IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

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

CAUSE NO.90 OF 2001.

KENYA UNION OF COMMERCIAL, FOOD& ALLIED WORKERS.....Claimants.

- v -

HEBATULLA BROTHERS LTD.....Respondents.

Issue in Dispute:-

"Termination of James Nyaa (hereinafter called the grievant).

W.D. Wambua, Assistant Secretary General, for the Claimants (hereinafter called the Union).

L.W. Kariuki, Senior Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

A W A R D.

The Minister for Labour referred this dispute to the Court for consideration and determination on 20th September 2001 in exercise of the powers vested on him by Section 8 of the Trade Disputes Act, Cap.234, 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 (9)(e) and (f) of the Act, were received by the Court on 25th September 2001. The dispute was then listed for mention on 11th October 2001, when Mr. R.M. Muthanga, Executive Officer, F.K.E., appeared for the Company but there was no appearance for the Union. In the circumstances, the dispute was listed for another mention on 8th November 2001, when Messrs. Wambua and Kariuki, who appeared for the parties respectively, were directed to submit or file their written memoranda or statements on or before 30th November and 28th December, 2001, and the dispute was fixed for hearing on 28th February 2002. Mr. Wambua submitted his memorandum on 30th November 2001, but Mr. Kariuki did not file his reply statement as directed. On 13th February 2002, however, the matter was brought up for mention on 21st February 2002, due to other pressing engagements which I had elsewhere on 28th February 2002. On the said occasion, i.e. 21st February 2002, Mr. Kariuki appeared for the Company but again there was no appearance for the Union. The case was, therefore, listed for a further mention on 4th April 2002, when Mr. Wambua appeared for the Union, and Mr. Kariuki, who appeared for the Company, was granted an
extension to file his reply statement on or before 25th April 2002, and the dispute was fixed for hearing on 30th May 2002. Mr. Kariuki belatedly filed his reply statement on 15th May 2002, and the case was heard as aforestated, i.e. on 30th May 2002.

The parties have a valid recognition agreement and have also entered into several collective agreements between themselves which regulate the terms and conditions of service of the unionisable employees. The present dispute arose on 9th October 1998 when the Company purported to offer the grievant, who had continuously worked for them as a machine attendant at a daily wage of Kshs.121.50, payable weekly since 21st May 1984 allegedly on casual basis, permanent employment with effect from 12th October 1998. It is stated by the Union that the grievant made a representation to the Company, claiming that his

past 14 years of service be taken into account but the Company refused his request. The grievant, therefore, declined to sign the letter of offer of permanent employment; and accordingly he was verbally and constructively dismissed. At the time of his dismissal as such, the grievant was earning Kshs.171/= per day, and he is claiming reinstatement to his job; or, in the alternative, the following terminal dues from the Company:-

(i) Two months' pay in lieu of notice:
2x26 days x Kshs.171/= = Kshs.8,892/=.

(ii) Days worked: 12 days x Kshs.171/= = " 2,052/=.

(iii) Annual leave: 14 years x 22 daysxKshs.171/ = " 52,668/=.

(iv) Severance pay since 1989 (9 years):
9 years x 15 days x Kshs.171/= = " 23,085/=.

(v) Maximum compensation of 12 months for

loss of employment: 12 months x Kshs.4,446/=
per month. = " 53,352/=.
Total: = Kshs.140,049/=.

In a nutshell, the case of the Company is that the grievant had in fact worked for them as a casual employee up to 9th October 1998 when he, among other casual employees, was offered permanent employment, but he declined to take it and decided to walk away without provocation. Mr. Kariuki vehemently contended that the grievant was a casual employee who was paid daily as and when there was work for him to do. (see R. App.I). However, he said, during the signing of the collective agreement for the period 1999/2000, the Union requested the management of the Company to offer permanent terms of employment to the casual employees who had worked for them for at least 3 months; but the grievant, who was at the time on casual employment, refused to accept the same and walked away while all the other workers, who were similarly on casual terms of employment like him, accepted to be absorbed on permanent terms of employment. In the circumstances, Mr. Kariuki asserted, the grievant was neither declared redundant nor constructively terminated or dismissed as alleged by the Union; and he is, therefore, not entitled to the said terminal benefits prayed for by the Union.

Accordingly, Mr. Kariuki prayed that the demand by the Union be dismissed as legally baseless.

After failure of bilateral negotiations and settlement of this matter at the parties' own level, the Union reported a formal trade dispute to the Minister for Labour on 2nd May 1998 in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. Joel Omweno to act as the Investigator; and on the basis of the investigation, the Minister released his report to the parties on 30th January 2001, in which he found and recommended, inter alia, as follows:-

"**FINDINGS**

…….. Mr. Nyaa was employed by Hebatulla Brothers Ltd on 21st May, 1984 as a machine attendant earning his daily wages at the end of the week. He served in this capacity until he lost his employment on 12th October, 1998. This position of
machine attendant is of a permanent nature in the establishment and called for his conversion to permanent terms even long before the Union came to their aid in the parties Collective Bargaining Agreement. Further, the weekly mode of payment contravened and was in conflict with the law covering casual employee. Nyaa was, therefore, entitled in equity to know what would be the fate
of his 14 years service upon signing the new contract.

…… he had served with absolute clean employment record for 14 years and that the management contravened the C.B.A. by engaging Nyaa as a 'casual' employee for 14 years.
…… Mr. Nyaa's termination was wrongful.

RECOMMENDATION.

……
……I recommend that Mr. Nyaa be accorded a normal termination of employment and he be paid all terminal dues in accordance with the Collective Bargaining Agreement applicable to the parties.

He should also receive 5 months pay as compensation for loss of employment".

Finally, the Minister appealed to the parties to accept the recommendation as a basis of resolving the matter. The Union accepted the recommendation, but the Company rejected it on the grounds (i) that the grievant was all along a casual

employee; (ii) that he declined an offer for permanent employment;

(iii) that he was never terminated as alleged by the Union, and (iv) that the question of continuity of service did not arise (see C. App: I to

4). Hence, this dispute for consideration and determination.

Therefore, the points for consideration and determination in this case are:-

(a) whether the grievant was a casual employee,

(b) and if not, whether he is entitled to the reliefs prayed for by the Union hereinabove.

For the convenience of discussion, the above points are taken up together for decision.

The main grounds on which the demand or claim of the Union is resisted by the Company are that the grievant was all along a casual employee; and that since he declined the offer of permanent employment with effect from 12th October 1998, he was not entitled to the said reliefs. In 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 longer 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 limited and temporary purpose, then the hiring or employment in each instance, being a matter of special engagement, cannot but be "casual" in character – e.g. where an employer simply asks a labourer to work for a day without any further commitment. Therefore, 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 and be paid for a longer period than one day at a time. In other words, the 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 (see *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 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 1995: Kenya Building, Construction, Timber, Furniture & Allied Industries Employees' Union v. Firoze Construction Ltd.,* I observed at pages 4 and 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 of employment, including service or employment, which may be interrupted on account of sickness, or authorised leave, or an accident, or a strike which is not illegal, or lock-out or a cessation of work which is not due to any fault on the part of the employee.

In this case, it was not specifically denied by the Company that the grievant was employed by them, albeit allegedly on casual basis or terms of employment, for 14 years, i.e. since 21st May 1984. On 9th October 1998, the Company purported to offer the grievant, who had continuously worked for them since 21st May 1984, permanent employment with effect from 12th May 1998, but without taking into account his past 14 years of service to them.

When the grievant made a representation to the Company that his past 14 years of service should be taken into account, they refused. In my view, this was an abuse of the process of the law. The Company retained or kept the grievant on casual terms of

employment for 14 years; and in the circumstances the concept of “casual employment” did not apply to him; but in my considered opinion, he was a permanent employee. Thus, the behavior of the Company in refusing to take into account the 14 years of the grievant’s past service to them, when they offered him permanent employment on 9th October 1998, and which led him to terminate his services, leaves no doubt in my mind that he was constructively dismissed; and there is no valid evidence on the record to sustain the argument or contention that the grievant was a casual employee for 14 years. Consequently, the grievant is entitled to the dues accruing to a permanent employee.

The documentary evidence which was submitted by the Company to the Court shows that the grievant received his wages for the 12 days worked in the month of October 1998. In the circumstances, the demand therefore is disallowed. However, the other demands by the Union under Clauses 4, 7(ii) and 9(f)(iv), pursuant to the proviso under Clause 18 of the parties’ collective agreement in force at the material time are allowed. I also consider that this is a fit case for a maximum compensation under Section 15(1)(ii) of the Act. Accordingly, the grievant is awarded or granted the dues he has claimed from the Company under (i), (iii), (iv) and (v) at page 4 hereinabove, amounting in total to Kshs.137,997/= only, and I so order.

Both members of the Court are in full agreement with this decision.

DATED and delivered at Nairobi this 4th day of July, 2002.

Charles P. Chemmuttut,

JUDGE.