



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

**(BIMA TOWERS)**

**CAUSE NO. 81 OF 2013**

**FRANCIS N. BWIRE**

**RAPHAEL O. ODIENY**

**NICHOLAS O. AMONDI**

**PETER N. RIUBA**

**SAMMY O. LOWINO**

**JOSEPH KULUBI**

**CHARLES O. OKUTHE**

**WILFRED B. ODWORI**

**JACKSON P. MUKUDO**

**HESBORN O. NYABENGE**

**VICTOR O. OUMA**

**VINCENT O. OMONDI**

**GEORGE O. OLIECH.....CLAIMANTS**

**v**

**KRYSTALLINE SALT LIMITED..... RESPONDENT**

**JUDGMENT**

1. The 13 Claimants through the firm of Nyagaka SM & Co. Advocates lodged a Memorandum of Claim against Krystalline Salt Ltd on 15 April 2013 and the issue in dispute was stated as *unlawful termination of employment, non-payment of terminal, contractual and or retirement benefits.*
2. The Respondent filed a Statement of Reply on 22 May 2013 which necessitated the Claimant's filing a Reply to the Response on 13 June 2013. On 3 July 2013 the Respondent filed a List of Documents.

3. On 27 August 2013 the Respondent filed a Preliminary Objection and the same being overtaken by events was abandoned on 4 December 2013.
4. On the same day the Court directed the County Labour Officer to prepare a report and the same was filed in Court on 20 February 2014. The Claimants did not agree with the report and the Cause proceeded to hearing on 28 May 2014.

### **Claimants' case**

5. The Claimants case is that they were employed on diverse dates by the Respondent and deployed to its Shimanzi godown to load salt.
6. They also contend that in the course of their employment they did not go on annual leave and worked during public holidays.
7. The 9<sup>th</sup> Claimant who testified on behalf of the other Claimants stated that none of the Claimants was issued with a written contract and that they were being paid at a daily rate Kshs 500/- but paid weekly on Saturdays.
8. He further stated that the Claimants would report for work at 7.00 am but leave depending on the volume of work for which they would be paid overtime. They also worked during public holidays.
9. On the termination, the witness stated that on 11 August 2012 they offloaded salt at Shimanzi godown but noticed no salt was coming in prompting them to ask a Clerk, Willy Gambo for clarification, but he did not give them any information.
10. On 12 August 2012, the witness stated that they went to Mombasa Salt in Changamwe which had been purchased by the Respondent but were denied entry forcing them to return to Shimanzi and later to report to their Union. The Union wrote letters to the Respondent but nothing came out of it forcing them to seek legal advice but even the Advocate's demand letter was not responded to.
11. Although the Claimants did not disclose how they were terminated, the witness stated that the termination caught them by surprise and was unlawful.
12. In cross examination, the witness stated that they used to pay union subscriptions directly to the Union.

### **Respondent's case**

13. The Respondent contended that the Claimants were not its employees but were employees of respective gang leaders. In the alternative, the Respondent asserted that the Claimants were casual employees and not contract/term employees.
14. The Respondent's witness, John Lugwe, at the start of his testimony stated that he was a Cashier with the Respondent and that the Respondent used to engage the Claimants at the Respondent's Shimanzi depot in the mornings and at the end of the day their wages would be calculated and they would be paid weekly, depending on the tonnage loaded/offloaded.
15. Later in his testimony, the witness stated that the Claimants were not employees of the Respondent but were casuals under gang leaders (subcontractors) who took their identity cards and forwarded the same to the Respondent for allocation of work on a daily piece work basis.
16. The witness also referred to the Respondent's payroll and Weekly Casual Sheets and stated the Claimants names were not in the documents.
17. In cross examination, the witness stated that the Respondent had no agreement (formal) with the gang leaders and that it is the gang leaders who would compute the Claimants wages which would then be paid after preparation of vouchers. The witness also admitted that the Claimants were employees of the Respondent.
18. Consequently, the witness stated that the Respondent was not responsible or liable for the Claimants claims, and that claims prior to 14 February 2010 were statute/time barred.
19. Before analyzing the respective parties' cases, the Court needs to note that the Respondent's witness contradicted himself severally in oral testimony. Some details of his oral testimony were also not consistent with his witness statement filed in Court. An example is where the witness in his statement states at paragraph 4 that he does not know the Claimants and in oral testimony stated that the Claimants were employees of the Respondent. In exam in chief, he contradicted himself and stated the Claimants were not employees of the Respondent.
20. Further, the Court has not agreed/adopted the findings of the Labour Officer because the said

findings did not consider various provisions of law such as sections 9 and 37 of the Employment Act, 2007 and how the said provisions would apply in the situation of the Claimants.

### **Issues for determination**

21. From the pleadings, testimony, documents and parties submissions the issues arising for determination are, whether the Claimants were employees of the Respondent or subcontractors, whether the Claimants were casuals, whether the Claimants were terminated unfairly and appropriate relief.

### ***Whether Claimants were employees of Respondent or subcontractors***

22. It cannot be disputed that the Claimants were loading/offloading salt at the Respondent's Shimanzi godown. The dispute is as to whether for purposes of the law, the Claimants were employees of the Respondent or employees of a third party/subcontractors commonly referred to here in Mombasa, as gang leaders.

23. The Respondent's witness stated that the Respondent had no agreement with the gang leaders. By agreement, the Court understood the witness to be referring to a formal written agreement.

24. The Respondent further contended that had the Claimants been its employees their details would have been in the payroll/weekly wage sheets.

25. The hallmarks of a true independent contractor have been the subject of discussion in Court decisions and academic writings. This Court has discussed the issue in *Kenya Hotel & Allied Workers Union v Alfajiri Villas (Magufa Ltd)*, (2014) eKLR.

26. Several tests have been identified in decisions such as in *Cassidy v Min. of Health* [1951] 2 KB 343 and *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497. These tests include the organizational/integration test and the mixed factor test.

27. In the *Alfajiri Villas* case this Court observed that

*An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13<sup>th</sup> Cheque and so on.*

28. The Claimants were doing the Respondent's work at hours set by the Respondent. Their remuneration came directly from the Respondent after calculations/computations by the so called gang leaders. The Claimants were directly under the control of the Respondent.

29. The Claimants were employees of the Respondent for purposes of the law.

### ***Whether the Claimants were casuals***

30. The Respondent had pleaded in the alternative that the Claimants were casuals. The Claimants had pleaded that they were variously employed by the Respondent from 1994 to 2006 before termination in 2012.

31. It appears the Respondent did not keep any records in respect of the Claimants. The wages details in respect of the Claimants/Casuals were not produced but were mentioned in testimony.

32. The Respondent's witness testified that the Claimants' wages were based on a daily rate but paid weekly. The job the Claimants were engaged in could not be completed within 3 months. The work still continues but with other persons engaged because the Respondent has not closed shop.

33. By dint of sections 9(1) and 37 of the Employment Act, 2007, the Claimants were not casuals but employees whose contracts were deemed converted into term contracts, to be paid monthly wages.

### ***Whether Claimants were terminated unfairly***

34. The Employment Act, 2007 has now given ordinary employees security of tenure. Security of tenure in that before termination, the employer is under a positive duty to comply with the procedural fairness safeguards in section 41 or 45(2)(c) of the Employment Act, 2007 and to prove the reasons for termination and that the reasons are valid and fair as required by sections 43, 45 and 47 of the Act.
35. Because of the position the Respondent had adopted, it did not mount any challenge to the allegations of unfair termination.
36. In light of the Court's findings in regard to the employment relationship, the Respondent was under an obligation to follow a fair procedure before terminating the services of the Claimant. This was not done.
37. The Respondent also did not attempt to prove the reasons for termination or that the reasons were valid and fair.
38. The Court therefore finds that the services of the Claimants were terminated unfairly.

### **Appropriate relief**

#### ***One month pay in lieu of Notice***

39. The Court reached a conclusion that by operation of statute, the Claimants' employment were deemed converted to term contracts. Such contracts should be terminated in accordance with sections 35 and 36 of the Employment Act, 2007.
40. The exact monthly wages of the Claimants were estimates and therefore the Court would agree with the Respondent's submissions and use the prescribed minimum monthly wages in 2012 for purposes of determining appropriate pay in lieu of notice.
41. The Court also agrees with the Respondent that the Claimants fell in the category of general labourers. The minimum monthly wage was set by Legal Notice No. 71 of 2012 at Kshs 8,579/-. Factoring 15% of basic wage as house allowance the gross monthly minimum wage was Kshs 9,865/-. Each Claimant is awarded Kshs 9,865/- as one month pay in lieu of notice.

#### ***Leave pay***

42. Each of the Claimants sought leave pay. Under section 28 of the Employment Act, 2007, employees are entitled to a minimum of 21 days annual leave with full pay.
43. Section 28 (4) of the Act has imposed a limitation that the remainder of annual leave not taken should be taken within 18 months from the end of the annual leave earning period.
44. The parties did not disclose the leave earning period/year. The Respondent appeared to suggest the period run from January by submitting the Claimants could only be awarded up to July 2012 accrued leave.
45. The keeping/maintenance of records is the duty of an employer. The Respondent did not produce the leave records while well aware there was a claim for leave.
46. The Court would award each Claimant the equivalent of one month's wage (Kshs 9,865/-) in lieu of leave based on the minimum wage in August 2012.
47. Considering the finding, the issue of limitation raised by the Respondent need not be discussed.

#### ***Service pay***

##### ***1<sup>st</sup> to 3<sup>rd</sup> Claimants***

48. The statute has not fixed the rate for determining service pay. But it is trite now that the custom/practice has been to use the equivalent of 15 days pay for each year of service.
49. These Claimants were employed in 1994. It was not suggested they were exempt from service pay by virtue of section 35(6) of the Employment Act, 2007.
50. These Claimants served for 18 years. They would each be entitled to service pay equivalent to 270 days.
51. Using the correct formula of basic salary plus house allowance divided by twenty six to get the daily rate which is then multiplied with the number of service pay days, these Claimants' daily rate

was Kshs 379/-. This multiplied by 270 gives Kshs 102,330/- each.

#### **4<sup>th</sup> to 7<sup>th</sup> Claimants**

52. These Claimants served from 1996. They served for 16 years. This translates to equivalent of 240 days. They would each be entitled to service pay of Kshs 90,960/-.

#### **8<sup>th</sup> Claimant**

53. The 8<sup>th</sup> Claimant served for 15 years and would be entitled to service pay equivalent to 225 days. This translates to Kshs 85,275/-.

#### **9<sup>th</sup> Claimant**

54. This Claimant service pay is equivalent to 195 days which is Kshs 73,905/-.

#### **10<sup>th</sup> Claimant**

55. The 10<sup>th</sup> Claimant worked for 10 years which translates to 150 service pay days. He would be entitled to Kshs 56,850/-.

#### **11<sup>th</sup> Claimant**

56. This Claimant served for 8 years, translating to 120 service pay days and would be entitled to Kshs 45,480/-.

#### **12<sup>th</sup> Claimant**

57. He served for 7 years translating to 105 service pay days and would be entitled to Kshs 39,795/-.

#### **13<sup>th</sup> Claimant**

58. The last Claimant served for 6 years translating to 90 service pay days and would be entitled to Kshs 34,110/-.

59. This Claimant also sought pay for public holidays and weekends worked. No evidential or contractual foundation for this head of claim was laid and it is declined.

### **Conclusion and Orders**

60. The Court finds and holds that the Claimants contracts were converted into term contracts by operation of statute and that their termination was unfair and awards and orders the Respondent to pay them

- a. One month pay in lieu of Notice (each Grievant)      Kshs 9,865/-
- b. One month pay in lieu of leave (each Grievant)      Kshs 9,865/-
- c. Service pay

- i. Francis N. Bwire      Kshs 102,330/-
- ii. Raphael O. Odieny      Kshs 102,330/-
- iii. Nicholas O Amondi      Kshs 102,330/-
- iv. Peter N. Riuba      Kshs 90,960/-
- v. Sammy O. Lowino      Kshs 90,960/-
- vi. Joseph Kulubi      Kshs 90,960/-
- vii. Charles O. Okuthe      Kshs 90,960/-

viii. Wilfred B. Odwori	Kshs 85,275/-
ix. Jackson P. Mukudo	Kshs 73,905/-
x. Hesborne O. Nyabenge	Kshs 56,850/-
xi. Victor O. Ouma	Kshs 45,480/-
xii. Vincent O. Omondi	Kshs 39,795/-
xiii. George O. Oliech	Kshs 34,110/-

61. The Claimants are awarded costs.

**Delivered, dated and signed in open Court in Mombasa on this 11<sup>th</sup> day of July 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Asewe instructed by Nyagaka S.M. & Co. Advocates

For Respondent Mr. Matheka instructed by Anjarwalla & Khanna Advocates