



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 326 of 2011

BETWEEN

1. AGNES NGIMA KARIUKI

2. ALICE NJOKI NJUGUNA

3. ANNE NJOKI NJUGUNA

4. EUNICE MUTINDA KAHUTHIA

5. JACKLINE WANJIRU KIHORO

6. JANE MUTHONI

7. SALOME WAIRIMU MWANGI

**8. SALOME WAKORI NJOKI.....
..... CLAIMANTS**

VERSUS

**JETLAK FOOD
LIMITED.....
RESPONDENT**

*Rika J
CC. Elizabeth Anyango
Claimants acting in person*

*Mr. Masese George Mabeya Advocate, instructed by the Federation of Kenya Employers for the
Respondent*

ISSUE IN DISPUTE: UNFAIR AND ULAWFUL TERMINATION

SECOND AWARD

1. This is the second Award in this dispute. The initial Award was delivered in favour of the Claimants on 21st November 2011. The Respondent applied successfully to set aside the Award. In a ruling delivered

on 2nd August 2012, the Court set aside its Award and allowed the Respondent to file a Statement of Reply and adduce evidence, the first hearing having proceeded *ex parte*. The Court ordered the Respondent to deposit half of the sum Awarded in Court, an amount of Kshs. 894,542.50, as security. The Claimants gave evidence *de novo* through Claimant Number 5, Jackline Wanjiru Kihoro and closed their case on 25th September 2012. The Respondent testified through its Financial Administrator Julius Muchoki Waithaka, and closed its case on 29th November 2012.

2. Jackline did not give any new evidence from the one given in the *ex parte* hearing. It will not be necessary to rehash that evidence here. In short however, the Claimants testified they were employed by the Respondent in its production department on diverse dates between the years 2000 and 2010. They earned a salary of Kshs. 7,200 monthly. Their contracts of employment were all terminated by the Respondent's Managing Director Mr. Anup Bid, without notice or reason. They were not paid any terminal benefits. The eight employees availed to the Court their National Hospital Insurance Fund Membership Cards; Certificates of Medical Examination issued by the Public Health Officer Ruiru, as confirmation of their medical fitness to work at Jetlak; Photographs taken with Anup Bid while on duty; and a letter written on their behalf by their Member of Parliament Mr. William Kabogo to the Respondent, enquiring why their contracts were terminated. Jackline testified on cross-examination that she has not seen the weekly casual pay sheet, introduced as appendix 1 of the Statement of Reply. She did not know who prepared the document. The document indicated she had worked for 2 days and was paid Kshs. 300 per day. Her colleagues were similarly shown in the document to work on casual terms. They did not read the disclaimer in the document before they signed. Churchill Mayaka, the Respondent's officer who prepared the Weekly Wage Summaries, joined the Respondent in 2010. The photographs exhibited by the Claimants did not show when they were taken. They however did capture the workplace background. The Claimants were not issued written contracts. They were not issued letters of termination. There were days in the week, when the witness was shown to be absent from work. The Respondent did not at any time tell the Claimants, that it was experiencing a poor market for its products. The witness urged the Court to find that the Claimants were regular rather than casual employees, and uphold the earlier Award.

3. Julius Muchoki Waithaka testified that he was employed by Jetlak Limited in 2006. He joined as an Accounts Administrator. The company is based at Ruiru Town, and manufactures seasonal products such as juices and peanut butter. He recalled engaging the Claimants from 2007, in production department. The Respondent recruits permanent, casual and seasonal employees. The products are seasonal and recruitment is dictated to by the seasons. Jetlak Limited currently has 18 permanent employees in production department, 50 contract employees and about 80 casuals on the waiting list. He did not know if the Claimants worked before 2007. The Claimants were engaged on specific days as casuals. This was well captured in the Weekly Casual Pay Sheets. The documents had a disclaimer clause. The Respondent was discharged from any future liability. The Claimants signed voluntarily. No one was forced into signing the disclaimer. No employee went to complain against termination after the decision. There are several companies at Ruiru such as Spinners Limited, who engage casuals. Anup Bid is the Managing Director. He is not directly involved with the employees. Medical certificates are not given for any employee to specifically work at Jetlak. The Respondent is a small company and could not afford to take in its casual employees as contract workers. There was no justification in the claim for any notice pay, little less 3 months' salary as notice pay. Waithaka testified that the Respondent respects its employees and labour laws. He proposed that the company would be willing to pay the Claimants 1 month salary on humanitarian ground to resolve the dispute.

4. Answering questions from the Claimants, Waithaka testified that the company received the letter of M.P. Kabogo asking for clarification on the issues in dispute. The company responded to the Ministry of Labour, stating that the issue was not political. The Respondent has a collective agreement concluded with the Commercial Union, following a Court decision. The Respondent started issuing employees written contracts in 2007 to be in compliance with the new labour law regime. The employees worked irregularly. The company deducted and remitted N.H.I.F contributions with regard to permanent employees, but the policy changed later to encompass the casuals. The company is duly registered and has its own piece of land. The business is seasonal. On average day, the company has about 100 employees, including the casuals. Waithaka denied the suggestion by Jackline that the other companies

around Ruiru, only engage men workers. Alpha Knits Limited takes all genders. The disclaimer in the Wage Sheets was not affixed after the employees had signed. The Medical Certificates showed the employees were fit to work specifically at Jetlak Limited. Waithaka admitted he had not provided the Court with any employment records relating to the period before 2009. The Respondent only availed records for 2010, when the employees were dismissed. The employees were not really dismissed; they worked as casuals. Other seasonal employees have been employed after the Claimants left. The Claimants rushed to M.P. Kabogo and could not complain that they were discriminated against. The witness concluded his evidence with the statement that the law did not require the employer, to keep employment records beyond 5 years.

The Court Finds and Awards:-

5. It is true that the Claimants were employees of the Respondent. They did not work continuously. As demonstrated in the Weekly Casual Pay Sheets availed to this Court by the Respondent, they worked irregularly on diverse dates, and were paid Kshs. 300 per each day worked. These irregular days of work, were explained by the Respondent to arise from the seasonal nature of the Respondent's business. It is not likely, given this evidence that, the Claimants served for the totality of the years given in their Claim. The records nonetheless captured only the year 2010, when the Claimants left employment. Waithaka testified that he was not able to say if the Claimants had worked before 2007. The records given by the Respondent were incomplete. Why for instance did the Respondent not provide records for 2008 and 2009? While the 2010 records show the Claimants worked irregularly, they do not contradict the Claimants on the dates they gave as the beginning of their employment with Jetlak. The Claimants testified they have worked with the Respondent for periods ranging from 4 to 10 years. They of course have not worked the totality of these years, given the nature of their work. They could not on the other hand be treated as casual employees in 2010 when they left, given the cumulative years worked at Jetlak. Section 37 [4] of the Employment Act 2007 states that, "*in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing, declare the employee to be employed on terms and conditions consistent with the Act.*" The Court finds and declares that the Claimants were entitled to be treated as regular employees on exit, and receive the whole gamut of benefits conferred on regular employees by the Employment Act 2007, during and after termination of employment.

6. The Court concluded in the earlier hearing that the Respondent had an obligation under Section 41, 43 and 45 of the Employment Act 2007, to accord the Claimants fair procedure and substantive justification, in termination. The evidence adduced by the Respondent does not reveal that the Respondent observed these guarantees. The Claimants are entitled to compensation. In view of the Respondent's explanation that it misconceived the relationship to be casual engagement, the Court is persuaded the decision by the Respondent was not driven by malice. Waithaka testified that the Respondent treats its employees reasonably, and proposed to settle by paying the employees 1 month salary. The Respondent has by its evidence mitigated the violation. The Court shall reduce the amount of **compensation payable to 3 months' salary in favour of each Claimant**. Service pay is pleaded at 15 days' salary for each year completed in employment. The Court is satisfied that in light of the irregular number of days worked in a week, it would not be proportionate to grant the entire number of years claimed, to comprise the period of creditable service. Each Claimant shall be deemed to have worked, for half the number of years given to have worked in the Award of 21st November 2011. To sustain the same degree of proportionality, the Claimants are granted half the number of years with regard to house rent allowance; annual leave; and notice period, granted under the earlier Award. The effect of this is that **Agnes Ngima Kariuki is Awarded Kshs. 122,455; Alice Njoki Njuguna Kshs. 122,455; Anne Wambui Chege Kshs. 73,822; Eunice Mutinda Kahuthia Kshs. 85,984.50; Jackline Wanjiru Kihoro Kshs. 134, 612; Jane Muthoni Kshs. 146,769; Salome Wairimu Mwangi Kshs. 85,984.50; and Salome Wakore Njoki Kshs. 122,455**. The Respondent shall pay to the Claimants a total of Kshs. 894,537 in satisfaction of the whole claim. It has been noted the Respondent deposited the sum of 894,542.50 with the Ministry of Labour. This was meant to be half of the sum Awarded in the initial decision. The Award seems to have contained an error on the total amount payable. It was given as Kshs. 1,789,085, and resulted in the wrong calculation of half the amount received as deposit. The total payable should have been Kshs. 1,789,074,

and the correct deposit should have been Kshs. 894,537. The Registrar shall ensure the sum of Kshs. 894,537 is released to the Claimants, and the difference of Kshs.5.50 released to the Respondent. In sum-:

[a] Termination of the Claimants contracts of employment was unfair;

[b] The Respondent shall pay to the Claimants the total sum of Kshs. 894,537 as particularized in paragraph 6 above;

[c] The amount of Kshs. 894,537 shall be paid to the Claimants forthwith from the sum of Kshs. 894,542.50 deposited by the Respondent in Court as security, with the difference of Kshs.5.50 reverting to the Respondent; and

[d] No order on the costs.

Dated and delivered at Nairobi this 8th day of April 2013

James Rika

Judge