REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 45 OF 2012

JONATHAN ZACHARIA & 24 OTHERS ….....CLAIMANTS

VERSUS

BULK WAREHOUSE MANAGEMENT & 2 OTHERS ….....RESPONDENTS

J U D G M E N T

The claimants bought this suit against the respondents seeking declaration that the termination was through redundancy and that they were entitled to terminal dues amounting to Ksh.14,468,084 in aggregate.

The respondents have filed separate defences. The first respondent defence is to the effect that the claimants were employed as casual employees and as such redundancy dues did not apply to them under the CBA between the 3rd defendant and herself. In addition the 1st respondent averred that any redundancy costs in respect of her permanent employees was to be born by the 2nd respondent as per the service agreement between the said respondent and herself.

The second respondent on her part has denied any employment relationship between herself and the claimants. She has denied any Agency Relationship between herself and the 1st respondent to employ the claimants. She has averred that there was no privy of contract between herself and the claimants with respect to the service Agreement as such the claimants are not entitled to enforce it in court to claim dues under a CBA to which the 2nd respondent was not privy. Consequently the 2nd respondent averred that the court lacked the jurisdiction to entertain this suit.

The 3rd respondent in her defence averred that she had signed a CBA with the 1st and 2nd respondents on 21/5/2008 and registered it with the Industrial Court on 7/7/2008. That on 29/8/2008 she received a letter from the 1st respondent indicating that her service contract with the 2nd respondent was ending on 30/11/2008 and as such her permanent workers were to be taken over by the Principal (2nd respondent) pursuant to clause 17 of the aforesaid CBA. That on 6/10/2013 the 1st respondent wrote again informing the 3rd respondent that she had received instructions from the principal (2nd respondent) to declare all her permanent employees redundant. In principle the 3rd respondent averred that the claimants had become entitled to redundancy dues by dint of Section 37 of the Employment Act 2007.

The case was heard on 21/2/2013, 15/3/2013 and 24/4/2013 when Charles Omondi testified on behalf of all the claimants as CW1 while John Gathura Kabera testified on behalf of the 2nd respondent as RW1. The first and third respondents did not call any witnesses.

CW1 told the court that the claimants were employed by the 2nd respondent while 1st respondent

was the management supervisor. That like all the other claimants save 16th and 19th claimants were earning ksh280 per day payable at the end of every week. That there was no rest day between Monday and Sundays and his monthly pay was Ksh.8400/-. That he worked as a belt attendant but the other claimants were doing different jobs. He relied on appendix 3 in the memorandum of claim to show the analysis of the payable to each of the claimants. That the weekly payments was done upon the claimants signing a master roll.

He added that all the claimants were members of the 3rd respondent union and produced receipts for subscription as exhibit. That they were declared redundant on 30/7/2008 by the 1st respondent. That he had worked continuously from 2000 to 2008. That no terminal dues were paid to the claimants and they were now claiming the same from the 2nd respondent who was their principal employer. That the latter is the one who used to pay their salaries through the 1st respondent. That under clause L of the Service Agreement between the 1st and 2nd respondent, the latter was bound to pay the redundancy costs to the employees recruited by the 1st respondent.

CW1 confirmed that he knows all the other claimants and the period they worked according to the Appendix 3 of the claim which includes Notice pay, Severance or service pay, Accrued leave, Leave traveling allowance, house allowance, baggage, overtime and holidays. He also confirmed that he had authority from them to testify on their behalf towards their aggregate claim for ksh. 14,468,084.

On cross-examination he maintained that his employer since 2002 was the 2nd respondent. That whenever there was no Soda Ash to be conveyed, he used to do cleaning of at the belt. That although he was not the supervisor he knew the job for each of the other claimants because they worked together. He could however not know when they were present all the time. That he knew the salary of the other claimants by asking them.

He denied being a casual worker and insisted that his work was continuous. That his work station was located outside the port and as such they did not require any pass to the port.

On the membership of the 3rd respondent he maintained that he joined in 2007 and he was not given all the recipients. He however confirmed that the 3rd respondents list of members indicated that he had joined the union on 1/4/2008.

On the redundancy, he maintained that it was verbally declared by the 1st respondent when she told the claimants that the new Service Contractors was going to take over from her. That soon thereafter there was strike and than their employment was continued under new supervisor M/s Go-waves. He maintained that his claim was based on the CBA and denied being paid wages on daily basis. He admitted that claimant member 8 and 22 did not sign the authority to sue. The said claimants are number 9 and 23 on Appendix 3. He admitted that claimant number 8 died before signing the authority.

He read the CBA which showed that casual workers were to be governed by the Employment Act. That the CBA did not apply to causal employees although he used it to compute the dues in the appendix 3 for the claimants.

He confirmed from letter dated 2/7/2008 (2nd respondent appendix 2) that the employer was notified of their union membership. That Owen Ongeri was not in the list of members but CW1 contested that the membership could be proved with subscription receipts. That if any of the claimants was not a member of the union, he was not covered by by the CBA and could not benefit from it.

He contended that appendix 2(a) to the claim said that temporary employees were covered by the CBA but denied that the claimants were temporary workers. He however agreed that none of the claimants exhibits talked of permanent employees.

He maintained that he never went for leave or off duty during his service and never made any demand for the same. He could not confirm the claims for all the claimants but he believed in the analysis in appendix 3 to claim.

He admitted that the claimants were not parties to the service contract between the 1st and 2nd respondent nor was their union. He further maintained that the employer had the custody of all employment documents that show that the claimants were in continuous service.

RW1 is the HR manager for the 2nd respondent and had now served 21 years. He contented that Appendix 1 (CBA) was only between the 1st and 3rd respondent and not the 2nd respondent. He however admitted that 1st and 2nd respondent had a Service Agreement which the 1st respondent was contracted to provide labour to the 2nd respondent premises (2nd respondent's appendix 1).

That the 1st respondent was to be an independent contractor who would be paid management fees by the 2nd respondent and then pay her workers. That the 3rd respondent union at all material times knew that the claimants were employed by the 1st respondent. That the 1st respondent served a three months notice to terminate the services Agreement vide Appendix 2. That the permanent employees were laid off and paid their dues. That under the CBA, the casual workers were to be governed by the employment Act.

According to RW1 the claimants were temporary workers providing labour only when needed at the port of Mombasa. He therefore denied that claimants could be declared redundant because they were temporary workers under the Employment Act.

That claimants never disputed the terms of their service until 1st respondent left prompting the claimants to go on one week strike but they were later absorbed by the new contractors. He denied that the 2nd respondent was liable to compensate the claimants because they were not her workers.

On cross examination he admitted that members of the 3rd respondent union were bound by the CBA between the union and the respondent. He maintained that 1st respondent was an independent contractor meaning that he was to meet all the obligations of an employer towards her employees including payment of salaries. He further admitted that the wages for temporary workers came from the 2nd respondent in addition to the management fees. He also admitted that clause L of the Service Agreement provided that the 2nd respondent was to pay redundancy costs for all the employees if it occurred during the contract. That the clause was not specific on whether the redundancy pay was for the permanent employees only.

He maintained that no redundancy pay was made to the claimants because they were not in continuous service. That 2nd respondent did not have employment records for the workers because they were with the 1st respondent. He however agreed that the law provides for conversion for temporary services into permanent service after an aggregate of days of service.

On being shown letter dated 29/8/2008 and 6/10/2008 written by the 1st respondent, he admitted that the 2nd respondent was the principal to the 1st respondent. After the close of the hearing, parties filed written submission and highlighted on 6/6/2013.

I have carefully gone through the pleadings filed by the parties and considered the evidence and all the closing submission made orally and in writing. The issues for determination are:

1. **whether the court has jurisdiction to entertain the suit before it.**
2. **Whether the claimants were employed by the 1st or 2nd respondent.**
3. **Whether the claimants were qualified to be declared redundant**
4. **whether claimants were entitled to the reliefs sought.**
5. **Whether the claimants have the right to sue the 2nd respondent under the Service Level Agreement between the 1st and 2nd respondent.**

The answer to the first issue is in the affirmative. The dispute before the court is termination of employment through redundancy. It is a dispute related to employment and labour relations. Whether one of the parties deny being the employer of the claimants is a matter of evidence which can only be determined after the hearing of all the parties.

Section 12 of the Industrial Court Act and Article 162 of the constitution confer jurisdiction to this court exclusively to preside over all the disputes related to employment and labour relations. The preamble to the Industrial court Act states,

"An Act of parliament to establish the Industrial Court as Superior Court of record to confer jurisdiction on the court with respect to employment and Labour Relations and for connected purposes"

The foregoing needs no much effort in asserting that the jurisdiction for the court is expanded to include other matters connected to employment and labour relations.

In the present case the issue of jurisdiction is only being raised by the 2nd respondent who believes that she is only being enjoined in the suit just because she had a Service Level Agreement with the 1st respondent to which the claimants were not privy. I will deal with the issue of privity later in this judgment but suffice to say that the court finds and hold that the Service Level Agreement between 1st and 2nd respondent was a matter connected to the employment of the claimants and the labour relations between all the parties to this suit as contemplated by the legislature in the aforesaid preamble to Industrial Court Act which defines the jurisdiction and the functions of the court.

As regards the second issue, I am satisfied that the claimants were employed by the 1st respondent and not the 2nd respondent. The CBA produced by the claimants forms the contract of employment between the 1st respondent and the claimants. The 2nd respondent was not privy to the said CBA and the only obligation accruing against the 2nd respondent under the CBA is the clause on redundancy by virtue of clause L of the Service Level Agreement between her and the 1st respondent.

Consequently, the allegation that the 1st respondent was only an agent or supervisor on behalf of the 2nd respondent is dismissed. The reference of the 2nd respondent as Principal by the 1st respondent in her correspondences with the 3rd respondent did not change the status of the 2nd respondent from a client for service to that of employer.

As regards the third issue, I note with concern that the 1st respondent who was the employer of the claimants did not provide any employment records in court to disprove the allegation by the claimants that they served continuously for periods ranging between one to eight years.

The burden of preparing written contract of employment is placed on the employer by section 9 and 10 of the Employment Act. More burden is heaped on the employer by Section 74 of the Act to keep a written record of all employees employed by him under this Act, even for some years after termination of contract.

Section 10(5) of the Act then puts the burden of disproving verbal allegations of terms of contract of services by an employee in court proceedings on the employer. In this case 1st respondent did nothing to disprove the employment relationship with the claimants. If anything she confirmed the relationship when she mentioned that the claimants were only casuals workers. She did not however produce any employment records for the complainants to disprove the allegation of continuous service.

Likewise the 2nd respondent could not disprove the allegation because according to RW1, the employment records were with the 1st respondent. They did not even bother to check with the 1st respondent to verify the status of the claimants despite the fact that the two parties are neighbours at Mombasa. Consequently the court believes the only oral evidence availed by the claimants, that is, they served continuously for periods ranging from 1 to 8 years. The question is whether such continuous service had converted them into permanent employees.

Section 37 of the Employment Act provides that,

" ***(1) not withstanding any provisions of this Act, where a casual employee -***

(a) works for a period of number of continuous working days which amount in aggregate to the equivalent of not less than one month..... the contract of service of the casual shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.

(3) An employee whose contract of service had been converted in accordance with subsection (1) and who works continuous for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee"

The foregoing provision clearly match the case advance by the claimants. Without any evidence from the 1st respondent to disprove the said allegation of continuous service for periods ranging from 1 to 8 years by the claimants the court has not option but to declare that the claimants had become permanent employees whose wages are paid monthly by virtue of their continuous service for more than two months.

The court's jurisdiction to vary the terms of service of casual employees and declare them permanent workers is provided for under Section 37(4) of the employment Act. Consequently and in answer to the said issue the court finds and holds that the claimants had become qualified to be declared redundant under the aforesaid CBA and Section 40 of the employment Act by dint of Section 37 of the Employment Act.

The next issue to answer then is whether the claimants are entitled to the reliefs sought. The claimant prays for declaration that they were laid redundant and that they are entitled to a total of Ksh.14,468,084.00 after pro-rata calculations based on the CBA.

To answer the first prayer sought, the court has considered the pleadings and evidence on record. The claimants say that they were terminated in August 2008 following an address by the 1st respondent in the end of July 2008 whereby she notified them that her service Agreement with the 2nd respondent was coming to an end. That they went for strike for one week and then resumed work under a new supervisor Ms. Go-waves. The evidence by the defence on the other hand is to the effect that the service contract come to an end in November 2008 after expiry of the termination notice. Whichever date the actual termination occurred, the same happened between August 2008 and November 2008. The law in force then was the Employment Act 2007 and more particularly Section 37 and 40 thereof. In view of my earlier finding that the claimants had become entitled to terms and conditions of service for permanent staff, I grant prayer 1 of the claim which is simply to order that the termination of claimants employment was by redundancy within the meaning of Section 40 of the employment Act and clause 8 of the CBA between the 1st and 3d respondent.

There seem to be no complaint raised by the claimants as to whether the redundancy was also unfair termination. There is no relief sought in that line and therefore the court will not venture into matters outside the dispute before it. Consequently I turn to the main relief sought of terminal dues amounting to Ksh.14,468,084.00.

I have considered the schedule produced by the claimants as appendix 3 which tabulates the dues for each claimant. The items shown in the said schedule include Notice pay, severance pay, unpaid leave, leave traveling allowance, house allowance, baggage and overtime and holidays worked. Section 40 provides that employer shall pay to employees declared redundant cash for the accrued leave days, not less than one month salary in lieu of notice and severance pay at the rate of not less than 15 days for each completed year of service.

The CBA in clause 8 (f) on the other hand provides that an employee declared redundant shall be entitled to normal notice or pay in lieu of notice, wages, overtime and any other remuneration accrued upto the termination date, prorata leave and severance pay at the rate of 23 days for each complete year of service.

It is the finding of this court that all the claimants were entitled to benefits provided under Section

40 of the Employment Act read with clause 8 of the CBA upon being laid redundant. The claimants prayer for Ksh.14,468084 includes claim by claimant number 8 who was said to be deceased but without any proof. I will dismiss the claim for house allowance and agree with the respondents case that the salary paid to the claimants during their respective period of service included the house allowance. If the court was to allow such a claim, it would open a bottomless pit of claims from litigants who negotiate or agree to consolidated salaries and only come to court to sue after termination of their services.

I will also dismiss the claim for overtime and holiday worked because it will be difficult to verify the same from the scanty information availed by both parties. The second reason I dismiss the claim for overtime and holidays allegedly worked is because I find it hard to comprehend how probable it is that a reasonable employee can wok for a complete year without rest day or holiday leave alone 12 years!

I however believe that one can work for such a period without leave and proceed to grant that prayer. The employer has not proved by records that the claimants went for their respective leave. The only argument advanced was a verbal one that the claimants were only casual workers who worked on and off. I will however dismiss the claim for leave travelling allowance because it is obvious they never went for any leave.

I will also allow the claim for notice pay because there was no notice given to the claimants. The respondents have insisted that they only served redundancy notice with respect to permanent staff. In view of my earlier finding, the claimants were entitled to the terms and conditions of service equivalent to that of the permanent staff and that extended to matters of termination by redundancy.

I have also granted the claimants prayer for severance pay at the rate of 23 day for each complete year of service as provided for under clause 8 of the CBA. In view of my earlier finding on the burden to keep employment records, I will believe the claimants evidence that they served in the periods shown in the claimants Appendix 3. Consequently the answer to the fourth issue is that the claimants are entitled to recover their redundancy terminal dues granted above form their employer who was the 1st respondent. She will also pay the claimants their baggage allowance as per the CBA.

The last issue to consider is whether the claimants have the right to enforce the Service Level Agreement between the 1st and 2nd respondent to recover their redundancy dues from the 2nd respondent. As earlier stated while dealing with the first issue, I now wish to consider the issue of privity of contract with respect to the Service Level Agreement. It is obvious that only the 1st and 2nd respondents were parties to the said service agreement. It follows therefore that the only persons with the right to enforce a right or an obligation therein is either the 1st or the 2nd respondent under the common law doctrine of privity of contract. Ordinarily therefore the claimants would be casually dismissed as strangers to the agreement with no right at all to sue the 2nd respondent under the said agreement.

The court however knows that the said principle of privity of contract is subject to some exceptions one of which the right by a beneficiary of a contractual obligation to sue to enforce the beneficial interest. I am satisfied that like all the other permanent staff of the 1st respondent whose redundancy benefits were paid by the 2nd respondent under the Service Agreement the claimants should also have been paid by the 2nd respondent under the said Service Agreement.

The question in my mind is whether the 2nd respondent could have raised the same objection if the other permanent staff were the ones suing today. In my view the fate should be the same for all employees after the conversion of the claimants into permanent staff status.

As I have already stated earlier in this judgment, this court has the jurisdiction to preside over all employment and labour relations disputes and connected matters. It would be working against the spirit and letter of our Constitution to deny litigants faster and efficient justice if I religiously followed procedural legal technicalities which serves only to multiply court proceedings. In my view, it is not legally rational in our current constitutional dispensation to require the claimants to prove their right before this court and then thereafter go either to a magistrate or another judge of equal status next door to enforce the proved right against the 2nd respondent. In my view the aforesaid preamble to Industrial

Court Act presupposes one forum in order to avoid duplicity of proceedings, delayed justice and added costs to the litigants hence the expanded jurisdiction of this court to include matters connected to employment in order to foster realization of substantive justice.

As a parting shot, I have noted the submission by the 2nd respondent on the contradictions made by the claimants in her pleadings and testimony. I have also noted the cited authorities in support thereof. In my view, the said contradictions were not fatal and did not undo the facts advanced by both claimants and the respondents on the issue of employment relationship between the parties to the suit and how the relationship ended. I therefore dismiss the said submissions for being secondary, mundane and mainly amounting to legal technicalities. In my view the issues for determination were clear and there was sufficient evidence upon which the court was to make a substantive decision. I have struck out the suit against the 3rd respondent for being frivolous and not reasonably disclosed. I have also struck out the 8th claimant's claim for the reason that he is alleged to be deceased It will be upon the said claimant or his estate to act appropriately.

In summary therefore I enter judgment and make orders for the claimant against the 1st and 2nd respondents as follows:

a. **The claimants were laid redundant by the 1st respondent.**
b. **The 1st and 2nd claimants jointly and severally to pay all the claimants save for the 8th claimant**

(i) notice pay;

(ii) severance pay;

(iii) leave days; and

iv. **baggage pay, as per the schedule marked Appendix 3 for the claimants. in aggregate the sum add up to: Kshs.6,841,012.00 as follows:**

NAMES	NOTICE	SERVICE CHARGES	UNPAID LEAVE	BAGGAGE	TOTAL
JONATHAN ZACHARIA	16,800.00	57,960.00	75,600.00	8,100.00	**158,460.00**
THOMAS MWALIKO	16,800.00	70,840.00	92,400.00	8,100.00	**346,600.00**
SIMON MUNYAO	16,800.00	39,480.00	58,500.00	8100.00	**311,020.00**
MOHAMED NDORO	16,800.00	103,040.00	134,400.00	8100.00	**385,220.00**
CHARLES OMONDI	16,800.00	39,480.00	58,800.00	8,100.00	**385,520.00**
JOSEPH AGANDA	8,400.00	35,840.00	23,600.00	7,400.00	**198,420.00**
EZEKIEL OKEMWA	8,400.00	35,840.00	23,600.00	7,400.00	**150,480.00**
OWEN ONGORI	16,800.00	39,480.00	39,480.00	8,100.00	**179,100.00**
SABASTIAN	8,400.00	19,320.00	19,320.00	7400.00	**158,300.00**

SANDAY					
MAZERA MBATU	25,200.00	115,920.00	115,200.00	8,600.00	**319,360.00**
SAMUEL GARAMA	8,400.00	19,320.00	25,200.00	7,400.00	**325,240.00**
MUSEMBI MUTUNGI	8,400	5,440.00	8,400.00	7,400.00	**89,960.00**
ASHUNDU BROWN	16,800.00	70,840.00	92,400.00	8,100.00	**217,780.00**
KARISA NGOMBO	16,800.00	64,400.00	84,000.00	8,100.00	**361,440.00**
DAVID NJERU	31,500.00	114,900.00	189,000.00	8,600.00	**517,300.00**
STANLISH MWMBIRI	16,800.00	57,960.00	75,600.00	8,100.00	**502,460.00**
KOMU MUTUKU	8400.00	35,840.00	23,600.00	7,400.00	**233,700.00**
ARNEST MUTHANYA	12,720.00	29,256.00	38,160.00	7,400.00	**162,776.00**
JOHN WAMBUA	16,800.00	39,480.00	58,800.00	8,100.00	**210,716.00**
DAVID MUTHAMBI	16,800.00	39,840.00	58,800.00	8,100.00	**246,360.00**
GEORGE MWEKE	16,800.00	64,400.00	84,000.00	8,100.00	**296,480.00**
NZUKI TITO	16,800.00	57,960.00	75,600.00	8,100.00	**331,760.00**
JAMES OWITII	16,800.00	77,280.00	100,800.00	8,100.00	**361,440.00**
SLITON NDONYE	16,800.00	70,840.00	92,400.00	8,100.00	**391,120.00**
TOTAL					**6,841,012.00**

The claimant will also have costs and interest.

Orders accordingly.

Signed dated and delivered this 19th July 2013

ONESMUS MAKAU

JUDGE