REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CAUSE NO.113 OF 1998.

KENYA ENGINEERING WORKERS' UNION.....Claimants.

VERSUS

KALUWORKS LTD.....Respondents.

Issue in Dispute:-

"Unlawful redundancy of 72 employees " (hereinafter called the grievants), namely:-

1. Silvester Oduor 11. Josphat Odhiambo

2.	James Ochwangi	12.	Jackson Mutua
3.	Philip Nyasero	13.	Fred Wambua
4.	Vitalis Ogutu	14.	Benson Oketch
5.	Muli Ngoma	15.	Mourice Musyoki
6.	Kennedy Ingosi	16.	Dickson Ondongo
7.	Jason Muchira	17.	Jonum Onyango
8.	Gordon Ongele	18.	Wilberforce Achoki
9.	Wilson Solit	19.	Martin Mbatha
10.	Edwin Gastone	20.	Donald Mwovi
21.	Justus Ngola	41.	Albert Owino
22.	Jackton Odhiambo	42.	Meshack Olusoh
23.	Daudi Mwanzi	43.	Kioko Mukua
24.	Javan Ongwech	44.	Paul Odongo
25.	Peter Mukaya	45.	Jack Omollo
26.	Kennedy Kaesa	46.	Barrack Otieno
27.	Josherd Amata	47.	Jackson Kingoo
28.	Elly Wanyonyi	48.	Charles Nyagah
29.	Nyamai Mbetu	49.	Dominic Oduor
30.	Josema Ouma	50.	Zackayo Kanyoka
31.	Jackson Mailu	51.	Stephen Mutinda
32.	Benjamin Mvindi	52.	Charles Maina
33.	Boaz Odundo	53.	Samuel Maina
34.	Alfred Mwangangi	54.	Samuel Musili
35.	Jacob Mulatya	55.	Seth Onyango
36.	James Nduba	56.	Kennedy Kavoo
37.	Mutunga Kalinga	57.	Henry Mutua

38.	Julius Obiero	58.	Gideon Omunyaja
39.	Julius Kibe Ndavi	59.	Mutua Nyamai
40.	Julius Otieno	60.	Kaitu Mwanza
61.	Boaz Adundo	67.	Kennedy Kaesa
62.	John Omamo	68.	Mwendwa Mulwa
63.	Constant Okemu	69.	Musee Wambua
64.	Jackson Kingoo	70.	Peter Munyimi
65.	Edson Munyoka	71.	Lazrus Owino
66.	Dennis Kitili	72.	William Kilonzo

S.D.O. Mutambi for the Claimants (hereinafter called the Union).

J.N. Namasake, Principal Executive Officer, F.K.E., for the Respondents

(hereinafter called the Company).

A W A R D.

The Notification of Dispute, Form 'A', dated 20th May, 1999, together with the statutory certificate from the Labour Commissioner and the Minister for Labour under Section 14(7) and (8)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 23rd November 1999, and the dispute was then listed for mention on 15th December, 1999. On this occasion, Messrs. S.D.O. Mutambi and L.W. Karuki, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 7th January and 31st February, 2000, and the dispute was fixed for hearing on 15th March, 2000.

Mr. Mutambi for the Union submitted his memorandum on 21st December, 1999, and Mr. Namasake for the Company belatedly filed his reply statement on 10th March, 2000. The dispute was heard on 15th March and 1st November, 2000, and final submissions were made on 21st March, 2001.

The Company is a member of the Engineering and Allied Industries Employers Association with which the Union has a valid recognition agreement and has also entered into several collective agreements which regulate the terms and conditions of employment of the unionisable employees. The present dispute arose between January and May, 1997, when the grievants, who are alleged to have been engaged or employed by the Company on casual basis for a long period, were laid off on account of re-organisation due to poor business performance, i.e. almost non-movement of the finished products or backlog of finished goods. The parties attempted to resolve the matter at their own level but failed. On 3rd July, 1997, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. J.W. Wandeto of Industrial Area Labour Office to act as the investigator. Consequently, in his report which was released to the parties on 8th December, 1998, the Minister found and recommended, *inter alia*, as follows:

"FINDINGS"

……..Kaluworks Limited……has two branches in Mombasa and Nairobi. Between January and February, 1996 it transferred some 39 employees from its Mombasa factory to the Nairobi one. Some of these transferred employees were among 72 affected by this dispute.

……at the beginning of May, 1997 the company re-organised its shifts. This had the effect of an employee having to work for only three days in a week. This arrangement ceased altogether and the management promised to reinstate them on 23rd May, 1997, 26th May, 1997, 28th May, 1997, 30th May, 1997 and 3rd of June, 1997. All these dates the employees were told to be reporting at the gate only to be told that there was no available employment for them. Hence this dispute.

……the company did not inform the local Labour Officer or the Union the fact that they were having advance (read adverse) trading patterns. The reason they gave that their stores were over-stretched to capacity is not a convincing ground to plead for redundancy. This is seen from the fact that it re-employed 13 of the former employees plus others but on strictly casual basis. Such move on the management's part was not done in good faith and indeed smacks of unfair labour practice. This is reinforced by the way the company pays its employees wages. Usually employees are paid on a weekly, fortnightly and on monthly basis. But this rotates. The end result is that an employee loses his/her years of services, social security, leave, overtime e.t.c.

RECOMMENDATION.

……the alleged redundancy was wrongful and unfair labour practice.

I, therefore, recommend the following:-

1. Those re-employed be treated as permanent employees without loss of their previous years of service. The days they did not work be treated as leave without pay.

2. The rest be given a normal termination with the following terminal dues:-

(a) One month's notice.

(b) Days worked and leave.

(c) Underpayments for Saturdays and Sundays.

3. Compensation for loss of employment at the rate of 15 days per year of service.

4. Those from Mombasa should treat their services as being continuous from the day they were employed at Mombasa".

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of the dispute. The Union accepted the recommendation but the Company rejected the findings and recommendation on the ground that the same were shoddy, biased

and baseless. Hence this dispute for consideration and determination.

In a nutshell, Mr. Mutambi for the Union submitted that all the 72 grievants were not casual workers as alleged by the Company, but permanent employees as they had continuously rendered services to the Company for over 3 months pursuant to Clause 19 of the parties' collective agreement for the period 1st September 1996 to 31st August, 1998. Therefore, their termination from service on account of redundancy was unprocedural, illegal and amounted to unfair labour practice.

In the circumstances, Mr. Mutambi prayed that the services of the grievants be treated as continuous and they be paid the following redundancy benefits in terms of Clause 24 of the parties' collective agreement in force at the material time:-

(a) one or two months' pay in lieu of notice.

(b) Days worked, leave and overtime.

(c) House allowance.

(d) Underpayments on Saturdays and Sundays.

(e) 12 months' compensation.

Briefly, the case of the Company, was that all the 72 grievants were actually casual workers who, unlike permanent employees, could not be declared redundant and that 6 of them, i.e. Nos. 9, 18, 51, 68, 70 and 71, have since rejoined employment to continue with their casual duties.

Mr. Namasake for the Company stated that in a span of one year, the management had as a policy converted or absorbed 55 out of 165 casual employees, who had intermittently worked for the Company, into permanent employment. In the circumstances, Mr. Namasake vehemently maintained that the grievants were neither declared redundant nor unlawfully laid-off as alleged by the Union, and are, therefore, not entitled to the said terminal benefits prayed for by the Union. In any case, he said, grievants who refused the new work arrangements had been paid all their dues, and as such they do not have any valid claims against the Company.

Accordingly, Mr. Namasake prayed that the demand by the Union be rejected as vexatious and baseless.

The points for consideration and determination in this dispute are:-

(a) whether the grievants were casual employees, and

(b) if not, whether they are entitled to the reliefs prayed for by the Union hereinabove.

For the convenience of discussion, the above points are taken up together for determination of this dispute.

The main grounds on which the demand or claim by the Union is strongly resisted by the Company are that the grievants were all along casual employees and that, since they declined new work arrangements, they were not entitled to the aforementioned reliefs. Under Section 2 of the Employment Act, Cap.226, Laws of Kenya, a "casual employee" is defined as follows:-

' "casual employee" means an individual the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a loner period than twenty four hours at a time'.

This means that if a person is employed just once or occasionally at comparatively long or irregular intervals, and for a period not longer than 24 hours, then the hiring or employment in each instance, being a matter of special arrangement, is "casual" in character – e.g. where an employer simply asks a labourer to work for a day without any further commitment. In *Cause No.60 of 2002: Kenya Union of Commercial, Food & Allied Workers v. Hebatalla Brothers Ltd.* I observed at page 9 as follows:-

"…… for an employee to qualify as a casual, he must be paid

at the end of each day, and that he should not be employed

for a longer period than one day at a time. In other words,

contract expires at the end of each day when he receives his

pay as stipulated under Section 5(2)(a) of the said Act. If he is offered employment the following day, this should be considered as an entirely new contract. But if the above conditions are not fulfilled, then that employment is not a casual but permanent employment, in which case his terms of employment must be those covered under Section 5(2)(b), (c) and (d) of the said Act."

I also held a similar view in *Cause No.116 of 1999: Bakery, Confectionery, Manufacturing & Allied Workers Union v. Janendra Raichand Shah t/a Dais Bakery.*

The above definition, therefore, excludes employees who render "continuous service" or "continuous employment" to an employer for a longer period. This term or phrase postulates the continuance of the relationship between an employer and his employee or employees, and it must have some degree of stability, frequency and regularity (see *Pennsylvania Relations Board v. Yellow Cab & Bus Co., 10 Labour Cases, 63085.* In *Cause No.74 of 2005: Kenya Building, Construction, Timber, Furniture & Allied Industries Employees' Union v. Firoze Construction Ltd.*, I observed at pages 4 to 5 on the term or phrase "continuous service", or "continuous employment" as follows:-

'The concept of "continuous service" or "continuous employment" is most important in that nearly all of the various statutory or mutually agreed rights of employees are dependent upon the acquisition by an employee of a minimum period of "continuous employment" before a claim, for example, of terminal benefits may be presented. In my considered opinion, "continuous employment" postulates the continuance of relationship between the employer and the employee and, therefore, means service not broken or interrupted by the termination of the contract of employment by either the employer or the employee or by the operation of law. In such circumstances, the Court would not take a strict mathematical approach to this issue and limit itself to looking at the period that the cessation of work in relation to the period of work, but all circumstances of each case must be taken into account. Whether absence is a break in service would depend on the service rules. If, for example, an employee is sent on forced leave and if he is re-engaged later on, then there should not be a break in the continuity of his service; but if, on the other hand, the employee is terminated or retrenched because a certain operation has been stopped and he is re-employed, then in that case his absence would be treated as a break in his service contract'.

In my view, therefore, an employee is said to be in "continuous service" or "continuous employment" for a period if he is, for that period, in an uninterrupted service or employment, including service or employment, which may be interrupted on account of sickness, or authorized leave, or an accident, or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the employee.

In this case, the Union submitted to the investigator and to this Court that the grievants had worked continually for the Company for various periods between one (1) and eight (8) years, and the Company did not specifically deny this assertion. Therefore, the contention by Mr. Namasake that the grievants were engaged on casual basis loses its force. The Company nowhere says in its written statement what were the daily wages of the grievants. In his findings, the Minister for Labour established that the Company had promised to reinstate the grievants between 23rd May and 3rd June, 1997, and indeed re-employed 13 of them and other fresh hands, but left out most of the grievants during its re-organisation as surplus to requirement, which means that they were declared redundant. The fact that the grievants had continuously worked for the Company for the said periods shows that they were permanent employees and were deemed to have been confirmed in terms of Clause 19 of the parties' collective agreement in force at the material time, i.e. for the period 1st September, 1996 to 31st August, 1998, which states as follows:-

'19. CASUALS.

A casual employee who has completed 3 months continuous working months with the employer shall be confirmed into permanent employment'.

I have, therefore, no doubt in my mind that the grievants were in continuous service or employment for the said periods, that they were permanent employees in the service of the Company and that they were unlawfully declared redundant.

Under Section 2 of the Act, redundancy is defined as follows:-

' "Redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant'.

Redundancy, therefore, can be brought about by many factors, e.g. change in the method of working, reorganization or restructuring and technological changes due to economic conditions; and when it occurs, the procedure to be followed is regulated by Sections 71 and 72 of the Finance Act, 1994. Under Section 71 of the said Act, the Trade Disputes Act, Cap.234, was amended as follows:-

'(a) by inserting immediately after the word "employment" in

the second line of subsection (4) of section 4 the word,

"except termination by way of redundancy";

(b) by deleting subsection (5) of section 4 and inserting the

following:-

(5) The termination of employment through redundancy shall, whether or not there is agreement between the employer and the employee as to the terms of the redundancy, be deemed to constitute a trade dispute for the purposes of subsection (4); and

(c) by inserting immediately after subsection (5) the following new subsection:-

(6) Where there is agreement between the employer and the employee as to the terms of the redundancy, termination of employment may be effected after payment of compensation for the redundancy, and in any other case the employer or employee, as the case may be, may invoke the settlement procedure set out in the following sections of this Part'.

The Employment Act, Cap.226, was also amended under Section 72 thereof by inserting immediately after section 16 the following new section:-

'16A(1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –

(a) the union of which the employee is a member and

Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

(b) the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(c) no employee shall be placed at a disadvantage for being a member of the trade union;

(d) any leave due to any employee who is declared redundant shall be paid off in cash;

(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days for each completed year of service as severance pay.

(2) For purposes of this section -

"trade union" means a trade union registered under the Trade Union Act; and

"redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act'.

In my opinion, the question whether redundancy is necessary or not is exclusively and purely an administrative matter, and the management are the best judge. It is a normal and necessary incident of an industry or concern; and so long as it is undertaken for better management and to cut costs and increase productivity, and is not prompted by unfair labour practice, then the Court would not interfere with it, otherwise any interference might in the long run damage the industry or concern irreparably. Therefore, there is conditional, more or less absolute, power in the management of the industry or concern to undertake bona fide reorganization or restructuring of its operations on the grounds of economy and to determine the size of its workforce, and the Court cannot sit in judgment when it is honestly arrived at and is not vitiated by bad faith, discrimination or victimization.

With the foregoing observations in view, I am firmly persuaded that there was reorganization or restructuring carried on by the Company for a *bona fide* purpose, but it did not adhere to the procedure laid down under Sections 71 and 72 of the Finance Act, 1994 hereinabove.

In the circumstance, I allow the demand by the Union and award and order as follows:-

(a) That the grievants who were declared redundant be paid their redundancy benefits in accordance with Clause 24(f) of the parties' collective agreement, which provides thus:-

Up to 5 years - 16 days

6 – 10 years - 20 days

…… - ……

(i) Employees with upto 10 years continuous service – one month's notice or pay in lieu thereof ……

……

(ii) Payment of Wages, overtime and any other remuneration which may be due to him calculated up to the date on which he ceases employment.

(iii) Pro-rata leave:

In cases of termination of service on grounds of redundancy prior to the completion of one year's unbroken service the employee shall be entitled to payment for the number of working days proportionate to his leave earning service with the employer.

(iv) Where the employee is entitled to a benefit under either a Provident Fund or Gratuity Scheme, then he should get only one benefit which is more advantageous to him.

(b) The grievants who were re-employed are not subject of this dispute and are also not entitled to any relief.

The management of the Company is directed to calculate the amounts due to the grievants, who were declared redundant, and deposit the same with the Labour Officer, Industrial Area Labour Office, to the credit of the grievants within *thirty (30)* days from this date.

On consultation, the two members of the Court concur with this decision.

DATED and delivered at Nairobi this 25th day of April, 2003.

Charles P. Chemmuttut,

JUDGE