IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

A.K. Kerich & H.B.N. Gicheru, Members.)

CAUSE NO.108 OF 1999.

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

- v -

A.S.P. CO. LTD.....Respondents.

Issue in Dispute:-

" Mass dismissal of workers" (hereinafter called the grievants), namely:-

1. **Evans Okoth.**
2. **David Kitale.**
3. **Shadrack Dibondo.**
4. **James Waweru.**
5. **James Mbindo.**
6. **Daniel Kamuna.**
7. **Josephat Mwangi.**
8. **Samuel Kimani.**
9. **Patrick Odunga.**
10. **Joseph Ondenyo.**
11. **John Mwenda.**
12. **Boniface Kinyemasio.**
13. **Kennedy Nyaoko.**
14. **Vicky Onzere.**
15. **James Munico.**
16. **James Mburu.**
17. **Lawarence Odhiambo.**
18. **Peter Ochieng.**
19. **Joseph Kioko Muli.**
20. **Samuel Aswere.**
21. **Julius Mutunga.**
22. **Christopher Mutuni.**
23. **Bernard Irevuhe.**
24. **Peter Mutuku.**
25. **Thomas Wekesa.**

26. Josephat Mbela.
27. Dominik Dolla.
28. David Ojom.
29. Didecus Oloo.
30. George Ambunga.
31. Erick Chiteri.
32. Evans Ouko.
33. Zephania Mbugua.
34. Henry Abwavo.
35. Fredrick Opiyo.
36. Charles Kimyu.
37. Thadeus Audo.
38. Khamisi Salim.
39. Macharia Gitau.
40. John Oluoch.
41. Thomas Odira.
42. David Ambino.
43. John Mwanzia.
44. Joshua Makau.
45. Abel Morata.
46. Benjamin Oyugi.
47. Christopher Oketch.
48. John Saga.
49. Pius Mukeku.
50. Julius Muasya.
51. Solomon Odanga.
52. Amos Otieno.
53. Daniel Oyalo.
54. Joseph Ludenyo.
55. Fredrick Makokha.
56. John Ondari.
57. David Obiero.
58. Robert Kibet.
59. Hudson Kivanze Matisha.
60. Samson Ndolo.
61. George K. Ngugi.
62. Nathan Mbova.
63. Daniel Makau.
64. Boniface Omollo.
65. Zachary Obino.

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

K.M. Kibuthu, Advocate, of M/S Mbai & Kibuthu, Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

On 3rd November 1999, 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.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 5th November 1999. The Union submitted their memorandum on 3rd February 2000, and the Company filed their reply statement on 28th April, 2000. On 16th May, 2000, however, the Company raised a Preliminary Objection on the maintainability of the dispute, but the objection was withdrawn on 17th November 2000; and the dispute was heard on 15th and 16th March, 2001.

At the commencement of the hearing of this dispute, Mr. Mutambi 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 his introductory submission, the learned counsel, Mr. Kibuthu, stated that the Company are a limited liability concern, incorporated in Kenya in 1979. They bought out a Company known as East African Engineering Works Ltd., but retained a third of their workforce. The Company manufacture 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 rely for their survival on short term contracts or orders from their customers; and, in the circumstances, they do not maintain a regular workforce. Thus, the Company engage certain employees for a specific job and a specific period, and their discharge on completion of the job does not amount to punishment but because their services are no longer required. However, for their day to day running, the Company have a permanent workforce of about 250 who are not concerned with this dispute. He pointed out that the Company do not engage casual workers, but when the need arises the work is usually sub-contracted to another company, known as Sesenga General Contractors Ltd. Mr. Kibuthu averred that some of the grievants hereinabove were employed by the Company on various dates for specific duties and periods and under individual contracts of employment, depending on the duration of the contract or project (App.I). The said contracts of employment between the parties were negotiated freely and *consensus ad idem* 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 were a member of the Engineering and Allied Industries Employers' Association, (hereinafter called the Association) with which the Union had a valid recognition agreement, until 16th September 1997 when they ceased to be members at their own request (App.2).

According to Mr. Mutambi, the Company employed more than 200 unionisable employees and were, therefore, bound by the terms and conditions of service between the Association and the Union. He stated that between 1990 and 1995, the unionisable employees pulled out of the Union after they were enticed 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 unfavourable contractual terms and conditions of service to which nearly all the employees were periodically subjected, leaving only few of them on casual and/or permanent employment (App.C 20(a), (b), (c), (d) and (e)). However, due to unfair labour practices commited by the Company, about 190 employees rejoined the Union by July 1995 and signed check-off forms, but the management of the Company refused to implement (App.C 3(a) and (b)). At the same time, the Union officials, who were new in office, attempted to secure a recognition agreement with the Company, and the latter did not inform, reveal or divulge to the Union officials that they (Company) were a member of the Association (App.C.4). When the Company realised that the employees had joined the Union, they coerced them to revoke or renounce their union membership (App.C.5), and the 53 grievants who resisted to sign the purported notification were summarily dismissed on the ground that they were either casual employees or their contracts had expired, (App.C.6(a) and (b)). Therefore, on the basis of App.C.5 hereinabove, the Registrar of Trade Unions consequently treated the matter as closed on the ground that the grievants had individually revoked 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, *inter alia*, that they (Union) had not received copies of the letters of revocation by the grievants from the Company and that some grievants had withdrawn the alleged notifications because they were obtained by duress and undue influence (Apps.C.8 and C.9). The Union also issued a strike 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 23rd April 1996, the parties were advised first to address the grievances at the shop floor level in accordance with the laid down voluntary machinery, but the Company defied the advice (Apps.C.10, C.11 and C.12).

On the other hand, the learned counsel, Mr. Kibuthu, submitted that by a letter dated 18th July 1995, 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 196 employees, authorising the Company to deduct union dues from their salaries. But the purported signatories disowned the check-off forms; and upon investigation it was indeed found that the check-off forms were not genuine or forgeries as some of the employees, who allegedly signed the same, were either dead, had left employment or were not even aware of the existence of the Union (Apps.R.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 or under the provisions of the Employment Act, Cap.226, Laws of Kenya, while others are still in employment of the Company.

The parties attempted to settle the matter at their own level but without success; and on 29th February 1996 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. Macharia of Ministry of Labour Headquarters to act the Investigator. Consequently, the Minister released his report to the parties on 25th February 1997, wherein he found, *inter alia*, that the Company employed on average 250 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 28th February 1996; that the Union were 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 (Apps.C.15(a) and (b) and C.16). Hence this dispute for consideration and determination.

Mr. Mutambi emphasised that the Company were a member of the Association with which the Union had a valid recognition agreement and had entered into several collective agreements until 16th September 1997, when they ceased being a member. Therefore, their unionisable employees were bound by the terms and conditions of service negotiated and concluded between the Association and the Union. But by introducing unfavourable terms and conditions of service, unlawfully and irregularly dismissing unionisable employees and also coercing 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 averred that some of the 53 grievants were kept on casual terms contrary to the provisions of the parties' collective agreements and the labour laws, particularly the Employment Act and the Regulation of Wages and Conditions of Employment Act, Caps.226 and 229, Laws of Kenya, and yet their work was of permanent nature. The grievants were, therefore, entitled to enjoy terms and conditions of service appertaining to their status; but since they were dismissed for exercising their right to join the Union, they were entitled to terminal benefits and compensation for wrongful dismissal in accordance with Section 15(1)(ii) of the Act, or, in the alternative, to redundancy benefits. Accordingly, Mr. Mutambi urged the Court to find 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, underpayments, e.t.c., and maximum compensation for wrongful dismissal. He finally prayed that the grievants be paid the following terminal benefits:-

(a) (i) One or two months' wages in lieu of notice.

(ii) Days worked, leave and overtime.

(iii) Underpayment of wages, leave traveling allowance, house allowance, e.t.c.

(iv) Gratuity.

(v) 12 months' compensation in accordance with Section

15(1)(ii) 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 fake and forgery as the union dues were not deducted from their wages at the material time. Hence the Union has no *locus standi* in this matter. He averred that out of the 53 grievants, those listed under serial Nos.4, 22 and 39 were strangers because they were never employed by the Company, while those listed under serial Nos.11, 31, 43, 44, 48 and 50 are still in employment, and have individually signed notices of disclaimer on 27th March 2000 (R.Apps.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.Apps.22 – 40). Therefore, the names of the said 16 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, 38, 40, 41, 42, 47 and 53 have, after their respective contracts had expired, either been re-employed or terminated for breach of their contracts of employment, while the contracts of other grievants expired long before 28th February 1996. Thus, out of the 53 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 have not made out any case for the alleged mass dismissal of the grievants, and are, therefore, estopped from representing them because they were not members thereof.

As regards the allegation that the Company were 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 a forgery and none 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 lapsed on completion of the specific work or project at hand, and as such there was no *en masse* or *en block* and systemactic 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.226, 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, leave alone 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 *en masse* or *en block;* that there was no binding recognition agreement and collective agreement between the Union and the Association or the Company; that were the Company were able to secure new contracts, some of the grievants were re-deployed in new 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 economical to engage contract labour for the duration of a particular project or contract. Therefore, the Union's case, he said, was tainted with malice, lacked merit and merely calculated to embarrass 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 in toto.

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 that work on diverse dates and their services became redundant and were, therefore, terminated. In fact, a sample of the common letter of appointment fortifies this finding. It reads: "RE: APPOINTMENT – SHORT TERM ENGAGEMENTMENT CONTRACT". The grievants were employed for specific jobs and specific periods and the cessation of the work for which they were employed in the normal course or by lapse of time did not amount to dismissal or redundancy. The *ILO Recommendation No.119* on Termination of Employment advised that contracts should be terminated only if there was a valid reason related to the conduct or capacity of the employee, or the operational requirements of the business. This, broadly speaking, is the requirement or principle underlying the law of unfair dismissal, although its implementation is by no means simple. However, the *ILO Recommendation* accepted 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 desired 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 these 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 at hand. 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 fresh 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 employer 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 remuneration or contract system or monthly salary, and they may be presumed to know how the work could be performed most conveniently, beneficially 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 respect 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 this decision.

DATED and delivered at Nairobi this 7th day of November, 2002.

Charles P. Chemmuttut,

JUDGE.