management Power Limited purported the Employees had absconded, and instructed Police Officers to forcibly remove the Employees from the workplace. E.A. Power Management sued Westmont at the High Court, restraining Westmont from terminating the Management Agreement. The order for injunction issued, with the effect that the Employees were legally under E.A. Management. CSSB was still at the Site. On 4th March 2002, Westmont published in the Newspapers a notice stating it had terminated the Agreement with E.A. Management, which compelled the Employees to sign the letter of offer issued by CSSB. Employees continued to receive their salaries from the Accountant. The pay roll had the inscription CSSB.

9. The dispute between Westmont and E.A. Power Management was resolved, and on 18th February 2003, the Management Company wrote to the Employees informing them that Westmont has severed its contract with CSSB, and Employees would be required to reapply for their jobs. The Claimants refused to sign new contracts and were sacked. They did not abscond. The Management Company asked Employees to collect their March 2013, on 31st of that month. When they went they were asked to surrender their Port Passes in exchange of their salaries. The Claimants state the dealings involving the three Companies comprised some form of conspiracy between the Respondents, to deny the Employees the benefits accruing under their contracts of employment. The Employees sought the intervention of the Labour Office. The Labour Officer summoned the two Companies Westmont and E.A. Power Management, and directed them to deposit Kshs. 40,607,659 in Employees' terminal dues. The two Companies ignored the summons and the directive, opening the way for the filing of this Claim.

10. The Claimants seek the following orders against the Respondent, as captured in their Amended Claim:-

a. *A declaration that the Respondent breached the Claimant's contracts of employment*
b. *Damages be assessed and paid together with other dues, in favour of the Claimants against the Respondent.*
c. *Interest and any other relief.*

11. Cross-examined, Mr. Ateng and Mr. Mwadime told the Court their letters of appointment were issued by East African Power Management Company. They were issued and signed Terms of Service. Clause 2 [h] of the letter of employment, allowed for transfer of Employees, within the Group. The premises belonged to Kenya Ports Authority, while the barge was owned by Westmont. Employees continued to work even after Westmont alleged to terminate the Management contract with E.A. Power Management. Employees signed the letters of employment issued by CSSB. They did not agree they became Employees

of CSSB. The Respondent was their Employer. The Employees were not consulted in the making of various Management and Operations Agreements. Westmont Manager threatened the Employees to sign the CSSB contracts ….or they would be out of employment. Employees seek terminal benefits, including service pay.

12. The Claimants finally submit they have established their case for payment of terminal dues, computed for the period worked, between 1st April 1997 and 31st March 2003. They submit these dues add up at Kshs. 52,017,728. None of the Employees resigned; none was issued termination or dismissal letter; and none absconded. The Employer must not be allowed to create arrangements at the workplace which strip Employees of benefits they would otherwise have had, were it not for such arrangements. This was the holding of ***the Industrial Court in Elizabeth Waceke & 62 Ors v. Airtel Networks Kenya Limited & Another [2013] e-KLR***. The Claimants urge the Court to adopt its own conclusion in ***Kenya Petroleum Oil Workers Union v. Giefcon Limited & Another [2015] e-KLR,*** that, unregulated outsourcing is inimical to a fair labour regime as it tends to be used as a means of evading labour laws. The Companies involved entered into arrangements with the purpose of confusing Employees, and in the end depriving the Employees of their dues. The Claimants submit at page 9 of their Closing Submissions that they were not given reasons to justify termination, in accordance with Section 43 [1] of the Employment Act 2007. They were not heard in accordance with Section 41 and 45 of the same law. They pray the Court to grant their Claim which in their submissions is clarified to include 12 months' salary allowed under Section 49 of the Employment Act 2007.

Respondent's [East African Power Management Limited] Position

13. The Respondent as stated above did not present oral evidence and relies on the Pleadings, Witness Statement, Bundle of Documents and Submissions on record. It concedes having employed the Claimants on the terms and conditions set out in the letters of employment exhibited by both Parties. The Respondent had its own Terms of Service, and did not agree with the Terms of Service issued by Westmont.

14. The Claimants absconded duty in March 2002, and entered into fresh contracts with CSSB. They worked for CSSB until March 2003, when CSSB Management Agreement was terminated by Westmont. They were not denied access to the workplace by the Respondent; they were not the Respondent's Employees at the time. The Respondent did not breach their contracts of employment. On the contrary, it was the Claimants who breached their contracts by absconding in March 2002. They left for CSSB without notifying the Respondent. It was in their contracts with the Respondent that either Party could terminate the contracts, by issue of 1 month notice or payment of 1 month salary in lieu thereof. The notice period was subject to review. Review was done on 21st May 2001, changing the notice period to 6 months, or payment of 6 months' salary in lieu thereof. The Respondent prays the Claim is dismissed with costs to the Respondent. Additionally, the Respondent seeks damages from the Claimants for breach of contract.

15. Mr. Joshua Makiya Aroni filed a Witness Statement on 24th July 2012. He however did not attend Court to give evidence. His Statement is mentioned here in the same light as the Respondent's Pleadings, with little evidential weight assigned to it. He was the Accountant working for the Respondent at the time the Claimants were employed in 1997. Their terms of service were as shown in the letters of employment. The Respondent entered into a Management and Operations Agreement with Westmont dated 9th June 1997.

16. Westmont alleged to terminate the Agreement with the Respondent around 1st March 2002, and engaged a new Management Company CSSB, without the consent of the Respondent. CSSB recruited the Employees with promises of enhanced remuneration. The Claimants absconded and joined CSSB. The Respondent sued Westmont and CSSB in Mombasa H.C.C.C Number 78 of 2002. The Court gave an order for retention of the status quo. CSSB had already recruited the Employees. Employees who had taken up the offer by CSSB were deemed to be Employees of CSSB, while those who did not take up the offer, remained as Employees of the Respondent. The order for status quo meant the Respondent

remained on the ground, and continued to control operations, and give instructions to the Employees, to ensure operations at the Power Plant were not jeopardized.

17. In February 2003, the dispute involving the 3 Companies was resolved. The CSSB Management Agreement was terminated, and the Agreement between Westmont and E.A. Power Management Limited, restored.

18. In the period March 2002- February 2003, the Claimants were in the pay roll of the CSSB. Mr. Aroni restated that the Claimants breached their contracts with the Respondent, and they should be ordered to pay damages in terms of the Counterclaim. They terminated their contracts by absconding and entering into new contracts with CSSB. After restoration of the first Management Agreement, Employees were required to reapply for their jobs. Some did, and were taken in, while the Claimants refused to do so, and could not therefore be reabsorbed.

19. The remaining Respondent reiterated these facts in its Closing Submissions. The claim for terminal dues is made on the assumption that there was continuity in service, while there was break in service, at the time CSSB was engaged. It is unconscionable of the Claimants to seek remedy for unlawful termination, while they absconded and joined CSSB. The Claim has not been established through evidence. The Employment Act 2007 cannot be applied retrospectively.

20. The Respondent submits that the 3 Companies were separate legal entities. The Employees cannot have served in continuity. There was break in service.

21. The Respondent urges the Court to dismiss the Claim and grant the Counterclaim

Issues

22. The Court understands the issues in dispute to be:

a. Whether the Claimants were in continuous employment with the Respondent E.A. Power Management Limited;
b. Whether the Claimants' termination of employment is attributable to the Respondent;
c. Whether the Claimants merit the remedies sought; and
d. Whether the Employment Act 2007 governed their contracts of employment

The Court Finds:-

23. The Claimants were employed by the Respondent in various capacities, ranging from Auxiliary Operators to Ground Crew, in March 1997. They were invited for job interviews through letters dated February 1997. The letters were on the letterhead of Westmont Power Kenya Limited [Member of the Westmont Group]. They were signed by Ng Yip Sang, Human Resources Manager.

24. The Appointment Letters issued in March 1997 were again signed by Ng Yip Sang, this time indicating to be the Group Human Resources Manager. They were issued in the name of East African Power Management Limited, the Respondent herein.

25. Although the Respondent argues it was separate legal entity, in a Management and Operations Agreement with Westmont, there is adequate material to find such separateness was merely a façade, aimed at placing barriers in the way of Employees' in realizing their employment rights. The shared human resource division was just one aspect in a collectivity of very strong evidence, which would enable the Court to disregard separateness in considering the Employees' grievances.

26. Other pieces of evidence firming this conclusion include the following; job identity cards issued variously in the names of the two Companies; Employees were assured by Management these were sister Companies; salary review letters indicated E.A. Power Management Group was a member of Westmont; the Companies shared Directors and Staff; and the Companies operated from the same workplace.

27. In the Industrial Court cases cited by the Claimants [***Elizabeth Washeke and Kenya Petroleum Workers Union]*** the common thread was that arrangements crafted by Employers which tend to limit Employees in actualization of employment rights, must not have the endorsement of the Court.

28. The ***Industrial Court at Nairobi, in Cause Number 1011 of 2010 between Symon Wairobi Gituma v. East African Breweries Limited & 3 others,*** found that subsidiary or sister Companies are often merely places of work for many Employees, and that Courts should look at the business structure, not the legal structure adopted by the enterprise, in enforcing Employees' rights. In this regard, Courts must not hesitate in disregarding corporate separateness, and apportion liability to the centre of decision-making in the enterprise. There is a widespread use of triangular relationships by Employers involving agencies, subcontractors and façade companies, all aimed at evading labour regulation**.** ***G. Davidov in 'The Changing Idea about Labour Law [2007] Int. Lab. 311***, argues that there is a mismatch between labour laws as they are applied, and our goals. Goals have not changed, but new employment practices, designed to sidestep labour regulation, have emerged causing the mismatch. The Author argues strongly that Labour Laws must be used to articulate the unique characteristics of the employment relations that justify protective regulations.

29. The Court therefore agrees with the Claimants that the presence of various legal entities at the workplace claiming to be part of a 'Group of Companies,' should not result in the obfuscation or defeat of their employment rights. The E.A. Power Management Company was merely a façade company, joined at the hip with Westmont. The Court views these Companies as economic units, rather than legally separate. The Respondent was not the traditional outsourcing company, but a business arm entrusted management of human resources, within the same Group of Companies. It did not independently employ, and could not independently employ the Claimants, without Westmont.

30. It was rather unfortunate that the High Court aided Westmont in keeping away from responding to the Claim, while clearly, Westmont was the principal Company, all others being cogs within Westmont. The High Court asked the Employees to deposit security of Kshs. 5 million as demanded by Westmont. Employees had just lost their jobs. Where were they to raise Kshs. 5 million from? They were compelled to withdraw their Claims against Westmont. The High Court, with all due respect, did not articulate the unique characteristics of the employment relationship, which demand the weaker of the Parties in the employment relationship, is protected. To ask Employees who had just lost their jobs to deposit Kshs 5 million in Court, as a condition for them to be heard, was insensitive and a disincentive for the wronged Employees in seeking industrial justice. Had the remaining Respondent made similar demands, and its wish granted, probably the Claimants would have withdrawn the entire Claim and gone home, after years of work, empty- handed. ***The first conclusion the Court reaches, is that E.A. Power Management Limited and Westmont, were the same economic unit, which employed the Claimants***.

31. *Continuous service:* The Claimants were employed by Westmont and E.A Power Management Limited effective March 1997. The letters inviting them to the job interviews, and those of appointment, share the authority of both Companies. The Management and Operations Agreement between the two Companies, was executed June 1997. This Agreement alleged to place the Employees under the control of E.A. Power Management Company. The Agreement was in the view of the Court of no effect to the Employees. They had been employed prior to the Agreement by the two Companies. Appointment letters were in the name of the Management Company. The Management Company was a Co- Employer from the very first day. It made no sense for the Employer to convert into a Human Resources Management Company in June 1997.

32. Cergas Senja SDN BHD [CSSB] was engaged by Westmont to manage the Employees in place of E.A. Power Management Limited, in an Agreement dated 6th November 2001. Westmont was described in the Agreement as the Owner, and E.A. Power Management as the Existing Operator of the Plant. Westmont terminated its Agreement with its sister Company on 1st March 2002, to allow CSSB to take responsibility for the management and operations of the Plant. The sister Companies and the new Company were involved in a High Court Claim at Mombasa, where E.A. Power Management Company sought to restrain Co- Employer Westmont, from engaging CSSB. The Court restrained CSSB, directing the status quo be maintained.

33. Group Accountant Mr. Aroni did not testify, but his sworn Witness Statement is quite illuminating. It suggests that there were Employees who had at the time the High issued its order, crossed over to CSSB, while others remained with E.A. Power Management Limited. No names of the particular Employees crossing over, or remaining were given. Importantly, Aroni states that E.A. Power Management Limited remained at the workplace throughout, and was in control of the Employees. CSSB did not have separate Managers and Supervisors who controlled the Employees; control remained in the hands of E.A. Power Management as it has always been the case from 1997.

34. The letters of offer of employment given by CSSB to the Employees stated the terms and conditions of service under E.A. Power Management would continue to apply. These terms would however be reviewed within 3 to 6 months. The High Court dispute was compromised in February 2003. The Agreement with CSSB was terminated and the one with E.A. Power Management restored. The Respondent argues that for the period when CSSB was at the scene, the Claimants were not its Employees.

35. That argument is flawed. The Court has concluded that Westmont was the principal Employer, and E.A. Power Management was merely another face of Westmont. Westmont remained a principal Employer alongside E.A. Power Management even for the period CSSB intervened. Secondly, the order of status quo in the High Court protected the validity of the Agreement between Westmont and E.A. Power Management, whatever worth that Agreement was. The Employees would not be affected by the activities between Westmont and CSSB. Thirdly, E.A. Power Management remained in place, and in control of the Employees. Fourthly, the Employees performed the same duties, from the same premises as they had always done. There was no change in the custody of the place of work, the custody of the Employees, and the custody of the employment. In ***Nairobi Industrial Court Cause Number 684 of 2011 between Child Welfare Society of Kenya v. Margaret Bwire & Another*** as well as in the case of ***Kenya Petroleum Workers Union*** cited above, the Court held the term 'Employer' to include any person in the control or custody of the place of work, the control or custody of the Employees, and the control or custody of employment. There was nothing to suggest control and custody changed with the entry of CSSB. Control and custody remained steadily in the hands of Westmont and E.A. Power Management Limited.

36. Consequently the entry of CSSB and its letters of offer to Employees are to be treated as though they never happened. They were inconsequential, and have no effect on the continuity of Employees in employment, up to the date the Employees left employment. It was not necessary to require the Claimants to have fresh letters of employment under CSSB, or have them reapply for their jobs after CSSB left. The activities involving Westmont, E.A. Power Management and belatedly CSSB, were activities which the Employees were not privy to. The Management Agreement executed between Westmont and E.A. Power Management, as well as that involving CSSB, did not bring to an end the contracts concluded by the Employees in March 1997. The termination clauses in the contracts of employment of March/ April 1997 were not brought into play before CSSB's alleged takeover. ***The second conclusion is that Employees worked in continuity under the Respondent, from March 1997 to February 2003.***

37. *On termination:* Upon 'restoration' of the Agreement between Westmont and E.A. Power Management, the Respondent demanded the Claimants reapply for their jobs. According to Aroni, some did apply and were taken back, while the Claimants refused to reapply and lost their jobs. There was no need for the Claimants to reapply for jobs they had held in continuity from 1997. Why did the Respondent need them to reapply, while it was in control and custody of the Employees even during the period Westmont flirted with CSSB? The Employees were doing the same tasks and answering to the same Management. It was absolutely illogical to demand they reapply. The Respondent argued that the Claimants terminated their own contracts by contracting with CSSB. CSSB was a company brought in by Westmont, a sister Company to E.A. Power Management. Employees were merely acting in accordance with the instructions given to them by a shared Management. They cannot have terminated their own contracts by refusing to reapply for jobs which they still held, under the same Employer.

38. Employees did not voluntarily leave employment. There was a demand from their longtime Employer that they reapply for their jobs. Their contracts given in 1997 and subsequently reviewed had not been

terminated. The Respondent called in Police Officers who forcibly removed the Claimants from the premises. The third conclusion is that ***termination of employment can only be attributed to Westmont and E.A. Power Management Limited, with liability borne by the E.A. Power Management Limited, in the unfortunate absence of Westmont***.

39. ***Remedies and applicable law***: The Employment Act 2007 which the Claimants invoke has no relevance to their grievances which arose in 2003. The Act cannot be applied retrospectively. The argument that the Respondent disregarded the Claimants' substantive and procedural justice under Sections 41, 43 and 45 of the Employment Act 2007, is misconceived. The Act was not in place at the time the Claimants left employment.

40. The Employment Act Cap 226 then in force did not place an obligation on the Employers to accord Employees substantive and procedural justice. Employment it was stated was, at the will of the Employer. Termination could be preceded by good reason, bad reason or no reason at all. This position has been expressed in many decisions from the Civil Courts. The concept of unfair termination was unknown, except under the Trade Disputes regime, where Employers were obliged to hear their Employees before termination and give reasons justifying their termination decisions. Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya granted the Industrial Court the mandate to reinstate or grant compensation to Employees who were unfairly dismissed. These guarantees and remedies were absent in the Civil Courts. The Employment Act 2007 widened the scope of the unfair termination law, spreading its reach outside the Trade Disputes field.

41. In the ***Industrial Court at Mombasa Appeal between Kenya Ports Authority [2014] e-KLR*** and ***Nairobi Industrial Court case between Major Wilfred Kyallo Kangulyu v. Tetrapak Limited [2014] e-KLR,*** it was held that the Employer's duty to grant the Employee substantive and procedural justice, could be imposed by the contract of employment or human resource manual, before the advent of the Employment Act 2007.

42. The Claimants were subject to the Terms and Conditions of Employment for Non-Management Staff, issued upon them by the Respondent. The Respondent alluded to separate Manuals belonging to Westmont and E.A. Power Management Limited, but did not exhibit separate Manuals. Clause 25.1 required the Employer to give the Employee an opportunity to defend himself before dismissal. If the Respondent considered the Claimants to have deserted by engaging with CSSB, and therefore ripe for dismissal, there was a contractual obligation to grant the Claimants an opportunity to be heard. It was not permissible to compel the Employees to surrender their Port Passes in exchange of their salaries, or to call in the Police to forcibly remove them, without granting the Employees the opportunity to be heard. The right to be heard was given by the Manual, not the law in place, and there was no evidence that the Employer availed this right to the Employees before termination. It was a right incorporated in the individual contracts of employment. The reasons for termination of the Claimant's contracts were not justifiable***. The Claimants are not entitled to compensation for unfair termination, but are entitled to damages for unlawful termination. The Court allows each Claimant 12 months' salary at the rate payable as at March 2003, in damages for unlawful termination.***

43. The last review of Terms and Conditions of service changed the existing termination notice period to 6 months or 6 months' salary in lieu thereof. The Respondent did not issue the Claimants with the necessary termination notices. ***The Claimants are allowed 6 months' salary each in notice pay, based on their last monthly rates.***

44. Employees whose services were no longer required, and who served the Respondent for more than 5 years, were entitled to service pay calculated at 15 days' salary for every year completed in service. This was under the Terms and Conditions of Service and in keeping with the recognition and reward for years of service, in the energy industry under the Regulation of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya. Unless an Employee left on disciplinary grounds, there was no reason to deny him recognition and reward for the years served. The Claimants left without their years of service recognized or rewarded. They had served in continuity for over 5 years, and merited service pay. The Court grants them service pay at 15 days' salary for their respective years completed in service.

45. Other claims on terminal dues have not been established. The schedule attached to the Statement of Claim titled 'Terminal Dues Claim- Particulars' was not explained to the Court by the Claimants. They simply replicated benefits listed under the Terms and Conditions of Service, without elaborating how these applied in their final dues. What is the Court to make of 'House Allowance 25%, Leave Allowances 25 %, Shift Allowance 12%, March Salary, April Salary, May Salary etc?' 'Damages' are included in the list of terminal dues. The Claimants are not clear in their Pleadings, and do not relate the list to the terminal dues sought. Parties seeking the assistance of the Court must assist the Court in making such assistance possible. If 'house allowance' was meant to be a claim for arrears of house allowance, the salaries paid to the Claimants were clearly stated to be consolidated.

46. The Court is only able to grant the prayer for damages, service pay and notice pay. The Claimants shall also have costs and interest. The Respondent offered no evidence to back up its Counterclaim. It is the finding of the Court that termination was at the instigation of the Employer. The Counterclaim is rejected. IN SUM, IT IS ORDERED:

a. ***It is declared the Respondent E.A. Power Management Limited acted in breach of the Claimants' contracts of employment.***

b. ***The Respondent shall pay to each of the 28 Claimants, within 45 days of the delivery of this Award, damages for unlawful termination at 12 months' salary, notice pay at 6 months' salary and service pay at 15 days' salary for each year completed in service, all based on the last salaries earned by the Claimants.***

c. ***The Counterclaim is rejected.***

d. ***Costs to the Claimants.***

e. ***Interest allowed at 14% from date of delivery of this Award.***

Dated and delivered at Mombasa this 9th day of December, 2015.

James Rika

Judge