



REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmutut, J.,

J.M. Kilonzo & A.K. Kerich, Members.)

CAUSE NO. 86 OF 2002.

KENYA BUILDING, CONSTRUCTION, TIMBER,

FURNITURE & ALLIED INDUSTRIES EMPLOYEES' UNION.....Claimants.

v.

D. MANJI CONSTRUCTION LTD.....Respondents.

Issue in Dispute:-

“Wrongful termination of Mr. James Karanja.” (who is hereinafter called the grievant).

Mr. E. M. Gikunju, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

Mr. J.A. Wabuyabo, Advocate, holding brief for Mr. J.O. Rachuonyo, Advocate, of M/S Rachuonyo & Rachuonyo, Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Dispute, Form ‘A’, dated 16th May, 2002, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14(7) and (9)(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 8th November, 2002. The dispute was then listed for mention on 27th November, 2002, when Messrs. D.G. Mucheru and J.O. Rachuonyo, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 21st January and 27th February, 2003, and the dispute was fixed for hearing on 24th April, 2003. The Union submitted its memorandum on 17th January, 2003, and the Company filed its reply statement on 27th February, 2003, and the dispute was heard as aforesaid, i.e. on 24th April, 2003.

Admittedly, the Company was a member of the Kenya Association of Building Civil Engineering and Contractors (KABCEC) Group of F.K.E., which had a collective bargaining agreement with the Union. The grievant was engaged or employed by the Company as a carpenter on 8th January, 1986 at a daily rate of Kshs.45/= and he was terminated on 13th February, 1993 while

earning Kshs.83/= per day.

Mr. Gikunju for the Union submitted that the grievant approached his site Agent on 12th January, 1993 and requested to be allowed to proceed on annual leave, but when the latter informed the Managing Director about it, he (grievant) was served with one month's notice of termination of his services allegedly on the ground that he would incite other workers or employees, who had not taken, or asked for, their annual leave to stage a strike. The grievant served his notice period of one month and was terminated as aforesaid.

The parties met at their own level but were unable to resolve the matter, and consequently 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. P.M. Wamoto of Ministry of Labour Headquarters to act as the Investigator, but his appointment was withdrawn and Mr. A.K. Nyaga of Industrial Area Labour Office was appointed to act as such. On 18th June, 2000, the Minister released his report to the parties in which he found "(i) that there was substantial evidence that Mr. James Karanja was employed in 1986 on weekly contract and at the time of leaving employment he was earning a daily salary of Kshs.83, (ii) that in December 1992, the grievant was served with one month's notice in writing to terminate his services after he requested to be granted his annual leave, (iii) that the reasons leading to the termination of the grievant was unlawful since payment or being granted annual leave was a legal entitlement as per the parties Collective Bargaining Agreement, (iv) that the grievant was not a casual worker since he was being paid on weekly basis and (v) that in accordance with the provisions of the parties collective bargaining agreement, the grievant was entitled for (to) two months notice". In the circumstances, the Minister recommended "that Mr. James Karanja be paid the balance of one month's salary in lieu of notice. In addition, he should be paid all his outstanding annual leave days and other statutory benefits plus two months salary as compensation for loss of employment."

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Union accepted the Minister's findings and recommendation, but the Company rejected the same (see Union Apps. I & 2). Hence this dispute for consideration and determination.

Mr. Gikunju submitted that the Company has time and again used different tactics to intimidate the employees and frustrated all efforts by the Union to represent them - for example, the Company joined the Association in order to avoid direct recognition of the Union, and when the latter raised certain issues, e.g. leave, the Company resigned from it (Association). He vehemently asserted that the action by the Company in terminating the services of the grievant was unjustified and its claim that the project was nearing completion was an attempt to defeat justice and deny the grievant his rightful terminal dues.

For the foregoing reasons, Mr. Gikunju urged the Court

to uphold the Minister's recommendation and award as follows:-

1. Balance of one month's notice – 26 days x Kshs.83/= = Kshs2,158/=
2. Outstanding annual leave 7 years x 26 days x Kshs.83/= = " 15,106/=
3. Service – 7 years x 10 days x Kshs. 83/= = " 5,810/=
4. Leave traveling allowance @Kshs. 400/= per year = " 2,800/=
5. Tools allowance –Kshs. 135/= x12x2 = " 11,340/=
6. Public holidays – 11 days x 7 years x Kshs. 83/= = " 6,391/=
7. Two month's salary as
compensation – 52 days x Kshs.83/= = " 4,316/=

Total Kshs. 47,921/=

The learned counsel for the Company, Mr. Wabuyabo, opposed the demand on the ground that the grievant was a casual worker who was engaged on an on and off basis while earning Kshs. 45/= to Kshs. 83/= per day on different contracts, covering various periods of between 1 and 2¹/₂ years. On completion of the contract, all the employees, including the grievant, were given one month's notice pursuant to Section 17 of the Regulation of Wages Order under the Regulation of Wages and Conditions of Employment Act, Cap. 229, Laws of Kenya, and Section 4(a) of the Employment Act, Cap. 226, Laws of Kenya. Mr. Wabuyabo averred further that the grievant received all his annual and leave travelling allowances and he was provided with tools. He pointed out that no work was performed by the grievant during public holidays and he was not entitled to any compensation.

In conclusion, Mr. Wabuyabo reaffirmed that the grievants' services were only terminated upon the completion of the contract, and he was properly served with the notice of termination and paid all his dues upon completion of the contract. Therefore, the claim by the Union is unjustified and unwarranted.

In the circumstances, Mr. Wabuyabo prayed that the demand by the Union be dismissed or rejected as baseless and malicious.

The admitted position is that the grievant was employed by the Company between 8th January, 1986 and 13th February, 1993, i.e. for a period of 7 years, but the Company has maintained that he was engaged on casual basis for a total period of between 1 and 2¹/₂ years. 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 provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.’

Admittedly, the grievant worked for the Company for a cumulative period of 1 to 2¹/₂ years, but his mode of payment would appear to have been on weekly or monthly basis. In the circumstances, we are of the view that the grievant was a permanent employee and was entitled to certain terminal benefits. On careful consideration of the demand by the Union as a whole, we are of the considered opinion that the grievant is not entitled to any outstanding annual leave, tools allowance and public holidays. These demands are stale and belated. We feel, however, that the grievant is entitled to balance of one month's notice, service pay, leave travelling allowance for the year 1993, and two month's compensation as recommended by the Minister. All in all, we award that the grievant be paid Kshs. **12,684/=** made up as follows:-

- (i) Balance of one month's notice – 26 days x kshs.83/= = Kshs.2,158/=
- (ii) Service – 7 years x 10 days x Kshs. 83/= = ” 5,810/=
- (iii) Leave travelling allowance @ Kshs.400/= per year = ” 400/=
- (iv) Two (2) month's salary as compensation – 52 days x Kshs. 83/= = ” 4,316/=

Total Kshs. 12,684/=

Both members concurred with this decision.

We so order.

DATED and delivered at Nairobi this 10th day of August, 2006.

Charles P. Chemmutut, MBS.,

JUDGE.

J.M. Kilonzo,

MEMBER.

A.K. Kerich,

MEMBER.