



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

Coram Charles P. Chemuturi, J.

A.K. Kariuki & H.E.N. Githiru, Members

CAUSE NO. 108 OF 2008

KENYA ENGINEERING WORKERS' UNION.....Complainant,

- v -

A.S.P. CO. LTD.....Respondent.

Case No. 108 of 2008

Basis document of workers (hereinafter called the grievance) remedy-

1. Evans Otach.

2. David Kiata.

3. Shadrack Othman.

4. James Wamari.

5. James Mwach.

6. David Kamani.

7. Josephat Wairagi.

8. Samuel Kiamani.

9. Patrick Othman.

10. Joseph Othman.

11. John Wamari.

12. Barnabas Kinyamoni.

13. Kennedy Mwach.

14. Vicky Othman.

15. James Mwach.

16. James Mwach.

17. Lawrence Othman.

18. Peter Othman.

19. Joseph Kibiki Mutai.

20. Samuel Amwari.

21. Julius Wairagi.

22. Christopher Mutai.

23. Bernard Othman.

24. Peter Mwach.

25. Thomas Wakes.

26. Josephat Muthi.

27. Donald Dohi.

28. David Ojoo.

29. Odessa Otieno.

30. George Ambunga.

31. Erick Othman.

32. Evans Oduo.

33. Zephania Mwangi.

34. Henry Abwero.

35. Fredrick Ojoo.

36. Charles Kimyo.

37. Theodor Audo.

38. Khamisi Salim.

39. Mwachiro Githu.

40. John Oluoch.

41. Thomas Odir.

42. David Ambao.

43. John Mwanza.

44. Joshua Wakes.

45. Abel Mwanza.

46. Benjamin Orygo.

47. Christopher Oduch.

48. John Siga.

49. Pius Wabwire.

50. Julius Mwangi.

51. Solomon Odinga.

52. Anna Odeno.

53. Daniel Oyo.

54. Joseph Luthengo.

55. Fredrick Makinda.

56. John Odari.

57. David Odeno.

58. Robert Kikat.

59. Hudson Kivase Mutinda.

60. Samuel Ndihi.

61. George K. Ngugi.

62. Nathan Mwangi.

63. Daniel Mutitu.

64. Benissa Oduho.

65. Zachary Othman.

S. Mutendi, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

K.M. Kibuthi, Advocate, of M.S. Sibat & Kibuthi, Advocates, for the Respondents (hereinafter called the Company).

AWARDS

On 27th November 1995, the Minister for Labour referred this dispute to the Court for consideration and determination under powers vested in him by Section 8 of the Trade Disputes Act, Cap 224, Laws of Kenya (which is hereinafter referred to as the Act), and his reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14, subsection (3)(a) and (b) of the Act, were received by the Court on 1st November 1995. The Union submitted their memorandum on 2nd February 2000, and the Company filed their reply statement on 28th April, 2000. On 10th May 2000, however, the Company raised a Preliminary Objection on the maintainability of the dispute, but the objection was withdrawn on 13th November 2000, and the dispute was heard on 13th and 16th March, 2001.

At the commencement of the hearing of this dispute, M. Mutendi informed the Court that the dispute affected only 53 grievants, i.e. Nos. 1

to 53, while grievants Nos. 54 to 65 were erroneously included therein. This being the case, the demand in respect of grievants Nos. 54 to 65 is dismissed as withdrawn.

In its introductory submission, the learned counsel, Mr. Kibuthu, stated that the Company was a limited liability concern, incorporated in Kenya in 1975. They bought a share in a Company known as East African Engineering Works Ltd, but retained a third of their work force. The Company manufactures large diameter steel pipes and fittings for specific infrastructure projects according to the customer's requirements - e.g. Government Ministries, Local Authorities, parastatals and Non-governmental organizations (NGOs). Therefore, the Company are basically "contract manufacturers" which vary for their various on short-term contracts or orders from their customers, and, in the circumstances, they do not employ a regular workforce. Thus, the Company employ casual employees for a specific job and thereafter discharge on completion of the job and not attempt to perpetuate for because their services are no longer required. However, for that day to day running, the Company have a permanent workforce of about 200 who are not covered with this dispute. He pointed out that the Company do not engage casual workers, but when they need extra staff to complete a contract to another company, known as Sanyasi General Contractors Ltd, Mr. Kibuthu stated that some of the grievants hereinbefore were employed by the Company on various dates for specific dates and periods and under individual contracts of employment, depending on the duration of the contract or project (App 1). The said contracts of employment between the parties were negotiated freely and consensus of client was reached in accordance with the provisions of the Employment Act, Cap. 226, Laws of Kenya, and when an employee's contract of employment came to an end by effluxion of time, such employee would always be considered for a further contractual engagement on satisfactory performance of his work and availability of new contracts or orders.

Admittedly, the Company was a member of the Engineering and Allied Industries Employees' Association, (hereinafter called the Association) with which the Union had a valid recognition agreement, until 14th September 1997 when they ceased to be members at their own request (App. 2).

According to Mr. Mwaniki, the Company employed more than 200 contractual employees and were, therefore, bound by the terms and conditions of service between the Association and the Union. He stated that between 1980 and 1985, the arbitrator employees pulled out of the Union after they were notified by the management of the Company to do so; and consequently the Company ceased to observe the provisions of both the recognition and collective agreements between the Union and the Association, although they remained a member thereof. In the circumstances, the Company introduced alternative contractual terms and conditions of service which meant that all employees were practically subjected to individual contracts leaving only five of them on casual basis permanent employment (App. 2)(P. 2)(b), (c), (d) and (e). However, in its earlier labour petition submitted to the Company, about 100 employees required the Union by July 1985 and signed check-off terms, but the management of the Company refused to implement (App. C 2(a) and 2(b)). At the same time, the Union officials, who were now in office, attempted to secure a recognition agreement with the Company, and the latter did not return, except a document to the Union officials that they (Company) were a member of the Association (App. C 2). When the Company notified the employees that they (Company) were a member of the Association (App. C 2), and the 53 grievants who reported to sign the proposed notification were summarily dismissed on the ground that they were other casual employees of their contracts had expired (App. C 2(d) and 2(e)). Therefore, on the basis of App. C 2, the Registrar of Trade Unions consequently treated the matter as closed on the ground that the grievants had individually resigned or renounced their union membership and the Company had complied with the provisions of Section 47(1)(b) of the Act (App. C 7). The grievants denied having resigned from the Union, and the latter also wrote to the Registrar of Trade Unions to reconsider the matter in view of the fact, over which they (Union) had not received copies of the letters of resignation by the grievants from the Company and that some grievants had withdrawn the alleged notification because they were obtained by force and undue influence (App. C 8 and C 9). The Union also issued a written notice to the Company, which prompted the Federation of Kenya Employers (F.K.E.) and the Ministry of Labour to intervene, and during their meeting held on 27th April 1986, the parties were advised to address the grievance, at the same time that in accordance with the law then in force, but the Company failed to address (App. C 10, C 11 and C 12).

On the other hand, the learned counsel, Mr. Kibuthu, submitted that by a letter dated 14th July 1986, the Union, in order to prove that they had members in the Company's establishment, presented to the Company check-off forms purportedly signed by 156 employees, authorizing the Company to deduct union dues from their salaries. But the purported signatures disclosed the check-off forms, and upon investigation it was indeed found that the check-off forms were not genuine or forged as some of the employees, who allegedly signed the same, were either dead, had left employment or were not aware of the existence of the Union (App. 2, R. 3, R. 4 and R. 5). He pointed out that most of the grievants had their contracts of employment terminated on diverse dates by effluxion of time under the provisions of the Employment Act, Cap. 226, Laws of Kenya, while others are still at employment of the Company.

The parties attempted to settle the matter at their own level but without success, and on 23rd February 1986 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, under Section 7 of the Act, appointed Mr. P. N. Mwaniki of Ministry of Labour Headquarters to act the Investigator. Consequently, the Minister released the report to the parties on 20th February 1987, wherein he found, inter alia, that the Company employed on average 200 employees on casual, permanent and contract terms of service and the grievants herein were all employed on diverse dates, with their individual contracts expiring on 20th February 1986, that the Union was unable to substantiate their allegation that the grievants were dismissed en masse because they joined the Union, that the grievants' contractual agreements had expired, and that the question of mass dismissal did not arise. In the circumstances, the Minister recommended that the action taken by the Company was lawful and their decision should be upheld.

The Minister finally appealed to the parties to accept the recommendation as a basis of resolving the dispute. The Company accepted the recommendation but the Union rejected it on grounds that not all the 53 grievants were on contract, but some were casual and permanent

employees, that there was a valid collective agreement between the Union and the Association of which the Company was a member, and were, therefore, bound by its terms thereof, and that the report ignored the meaning of a "casual" employee as stipulated in the Employment Act, Cap. 226, Laws of Kenya (App. C 15(d) and (b) and C 16). Hence this dispute for consideration and determination.

Mr. Mwaniki emphasized that the Company was a member of the Association with which the Union had a valid recognition agreement and had entered into various collective agreements until 14th September 1997 when they ceased being a member. Therefore, that unreasonable employees were bound by the terms and conditions of service negotiated and concluded between the Association and the Union. Six by introducing unreasonable terms and conditions of service, unlawfully and irregularly dismissing unreasonable employees and also causing them to renounce their union membership, the Company violated the provisions of the Act and the parties' recognition and collective agreements and acted in bad faith or mala fide. He stated that some of the 53 grievants were laid on casual terms contrary to the provisions of the parties' collective agreements and the labour laws, particularly the Employment Act and the Registrar of Unions and Conditions of Employment Act, Cap. 226 and 229, Laws of Kenya, and further work was of permanent nature. The grievants were, therefore, entitled to equal terms and conditions of service equivalent to their status, not since they were dismissed by authority (App. 12) but the contract, they were entitled to service benefits and compensation for wrongful dismissal in accordance with Section 10(1)(c) of the Act, or, in the alternative, to redundancy benefits. Accordingly, Mr. Mwaniki urged the Court to hold that the grievants were permanent employees, and in the circumstances, they were entitled to all terminal benefits in accordance with the provisions of the parties' collective agreement in force at the material time, including gratuity, unemployment, A.I.C. and minimum compensation for wrongful dismissal. He finally prayed that the grievants be paid the following benefits (Annex):

(i) One or two month wages in lieu of notice.

(ii) Days worked, leave and overtime.

(iii) Underpayment of wages, leave travelling allowance,

house allowance, A.I.C.

(i) Gratuity

(ii) 12 months' compensation in accordance with Section

15(3)(c) of the Act.

(b) In the alternative, the grievants be paid redundancy benefits.

The learned counsel for the Company, Mr. Kibuthu submitted that the purported representation of the grievants by the Union was not true because the check-off forms were found to be false and forged so the union dues were not deducted from their wages at the material time. Hence the Union has no locus standi in this matter. He assumed that out of the 62 grievants, those listed under serial Nos. 4, 23 and 33 were strangers because they were never employed by the Company while those listed under serial Nos. 11, 31, 43, 44, 48 and 59 are still in employment and have individually agreed notices of disclaimer on 27th March 2002 (R. Agas 10-21). The learned counsel averred further that the grievants listed under serial Nos. 23, 28, 30, 36, 38, 40 and 47 have also executed notices of disclaimer and denied that they were members of the Union (R. Agas 22 - 40). Therefore, the names of the said 10 grievants, on whose behalf the Union purported to represent, ought to be expunged from the record. In any case, the grievants whose names appear under serial Nos. 15, 21, 23, 25, 26, 27, 28, 29, 30, 32, 35, 36, 45, 41, 42, 43 and 62 have, after their respective contracts had expired, either been re-employed or reinstated on basis of their contracts of employment, while the contracts of other grievants expired on 28th February 1996. Thus, out of the 62 grievants, only 22 of them left the employment of the Company on or about 28th February 1996, when their respective contracts of employment were lawfully terminated by effluxion of time. In the circumstances, the Union has not made out any case for the alleged mass dismissal of the grievants, and are, therefore, excluded from representing them because they were not members thereof.

As regards the allegation that the Company was bound by the recognition agreement and the collective agreement between the Union and the Association, the learned counsel submitted that the check-off forms were forged and some of the Company's employees were members of the Union prior to 1995 as alleged or at all. He stated that the contracts of employment between the grievants and the Company were entered freely, lawfully, and were consistent with their periodic business operations and contractual nature of a particular project or contract that had been secured. Accordingly, the individual contracts of the grievants expired or ceased on completion of the specific work or project or term, and as such there was no real or no fixed and systematic dismissal of the grievants as alleged by the Union.

In conclusion, Mr. Kibuthu submitted that the Company employed the grievants for short term contracts in accordance with Section 14 of the Employment Act, Cap 202, Laws of Kenya, that each of the grievants was paid all his terminal benefits on completion of the specific job assigned to him, that the grievants were not members of any union, knew about the Union on the record, and some of them have lodged notices of disclaimer against this dispute, that there is no evidence on the record to show that the grievants were dismissed on mass or on a bulk, that there was no binding recognition agreement and collective agreement between the Union and the Association or the Company, that when the Company was able to secure new contracts, some of the grievants were re-employed in the projects, and, therefore, that there was no wrongful dismissal of the grievants as alleged by the Union to warrant reinstatement or redundancy benefits and compensation. Consequently, the learned counsel urged the Court to find that the Company rely for their own survival, and the survival of their 250 permanent employees, on the periodic contracts that they are able to secure from customers from time to time, and as such it would be inequitable to engage contract labour for the duration of a particular project or contract. Therefore, the Union's case, he said, was based on false, forged and untrue evidence and was untenable in the management of the Company, who have had cordial relations with their employees.

Accordingly Mr. Kibuthu prayed that the demand by the Union be rejected as base.

On careful perusal of the documents on the record, I find that the work for which the grievants were engaged was of a contractual nature and that there was a cessation of the work on diverse dates and that services became redundant and were, therefore, terminated. In fact, a sample of the common letter of appointment for this finding. It reads: "THE APPOINTMENT - SHORT TERM ENGAGEMENT CONTRACT: The grievants were employed for specific jobs and specific periods and the cessation of the work for which they were employed is the normal course of the business of the Company and is not intended to be permanent. The A.S.P. Recommendation No. 13 (a) Termination of Employment advised that contracts should be terminated only if there was a valid reason related to the contract or capacity of the employee, or the operational requirements of the business. This, kindly specifying, is the requirement or principle underlying the law of contract, although its implementation is by no means simple. However, the A.S.P. Recommendation envisaged that certain categories of employees could legitimately be excluded from protection against unfair dismissal, e.g. those taken on for a specific period and those employed on a casual or temporary basis.

The allegation by the Union that the grievants were dismissed because they decided to join the Union is devoid of all force as there is nothing to show that the grievants took any active part in the affairs of the Union. The appointment letters issued to the grievants clearly stated that their appointments were for a specific job and for a specific period, and that their services would automatically cease on the completion of the work for which they were employed. Therefore, their removal from service was not by way of punishment. The fact that some of the grievants were re-employed did not make them permanent employees as the nature of the Company's business depended on specific orders from their customers. It is possible that some of the grievants might have been in the service of the Company for a number of years in view of the fact that they were being given preference in the matter of recruitment when new contracts of work were secured or obtained by the Company, but the work for which they were engaged was not of a permanent nature and their services were, therefore, terminable on the completion or cessation of the work or in such a case, the intention of the law is to prohibit interference with the conditions of service of the employees and also not to impose from periods of service inconsistent with the agreement of the parties. Thus, the law is not intended to take away the right of the employer to employ persons for specific periods or specific jobs or to force upon the employee persons whose services are not needed by him. In the circumstances, it was primarily for the management of the Company to decide as to how they could get the work done, i.e. whether on daily representation or contract system or monthly salary, and this to be determined to have been the work could be performed most conveniently, efficiently and economically. This matter should, therefore, be left to the discretion of the management.

As the grievants' engagements were of a contractual nature, I do not think that they are entitled to any other terminal benefits or re-instatement as no instance of arbitrary or whimsical action in this regard on the part of the management of the Company has been proved. The Union's demands are, therefore, rejected as untenable and misconceived.

On consultation, the two Members of the Court are in full agreement with the decision.

_____ and delivered at Nairobi on 7th day of November, 2012.

Charles P. Chennuiya.



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)