REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1520 of 1999

RASHID ODHIAMBO ALOGGOH & 245 OTHERS ……..…. APPLICANTS

VERSUS

HACO INDUSTRIES LIMITED …….……. RESPONDENT

JUDGMENT

I. INTRODUCTION

This case represents the story of two hundred and forty six brave and resilient people, whose dignity, pride and principles have endured them through this long and protracted litigation, in a journey that spans over seven years, through days and days of hearings, before a total of seven Judges, involving stops at both levels of our Courts.

They are employees of the Respondent, Haco Industries Limited. Some of them have worked for the Respondent for five years, others for as much as seventeen years.

Their journey here began seven years ago, on 10th November, 1999 with the filing of an Originating Summons, in the High Court, invoking this Court's Constitutional jurisdiction, seeking the following Orders: -

"***1. A declaration that the Applicants' right to associate guaranteed under Section 80 of the Constitution of Kenya is being and has been contravened by the refusal of the Respondent to issue the Applicants with letters of appointment.***

2. A declaration that the Respondent has contravened the rights of the Applicants not to be subjected to inhuman treatment guaranteed under Section 74 of the Constitution of Kenya and the rights of the Applicants not to be held in slavery or servitude guaranteed by Section 73 of the Constitution by refusing/failing to recognize the Applicants as month-to-month and week-to-week employees of the Respondent company.

3. A declaration that the Applicants are month-to-month and/or week- to-week employees of the Respondent.

4. A declaration that the provisions of the Regulation of Wages and Conditions of Employment Act, Chapter 229 Laws of Kenya apply to both the Applicants and the Respondent.

5. A declaration that the Respondent has been in breach of the Employment Act Chapter 226 Laws of Kenya.

6. A declaration that the Respondent is under obligation to pay all the Applicants their unpaid over-time wages earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for.

7. An order that the Respondent pays the Applicants their wages and salaries earned but not paid, over-time wages and salaries earned but not paid, house allowance earned but not paid, and leave days earned but not given and/or paid for.

8. An order that the Respondent do pay the Applicants costs of this suit."

The Originating Motion was based on Section 84(1) and (6) and Sections 73, 74, and 80 of the Constitution, the Employment Act, Cap 226, Regulation of Wages and Conditions of Employment Act, Cap. 229 and Section 3(1) of the Judicature Act, and was supported by the affidavits of Rashid Odhiambo Aloggoh, who leads his colleagues in this litigation.

Essentially, their case is that despite long service with their employer (in some cases seventeen years) they continue to be treated as "casual" employees, thereby being denied the various benefits available under the laws to "full" or "permanent" employees, such as housing allowance, medicals, leave (including maternity) allowance, the right to join a trade union, and to benefit under the National Social Security Fund and National Hospital Insurance Fund Schemes. They say that because the Respondent was violating the various statutes dealing with employment, they were being deprived of their rights under the Constitution, the right for example to join a trade union, and the right not to be held in slavery and servitude. Their case is summarized in the following "grounds" in support of the application.

"***(a) The Applicants have served the Respondent for periods of time ranging between two years to seventeen years without the Respondent company giving them letters of appointment and/or paying them decent wages and salaries.***

(b) By retaining the Applicants as casual employees, the Respondent has denied the Applicants their right to earn a decent wage and to enjoy the minimum terms and conditions of employment.

(c) The refusal/failure by the Respondent to issue the Applicants with letters of appointment has made it impossible for them to join any trade/workers union or to form and register trade/workers union of their choice.

(d) The Respondent has refused/failed to recognize the Applicants' right to join a union of their choice thus denying them the right of association.

(e) The Respondent has a statutory obligation to recognize the Applicants as month-to-month and/or week-to-week employees and accord them all their due rights and privileges under the statutes."

The Respondent filed an affidavit in reply, denying all the allegations, and contending that as a manufacturing company, it had several categories of employees such as permanent, part-time, and casuals and in accordance with custom and practice in the manufacturing industry, casuals were engaged on a daily basis, based on demand, and were not entitled to all the benefits that permanent employees were offered.

That application was heard by a Constitutional Court comprising A. Mbogholi Msagha, J and J.W. Onyango Otieno, J (as he then was), and in a Ruling dated 6th June, 2000, the Court rejected the Applicants' case, mainly on the ground that they had other lawful avenues (such as the Industrial Court) which had not been exhausted.

On Appeal, the Court of Appeal, in a Ruling dated 2nd July, 2004 held that the availability of other lawful causes of action was no bar to a party who alleged contravention of his or her rights under the Constitution, to ventilate those claims (Section 84(1) of the Constitution). The Court of Appeal then remitted the case back to the High Court for a determination whether the complaints made by the

Applicants were true, and if so, whether they amounted to a violation of Sections 73, 74 and 80 of the Constitution, as alleged by the Applicants.

That is how this case ended up with this Court. My brother Justice Ibrahim was appointed to re-hear the case, and upon his transfer to Eldoret, the Honourable the Chief Justice appointed me, by his Order dated 29th September, 2006 to hear the case. I began hearing the same on 2nd October, 2006.

The decision by the Court of Appeal in this case, as it remitted the same for re-hearing, represented a radical departure from past practice where such applications (where the jurisdiction of the Constitutional Court was invoked for violations of provisions of the Constitution) were heard based on depositions alone, and with no viva voce evidence. The decision in this case opened up a whole new approach in determining applications invoking the Court's Constitutional Jurisdiction, including hearing the testimony of witnesses, and subjecting them to examination. I did exactly that, and invited both parties to present viva voce evidence, in addition to the depositions filed in Court.

The Applicants relied on three affidavits sworn by Rashid Aloggoh on 9th November, 1999, 20th January, 2000, and 7th March, 2000, and in addition presented five witnesses for oral testimony – Maurice Samba (PW1), Onesmus Mutuku (PW2), John Mulwa Kitheka (PW3), Francesca Mbula Wambua (PW4) and Joseph Njenga Gakuru (PW5).

II. (1) Facts: Applicants' Case

The Applicants are presently in the employment of the Respondent company as "casual" employees for periods ranging in between two and seventeen years. Mr. Rashid Aloggoh (PW1) outlined to this Court how he secured his job with the Respondent in September, 1995 in Mombasa where the Respondent's manufacturing unit was then located. Since then, the Respondent had refused to give him a letter of appointment which he consistently requested for, until 1999 when he and his colleagues finally filed these proceedings in Court. The same applied to his two hundred and forty five colleagues, all of whom continue to be denied not just the letters of appointment, but all the benefits that accrue to "permanent" employees. Their terms were "oral" - simply that the hours of work were 8 to 5 daily, except for those working on shifts, and that they would be paid weekly; that if they worked hard, they would indeed get letters of appointment "after three months". In reality, however, they worked from 8 am to 6.30 pm on week days, and from 8 to 4.30 pm on Saturday, with one hour for lunch, and they got paid sometimes weekly, and sometimes fortnightly. Overtime pay was not based on the actual hours worked, but was a constant figure, much less than the actual time worked. There was no housing allowance paid; no annual leave, and no paid sick and maternity leave given to casuals. The witnesses testified that because they had been denied letters of appointment, they could not join trade unions, which required such letters as a pre-requisite. Nor were they able to join National Social Security Fund and National Hospital Insurance Fund schemes. By reason of all these denials, the Applicants contended that this amounted to a deprivation of their right to join trade unions, and to being held in slavery and servitude, contrary to the provisions of the Constitution.

(2) Facts: Respondent's Case

The Respondent did not present any viva voce evidence. Its case is contained in the Replying Affidavit sworn by its Human Resources Manager, Mr. Peter Kimani, on 2nd December, 1999. Contesting most of the facts outlined by the Applicants, the Respondent states that as a manufacturing company, it had permanent employees, part-time contractual employees and casual employees who are engaged on "need basis"; that it was an established practice and custom in the manufacturing industry to engage casuals on a regular basis as and when the need arose; that such regular casuals were given preference in recruitment, that being casuals they were not entitled to letters of appointment or to other benefits to which permanent employees were entitled; that the Applicants "voluntarily" sought causal employment by reporting at the Respondent's gate every morning; that no promises were ever made that the casuals would get "appointment letters"; that workers were compensated fully and in accordance with the law for overtime–work; that no worker had ever been denied the right to join the trade union; and the Applicants' employment being "casual" there was no basis in law to make any statutory deductions for taxes and

National Hospital Insurance Fund and National Social Security Fund.

III: Finding of Facts

Based on the evidence presented before this Court, both by way of depositions and viva voce, I find the facts material to the issues herein to be as follows:

The Applicants are, and have been in the employment of the Respondent, as "casual" employees, for periods ranging from two years to seventeen years. Some of them first began work in 1995 at the Respondent's manufacturing plant in Mombasa and subsequently moved with the company to Nairobi. The contract is on a daily basis: the prospective employee arrives at the Respondent's gate every morning. If there is work available, he gets hired as a casual. If he works for more than one day (according to the Respondent's affidavit) he gets paid on a weekly basis, sometimes on a fortnightly basis. All the Applicants have so far been paid for the days worked. The only dispute relates to overtime pay. The Applicants contend that the overtime pay is "constant" irrespective of the number of hours worked, while the Respondent has annexed a schedule (PK4 in the Replying Affidavit) to show that the overtime was paid in accordance with the number of hours worked, and was not constant. I accept the Respondent's testimony on this point as it is written and signed by each Applicant, **and I find that there is no evidence of any overtime pay pending or unpaid.**

It is not in dispute that the Applicants have been treated as "casual" employees for the period they have worked; that no letters of employment have been offered; that no statutory deductions have been made; that no housing, leave, medical and other benefits accruing to the permanent employees have been available to the Applicants. I also accept the Applicants' testimony that they have been denied the right to join a trade union, but I do not accept the evidence that that denial was solely as a result of the Respondent not issuing letters of employment.

I accept the Respondent's testimony that it made no promises that the Applicants' employment would be made permanent or that letters of appointment would be issued after three months of work. It simply does not seem logical that if such a promise was made, the employee would wait so long, in some cases seventeen years, to make such a claim or to complain. It seems logical to me that such an employee would either complain to the labour office, or simply quit employment. I will therefore accept the Respondent's evidence that no such promises were made.

And finally, there is no dispute that the Applicants entered into their contracts of employment with the Respondent, as casual employees, and continued work as casuals, **without any duress or coercion**. **It was completely voluntary, on a willing employer, willing employee basis. They were free to leave at any time, as there was no contract binding either party for any specified time.**

Now, the next stage is to outline the issues before this Court, and consider whether the facts as I have found, amount to, or constitute a violation of Sections 73, 74 and 80 of the Constitution.

IV. Issues

There are seven "declarations" sought by the Applicants, which give rise to the following seven issues for determination:

1. Whether the Applicants' freedom of association guaranteed in Section 80 of the Constitution has been infringed.

2. Whether the rights of the Applicants not to be subjected to inhuman treatment guaranteed in Section 74, and the rights not to be held in slavery or servitude guaranteed in Section 73 of the Constitution have been infringed by reason of the Respondent's failure/refusal to recognize the Applicants as month-to-month and week-to-week employees.

3. Whether the employees are month-to-month or week-to-week employees.

4. Whether the provisions of the Regulations of Wages and Conditions of Employment Act apply to the parties herein.

5. Whether the Respondent has been in breach of the Employment Act.

6. Whether there are any unpaid or pending wages, and leave.

7. Whether there are any unpaid or pending payments for house allowance.

V. Analysis and Conclusion

1. Right of Association : Section 80

Section 80(1) of the Constitution states as follows:

"***S.80(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."***

Now, **did the Respondent do anything to breach this Section?** The arguments put forward by the Appellants' Counsel, Mr. Ndambiri, are that the Applicants' rights of association were denied by reason of the Respondent's refusal to recognize them as permanent workers and its refusal to issue them with appointment letters that were needed for entry into trade unions. It is submitted that the Section 10 of the Trade Unions Act requires that registration in a trade union be done by completion of Form B found in the First Schedule. That Form requires the Applicant to state, among other things, his occupation, which must be evidenced by the letter of employment. Similarly, the Applicants' rights to seek redress from the Industrial Court is restricted because of their inability to belong to a Union.

Mr. Majanja, Counsel for the Respondent, submitted that the Respondent had done nothing to stop the Applicants from joining trade unions; that it had no control over the "rules" made by union for entry; and that the Applicants are indeed entitled to form their own Union.

I uphold the Respondent's submission, and find that there is nothing before this Court to show that the issuance of letters of appointments is the key to freedom of association or joining a trade union. The only evidence is that of the Applicants who say that each time they tried to join the union, they were told that they needed letters of appointment. There is no evidence from their union officials, or from officers of the Registrar of Trade Unions to confirm or validate that evidence. I am not satisfied that the law, as it stands now, prohibits the Applicants from joining a trade union, or forming one themselves. And I am not satisfied that the Respondent was or is the stumbling block in their efforts in this direction. The Respondent has no control over the entry rules made by unions. The Appellants being casual employees, the Respondent was well within its rights not to issue letters of appointments, as if they were permanent employees.

2. Inhuman treatment (Section 74) and Slavery/Servitude (Section 73)

Section 74(1) of the Constitution states as follows:

"***74(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment."***

The Applicants argue that by treating them as "casuals" for such a long period of time; subjecting them to long working hours "without pay"; paying them "indecent" salaries; not paying all the allowances (housing, leave, maternity etc) paid to permanent employees; and not deducting taxes from their pay, the Respondent has "reduced the rank, degree and dignity" of the Applicants. The practice of keeping them as "casuals" for long periods with promises to upgrade their status is "to coerce the Applicants to remain

in the existing labour relationship."

There is no evidence before this Court that the Applicants were subjected to long working hours "without pay." The Respondent has exhibited proof of payment of all dues, including over-time pay. The wages were freely negotiated – there is nothing "indecent" about a freely negotiated package. As casuals, the Applicants were clearly not entitled to all the allowances (eg. housing, leave, maternity etc) paid to permanent employees, and the Respondent was under no legal obligation to make any statutory deductions for casual employees. I see nothing in the conduct of the Respondent to demonstrate inhuman treatment of the Applicants. The prohibition against torture, cruel and inhuman and degrading treatment implies an "**action so barbarous, brutal and cruel"** while degrading punishment is "**that which brings a person dishonour or contempt."** (See ***Samuel Rukenya Mbura & Others v. Castle Breweries*** (Nbi HCCC No. 1119 of 2003 – a decision of this Court).

Section 73(1) of the Constitution states as follows:

"***73(1) No person shall be held in slavery or servitude."***

The Applicants argue that payment of meagre salaries, for long hours, amounted to economic and social exploitation, resulting in slavery. "Slavery" is not limited to use of whips and chains, or even the use of force and coercion. Payment of small and meagre wages for large, heavy and exhaustive labour is slavery", submit the Applicants

The prohibition against slavery and forced labour is one against servitude where one is a slave or servant in an **involuntary condition** like forced labour either for pay or without by coercion or imprisonment (see ***Sammy Muhia & Others v. K.P.L.*** (Nbi HCCC No. 620 of 2004).

I uphold the Respondent's submission that the evidence available both oral and by way of affidavit, does not in any way disclose that the Applicants were held in slavery or servitude. The evidence of the five witnesses who testified before Court was that they approached the gates of Haco Industries voluntarily, where they were told the conditions of work and pay, and having understood such terms and conditions, they accepted the work. No one was forced to work. All of them were paid for work done. Slavery or servitude imports notions of working for no pay at all. In the present case, none of the witnesses who gave evidence before the Court complained that they had worked without pay. At the very worst, they complained that some times the pay was deferred to the following week, but all conceded that the money due to them in the form of wages was always paid.

I am, therefore, unable to find any evidence of the Applicants being held in slavery or servitude, contrary to Section 73(1) of the Constitution.

3. Issue Nos 3, 4 and 5

These issues relate to declaration numbers 3,4 and 5 sought by the Applicants in the Originating Motion. These have been outlined earlier in this Judgment. Essentially, the Applicants want this Court to declare whether they are week-to-week or month-to-month employees; whether the provisions of Cap.229 apply to them; and whether the Respondent is in breach of the provisions of Cap.226. I am unable to grant any such declarations – that is not even the issue before this Court. **The issue is whether the infringement of those provisions, if any, constitute or amount to a violation of the Applicants' constitutional rights. There is no evidence before me to demonstrate serious breaches of these statutes in a way to amount to a violation of the Applicants' Constitutional rights.** And with regard to the 3rd issue, whether they are "week-to-week" or "month-to-month" employees, I am at a loss to understand the basis of that Order. Nowhere in the statutes have I come across such terms, and I cannot simply give a definition of my own. It is the parties who determine freely their contractual relationship, and in this case, the Applicant's are "casual" employees. Section 2 of the Employment Act, Cap. 226 defines a casual employee as

"***an individual the terms of whose engagement provide for his payment at the end of each day and who***

is not engaged for a longer period than 24 hours at a time."

Indeed, the Applicants were employed on fresh contracts on a daily basis, and eligible for payment daily, except only that it was accumulated weekly for those who worked more than one day. So, I would call them "casual employees."

The fact that the Applicants are week-to-week or month-to-month employees, of itself, does not infringe on their rights. **What is important is that they had engaged freely in their employment contract, were free to leave at anytime, and were indeed paid fully for their services.**

4. Issue Nos. 6 and 7

As I have found that there is no evidence of any underpayment or pending payments, these declarations are not available.

Finally, **in conclusion,** I simply want to say that I feel a deep sense of sorrow for those Applicants who have served for such long periods of time, with dedication and hard work, to continue to remain "causal" employees. There are several thousand workers in this situation both here, and around the world. That is an unfortunate fact of life. The law allows it. The notion of freedom of contract encourages it, and the huge disparity in the bargaining positions of employers and employees often "forces" individuals to accept the terms. But then if the Court was to "outlaw" such practices, or if Parliament was to amend the statutes to prevent the same, I shudder to think what would happen to several thousand families who still live on casual employment. It is inevitable that any drastic changes in legislation would result in huge lay-offs, because companies would simply not be able to afford so many employees on "permanent terms". I cannot simply ignore such an eventuality. It is not exactly the Respondent's fault that so many employees find themselves in this situation. **There are so many external and larger factors that contribute to this unfortunate situation – the state of our economy, the huge scarcity of jobs, the inequality in bargaining power; Government policy and legislation in the country, and the notion of a free market economy.**

So, then, it is with a heavy heart, and much sympathy, that I have to decline the application before me. But keeping in mind the nature of this case, and the unfortunate situation the Applicants have found themselves in, I will not make any order of costs against them. Each party shall bear their own costs.

Dated and delivered at Nairobi this 19th day of March, 2007.

ALNASHIR VISRAM

JUDGE