



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

**AT MOMBASA**

**CAUSE NO. 78 OF 2014**

**MARY KITSAO NGOWA & 37 OTHERS .....CLAIMANTS**

**VERSUS**

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

**J U D G M E N T**

**INTRODUCTION**

1. This suit is brought by 37 claimants against their former employer. The claimants were employed by the respondent on diverse dates between 1998 and July 2012 when they were allegedly declared redundant. The reason for the said redundancy was the introduction of machines which replaced the claimants manual labour. The claimants avers that the said redundancy was abrupt and it amounted to unlawful, unfair and wrongful dismissal. Consequently they have prayed for compensation for unfair and wrongful dismissal plus accrued employment dues including house allowance arrears, accrued leave, overtime, severance pay plus salary arrears resulting from underpayment of salary. The summary of the claims for each claimant is particularized in the schedule annexed to the claim.

2. The respondent has denied liability for the alleged unfair termination of claimants' services and blames them for voluntarily deserting employment in protest against the introduction of Baling machines at the factory by her. In addition she averred that the claimants were demanding higher pay of Ksh.5 per bundle instead of ksh. 3.50 she was offering to them. She contended that the claimants were piece rate workers and as such their claim is grossly mis-conceived and unjustified.

3. The suit was heard on 8/7/2014 when the claimants were represented by Christine Namalwa Esendi (30th claimant) as CW1 while the respondent called Zablon Matano Beja and Ndoro kaka as RW1 and RW2 respectively.

**CLAIMANTS' CASE**

4. CW1 was employed by the respondent on 16/5/1998 and worked continuously until 19/7/2013. She was packing salt in bundles at the respondent's Marereni station. On 15/4/2011 she was transferred to Gongoni station on the same duties. She was working with her co-claimants in the same place and in the same capacity as casuals. They were given company uniform and gate passes. She produced the gate passes to prove that they were employed by the respondent.

5. Their employment contract was verbal but they worked continuously. They only missed work when one was sick and sought permission to go to the hospital at her own cost. Their pay per day depended on

ones speed and the efficiency of the machine allocated. They worked in groups and the money paid was shared equally. There was no payslip but each person signed a payment voucher after showing an identify card to the clerks who had the payroll. No NHIF or NSSF contributions were deducted from their pay. The claimants worked from 7am to 7pm with no lunch break, no leave or rest days.

6. On 19/7/2013 the claimants services were suddenly terminated on grounds that the respondent had fully installed baling machines which had in effect replaced the claimants manual labour. There was no prior notice or any meeting held to discuss the termination and payment of the claimants dues. They sought audience with their manager Mrs. Kimji but she told them that the installation of the machines meant that their labour was replaced.

7. CW1 denied that the claimants refused to work on the manual machines and deserted work. She contended that the manual machine was faulty and had been returned to the Mombasa station by the time they were terminated. She also denied that the claimants wanted to burn down the respondents premises.

8. CW1 explained that on 16/7/2013 the respondent published a note to workers which introduced a change in payment. It stated that the claimants were to work in groups and shifts and each group was to share equally the money they earned. She contended that such system of payment led to a pay below the minimum wage. She prayed for compensation and employment dues for herself and the rest of the claimants as prayed in the claim and the schedule annexed thereto.

9. On cross examination by the respondent's counsel, CW1 explained that she was employed by the respondent in 1998 and she use to received her wage after one day until 2012. From 2013, the system of payment changed so that people worked in groups and then share he money equally. She confirmed that from 1998 the workers were paid according to their ability and no one complained.

10. CW1 explained that on 19/7/2013 at 8.00am, their manager Madam Pushba told the claimants that if machines had been installed in ones place of work, that employee had to move out. CW1 admitted that the machines were brought in gradually and replaced the claimants' labour. She admitted however that no none told the claimants that their job was over. She denied that some of the claimants returned to work after 19/7/2013.

11. CW1 maintained that the claimants worked continuously and if one absented herself without permission, she was punished by an unpaid suspension.

12. CW1 denied that the claimants left work on 29/6/2013. She also explained that the claimants reported to the labour officer after they disagreed with Pushba on their demand for payment of terminal dues.

13. On re-examination, CW1 clarified that Pushba was the HR Manager while her husband Mr. Kimji was dealing with loading of lorries. According to CW1, the said two officers had the power to hire and fire workers. She further clarified that the meeting between Pushba and the claimants representatives was to discuss their terminal dues.

### **DEFENCE CASE**

14. RW1 is the Publics Relations Officer. He confirmed that the claimants were employed as packers/stacker doing the work of packing salt and arranging it into bales.

15. On 26/6/2013 morning, the claimants walked out of the work place and went on strike. RW1 was send by Pushba (Administration Manger) to talk to the workers to resume work. The claimants refused to resume work arguing that the machines which had been brought from Mombasa were not working as the claimants wanted. RW1 asked for a meeting with the claimants' representatives, Pushba and the Security Officer Mr. Wekesa. According to RW1 it was agreed that the claimants were to resume work while the management addressed their grievances. The claimants however never resumed work.

16. On cross-examination, by the claimant's counsel, RW1 admitted that no return to work formula was

ever written during the joint meeting on 26/6/2013 evening.

17. RW2 is the supervisor at the respondent's packing section. He contended that the claimants were employed by the respondent on piece-rate basis, they were recruited by clerks as packers and issued with identity card (gate pass) by the personnel officer. The claimants were also given boots and uniform which were returned after termination of employment.

18. On 26/6/2013, the respondents fully installed Baling machines but the claimants demanded that the machines be removed. The shift manager Mr. Kuldip told the claimants that they were to work on the manual machines but the claimants refused to work on the manual machines and never returned to work the following day. Some however started to return after a few weeks.

19. RW2 explained that initially the claimants were paid Ksh.2.80 per bundle but from 26/6/2013 following the workers strike, the pay was increased to ksh.3 per bundle. The claimants however never resumed work after the increase of the pay. RW2 confirmed that 7th and 8th claimants never returned to work.

20. RW2 further explained that when he joined the respondent in 2011, he found the workers working in groups and the same procedure continues to date. He produced records for payments for the period between 31/5/2013 to 16/7/2013 to prove that the claimants left work on 26/6/2013.

21. On cross-examination by the claimants counsel, RW2 confirmed that the workers attendance register is kept by the clerks and they contained the information of work attendance by the staff. RW2 stated that the claimants did not return their uniform but clarified that only the Storekeeper could confirm whether or not the uniform was never returned. RW2 never attended the joint meeting on 26/6/2013 between the manager and the workers.

22. After the close of the hearing both counsel filed written submissions of which the court has carefully considered in making this judgment.

### **ANALYSIS AND DETERMINATION**

23. It is not in dispute that the claimants were employed on casual basis between 1998 and July 2013. It is also not in dispute that from 2011 the respondent started installing machines to replace the manual labour hitherto done by the claimants. It is also not in dispute that by mid 2013, the respondent completed the machine installation and thereby left only a limited section for manually operated machines which were faulty and inefficient. It is also not in dispute that the services of the claimants ended in or about June or July 2013 without any dues being paid to them. The issues for determination are:

**(a) whether the claimants worked for the respondent on contract of service or contract for services.**

**(b) Whether the claimants are entitled to conversion of status from casual/piece-rate employment to regular employees.**

**(c) Whether the claimant's employment was unfairly terminated by the respondent.**

**(d) Whether the claimants are entitled to remedies sought.**

### **Nature of employment contract**

24. The claimants case is that they were employed on casual basis. They were paid their days wages on the following day. They worked continuously until 2013 when their mode of payment changed to piece rate in which they were ganged up in small groups who worked jointly in parking salt into bales after which they were paid ksh.2.8 per bale. The group then shared the pay equally. The amount of pay depended on the speed of the group members and the efficiency of the machines allocated by the respondent.

25. The claimants were provided with uniform and employment identity cards. They worked from the respondent's premises only under the supervision of the RW2 who was employed by the respondent. If the claimants absented themselves without permission they were punished by an unpaid suspension.

26. In this court's view the claimants' evidence that from 1998 to June 2013, they were paid daily wage as casual workers was not rebutted by the defence. The respondent did not produce any written evidence to disprove that contention by the claimants. All that RW2 did was to verbally say that when he joined the respondent in 2011, he found the claimants receiving payment in groups which has continued to date. The only documentary evidence of group payment on piece-rate is the Receipt from Production Note (Exh.d.1) for May – July 2013. That was not enough to disprove the claimant's contention on the mode of payment before May 2013..

27. Even if this court was to be persuaded to believe that the claimants were employed as piece rate workers, the court would still find that they were not independent contractors but employees of the respondent under contract of service within the meaning of Section 2 of the Employment Act. The said section defines contract of service as:

**“ an agreement, whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership...”**

The consequence of such employer employee relationship is to subject the parties to certain legal rights and obligations automatically.

28. In reaching the foregoing conclusion, the court is persuaded by Indian Jurisprudence in similar disputes. In **SHRI BIRDHICHAND SHARMA -vs- FIRST CIVIL JUDGE NAGPUR AND OTHERS [1961] 2 FLR 577** the claimants were employed as piece rate workers. They applied for leave but they were not paid anything during the leave period prompting them to sue the employer. The supreme court of India had this to say

**“... the fact that a worker is a piece-rate worker would not necessarily take him out of the category of a worker within the meaning of s.2(1) of the Factories Act. Considering the entire circumstances and particularly the fact that if the worker does not reach the factory before midday he is given no work, he is to work at the factory and cannot work elsewhere, he can be removed if he is absent for eight days continuously and finally his attendance is noted and biris prepared by him are liable to rejection if they did not come up to the standard, there can be no doubt that the respondents 2 and 4 worked within the meaning of S.2(1) of the Factories Act. This is also the view taken by the Bombay High Court in States Vs Shankar Balaji Waje A.I.R. 1960 BOM 296 in similar circumstances and that we think is the right view.”**

The court then proceeded to affirm the decision of the trial court which found that the piece rate workers were entitled to paid leave after working for the minimum number of working days required to earn leave under the law.

29. The claimant's evidence herein, that they served continuously as casual workers was however not rebutted. The respondent did not produce any employment records including attendance registers to prove that the claimants never served as casual workers for a continuous period of at least one month in aggregate or more. Under Section 74(1) of the Employment Act the employer has obligation to produce employment records to disprove the employees case. RW1 and RW2 confirmed that the claimants worked for the respondents upto 26/6/2013 or thereabout. The court is therefore satisfied that the claimants were in continuous service on casual basis for many consecutive days between 1998 and 2013.

30. Under Section 37(1) (a) of the Employment Act a casual employee who works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month, the contract of service of the said casual employee is deemed to be one where wages are paid monthly and is terminable by a 28 days notice in writing. Under Section 37(2), the converted employee

becomes entitled to paid rest days and holidays. In addition to the foregoing Section 37(3) of the Act provides that where employee whose contract has been converted under Subsection (1) as above continues to work for two or more months from the date of engagement as casual employee, he shall be entitled to the same terms and conditions of service as employees who are not employed as casuals. Section 37(4) of the Act then donates power to this court to declare terms and conditions of casual employees to be consistent with the provisions of the Employment Act.

31. After considering the evidence and circumstances of this case, the court is satisfied that this is a good case for the exercise of the power to vary and convert the contract of employment for the claimants from casual employment to employment consistent with Section 35(1) (c) and Section 37(2) of the Employment Act. The claimants were therefore entitled to notice of at least 28 days in writing before termination. They were also entitled to paid leave, rest days and holidays during the period of their service. It was unfair labour practice for the respondent to have continuously exploited and denied the claimants their rights for so many years and it is only by chance that the labour office never received any complaint about the said unfair labour practice.

32. The claimants have alleged that they were exploited by the respondent through underpayment. According to them they were paid below the statutory minimum wage per day. That the said situation was made worse whenever one was allocated a faulty and inefficient machine which compromised the employee's productivity and therefore less or no pay at all for that day. In the schedule of the claimants' claims, the statutory minimum wage for various years that the claimants served is indicated.

33. The court agrees that the statutory minimum wages are automatically incorporated into every contract of employment where they are relevant and applicable. In this case the respondent did not confirm to the court that the daily wages she was paying to the claimants was equal or more than the minimum statutory wage for each respective time of service by the claimants. All what she did was to merely allege that the claimants were piece-rate workers earning proportionate to their productivity.

34. The circumstances of this is such that the said productivity was not even depended on ones effort but the effort of the whole group and efficiency of the machines. It was therefore illegal, unfair and irrational to pay an employee who has attended work a sum below the statutory minimum wages. The minimum labour standards are meant to uphold the dignity of human being at the workplace and also for affording the worker a dignified life and survival. An employer cannot therefore not be allowed to sacrifice the said minimum labour standards at the altar of profit making in business.

35. Consequently, the answer to the second question for determination aforesaid is that the continuous service by the claimants qualified them to and are hereby declared to have served the respondent under contract of service on permanent basis with full rights and benefits as provided under the labour laws and the constitution.

### **Unfair termination**

36. The claimants' case is that their labour was replaced by machines in July 2013. Before then the employer had also decided to change the mode of payment from daily wage to piece rate. For the said reasons they deem that their employment was unfairly severed. They have denied the alleged strike and maintained that they were dismissed verbally by respondents manager madam Pushba. On the other hand the respondent contends that the claimants staged strike on 26/6/2013 as a result of faulty manual machine and low pay. That piece of evidence by RW1 and RW2 however contradicted the letters written by the defence witnesses on 3-4-2014 and filed with the defence on 9/5/2014. In the said letters the RW2 and a Mr Ramla Salim who did not testify corroborated the claimants claim and evidence that their services ended in July 2013.

37. The court has considered all the matters raised by the two sides and formed the opinion that the termination of the claimants services had already been predetermined. It was only a matter of time and the claimants saw it coming when machines were installed systematically until July 2013. The said letter by RW2 who was the claimants supervisor stated in part as followed:

“It was on [sic] July 2013 when our packers went on strike because the management decided to bring baling[sic] machine to replace the manual packers since the baling[sic] machine can do the same job of packers and faster[sic].”

38. The intention of the respondent was therefore to layoff the claimants. She however did not follow the procedure for redundancy provided for under Section 40 of the employment Act. As a result the termination of the claimants' employment was rendered unlawful and unfair within the meaning of Section 45 of the said Act. It was also wrongful because no notice of termination was served on the claimants as provided for under Section 36 of the Act. The defence allegation of strike as the proximate cause of the termination of the claimants' employment is therefore dismissed. In any event the respondent has given irreconcilably contradicting statement about when the alleged strike took place.

### **Relief Sought**

39. Under Section 49 of the Employment Act an unfairly terminated employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. Each claimant is awarded one month salary in lieu of notice, 21 days leave per year of service subject to limitation period of 3 years, and 3 months compensation for unfair termination. The said awards are pegged on the employees lawful salary. In the present case, the claimants save the 37th claimant, pleaded that their daily wage for the respective claimants ranged between ksh.200 to ksh.300 per day. They however contended that their wage should have been the one gazetted under the annual wage orders. They relied on Section 48 of the Labour institutions Act to advance the foregoing proposition. The said provision of the law inserts automatically the minimum wage to every contract of employment where the minimum wage applies.

40. In the present case the claimants pleaded that they were underpaid for the diverse periods of their service upto July 2013 based on the respective annual Wage Orders and prayed for the underpaid salary as arrears for that period. The court is in agreement with the claimants that they were entitled to the payment of wages as published in the Wage Order as provided under Section 48 of the said labour Institution Act. The said minimum wage is the same to be applied in assessing the claimants dues in this suit. Those earning Ksh. 200 per day will also get the underpaid daily wages in arrears. The reason for excluding those earning ksh.300 per day is because the court presumed that the claimants workplace was outside a municipality or towns classified as municipalities in the General wage Order. The claimants pleaded for the minimum wage for the municipalities but they did not prove that they were working within a municipality. They will therefore get compensation as provided for workers outside municipalities.

41. In that regard the court declares that the claimants' lawful wage as provided for under the General Wage Order of 2013 was ksh.264.50 per day inclusive of house Allowance which translated to ksh.7,935 per month starting 1/5/2013. It follows therefore that those claimants earning ksh.300 per day or ksh.9000 per month were never underpaid. Consequently only the claimants who were earning below the minimum wage of ksh.264.50 per day will have their terminal dues and compensation based on the said ksh.7935 while those who were earning ksh.300 will have their terminal dues and compensation based on the ksh.9000 per month. In addition to the foregoing those claimants earning ksh.200 per day will get arrears of underpayment for the period starting 2011 to 2013. Between May 2011 and April 2012 the minimum wage was ksh.205.15, while between May 2012 and April 2013 the minimum wage was ksh.232 per day.

42. A simple calculation of the foregoing underpayment shows that the claimants who earned Ksh.200 per day were underpaid by  $ksh.5.15 \text{ per day} \times 30 \text{ days} \times 12 \text{ months} = ksh.1854$  between May 2011 and April 2012.. Between May 2012 to April 2013 they were underpaid by  $ksh.32 \times 30 \times 12 = 11520$ . Between May - July 2013 they were underpaid by  $ksh.64.50 \times 30 \times 2.5 \text{ months} = 4837.50$  The court therefore proceeds to award the claimants the following reliefs depending on their daily earnings.

### **Claimants earning ksh.200 per day**

43. According to Appendix 6 in the memorandum of claim, the 10 claimants earning Ksh.200 per day included Mary kitsao Ngowa, Rosemary Ngumba, Ruth Nafula Wanyonyi, Sidi karisa charo, Eunice Salama Elija, Frida Akinyi Nyangor, Hellen Shitawa kasaya, Jumwa Bimbo Baya, Lucy Dama karisa and Mary Samwel Charo. Each will get ksh.7935 being one month salary in lieu of notice. They will also get pay in lieu of 63 leave days for 2011-2013 being ksh.16,663.50. They will further get arrears of underpaid wage for May 2011-July 2013 being ksh.18211. In addition they will get 3 months gross pay for unfair termination being Ksh.23805 to total Ksh.66,614.50 per claimant in this category.

#### **Claimants earning ksh.300/ per day**

44. According to the said Appendix 6 to the claim, the claimants who were earning ksh.300 per day included Mercyline Thamaa Ramadhan, Mitrine Nangila, Millicient Adhiambo, Nyevu Kazungu charo, Pamela Nanjala Lusweti, Rose Nasimiyu Barasa, Selina Bahati Mwagiri, Margaret Charo Munyambu, Sidi wilyson, Everlyne Nanjala Lusweti, Esther Bahati, Lucy furaha Maitha, Macyline Luwali, Martha Kanze Kaingu, Bendera Samson Charo, Betres Sinayo Charo, Christine Namalwa Esendi, Christine Joshua, Dhahabu Lukanje, Elizabeth Washe Guro, Kanze Kalama Katana, and Rachel Dama kaingu. They will get ksh.9000 as one month salary in lieu of notice and ksh.18900 being 63 days leave for 2011-2013. In addition they will also get Ksh.27000 being compensation for unfair termination to total to ksh.54900 for each of the said claimants in this category.

#### **Other Claimants**

45. Michael Katana, Kazungu karisa Shume and Charo Chengo Kaingu were earning ksh.261 per day. They were only underpaid by ksh.3.50 per day between May and July 2013. That is a negligible amount and as such the court will not award them anything for underpayment. Likewise Bahati chome kiponda who was earning ksh.250 per day was only underpaid by 14.50 between May and July 2013 which is also too negligible to award. This category of claimants will therefore get the same award as the claimants who were earning ksh.200 per day less the award for underpayment. On the other hand the court has noted that Mr. Katana Chengo Mulewa's claim was not included in the schedule of the claims and also in Appendix 6. The court could not therefore award him anything because also his counsel did not propose any award in the written submissions filed.

46. Finally, each of the 37 claimants will be issued with a certificate of service as provided for under Section 51 of the employment Act.

#### **DISPOSITION**

For the reason stated above, judgment is entered for the said 36 claimants for an aggregate award of ksh.2,067,557 plus costs and interest.

Orders accordingly.

**Dated, signed and delivered this 31st October 2014.**

**O. N. Makau**

**Judge**