



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B.M. KARIUKI, MWILU & KANTAI, J.J.A)**

**CIVIL APPEAL NO. 10 OF 2008**

**BETWEEN**

**RASHID ODHIAMBO ALLOGOH & 245 OTHERS.....APPELLANT**

**AND**

**HACO INDUSTRIES LIMITED..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Honourable Mr. Justice Alnashir Visram as he then was) dated 19<sup>th</sup> March, 2007)*

in

**High Court Misc. Application No. 1520 Of 1999**

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**JUDGMENT OF THE COURT**

1. This is an appeal against the judgment and decree of the High Court of Kenya at Nairobi issued on 19<sup>th</sup> March, 2007 by Justice Alnashir Visram (as he then was) dismissing the claim by Rashid Odhiambo Allogoh and 245 others, (hereinafter referred to as “**the appellants**”) against Haco Industries Limited, (hereinafter referred to as “**the respondent.**”)
2. Through an Originating Motion the appellants sought to enforce fundamental rights and freedoms under **section 84(1) and (6)** of the retired Constitution and in particular alleged the breach by the respondent of **sections 73** (right not to be held in slavery or servitude), **74** (right not to be subjected to inhuman treatment) and **80** (right to associate). The appellants further sought declarations that the respondent had breached provisions of the Employment Act Cap.226 of the Laws of Kenya and the Regulation of Wages and Conditions of Employment Act.Cap. 229 as set out in the notice of motion. We however point out at this early juncture that no particular provisions of the statutes were set out in the Originating Motion breach of which the appellants sought the court’s declaration on.
3. The motion was supported by affidavits of the first appellant **Rashid Odhiambo Allogoh**. The grounds upon which the application was premised were that the appellants had worked for the respondent for periods of time ranging from 2 to 17 years without being issued with letters of appointment and/or being paid decent wages by the respondent. Further, the respondent denied the appellants the right to earn a decent wage and to enjoy other minimum terms and conditions thus held

them in slavery and servitude. Denial of letters of appointment hindered the appellants from joining a trade union or forming one of their own hence a violation of their fundamental right of association, it was claimed by the appellants.

4. The respondent opposed the motion by filing grounds of opposition and replying affidavit sworn by **Peter Kimani**, the respondent's Human Resource Manager. The respondent contends that the appellants were casual workers engaged on a daily basis and paid weekly or sometimes at the end of two weeks, including wages for overtime and that no amounts were due to the appellants. In essence, the respondent denies violating any provisions of statute or the constitution.

5. On the directions of the duty judge who heard the motion at the first instance, the matter was referred to the then Chief Justice Hon. B. Chunga who found that the case raised constitutional issues and directed that the matter be heard by two judges - Honourable Justices Onyango Otieno J and Mbogholi Msagha J. The learned judges dismissed the application through their judgment dated 6<sup>th</sup> December 2000 on the basis that the appellants had other recourse under statute. The dismissal prompted an appeal to this court vide Civil Appeal Number 110 of 2001. That appeal was allowed by this court through its judgment dated 2<sup>nd</sup> July 2004. By order of this court as it was then constituted, the motion was to be heard *de novo* by the High Court and directions given as to how the motion was to be determined.

6. The motion was thus heard by Justice Alnashir Visram (as he then was) whereupon the appellant relied on three affidavits sworn by the 1<sup>st</sup> Appellant **Rashid Allogoh**, affidavits sworn by **Elizabeth Wangu Maina**, **Doreen Auma Okello**, **Janet Bangweso Onyancha**, **Yunuke Kemunto Okemwa**, **Stella Wanza Mwatu** and **John Mulwa Kitheka** and the oral testimony by **Maurice Samba Wamboga**, **John Mulwa Kitheka**, **Fransisca Mbula Wambu** and **Joseph Njenga Gakuru**. The respondent still relied on the affidavit of **Peter Kimani**.

7. The trial judge considered the pleadings, oral testimony, written submissions and the annexures thereto and made a finding that the appellants were employed as casual workers and that the respondent had paid all their due salaries and wages including payment for overtime. The learned judge also made a finding that the appellants' fundamental rights under **sections 73, 74 and 80** had not been violated thereby dismissed the appellants' originating motion.

8. The appellants being aggrieved by the judgment of the High Court preferred this appeal. The appeal proceeded by way of written submissions with highlighting by the respective learned counsel for the parties. The appellants were represented by **Mr. A. Ndambiri**, advocate, while the respondent was represented by **Mr. E. Wetangula**, advocate. Respective counsel also filed their list of authorities to buttress their arguments. We have considered all these.

9. From the memorandum of appeal, the appellants raised nineteen grounds of appeal which were reduced to five in the appellants' submissions as filed and highlighted through their counsel. These are:-

- *Whether the appellants were casual workers for the periods they worked for the respondent.*
- *Whether, by holding, treating and engaging the appellants as casual workers for periods of time ranging from two to seventeen years, the respondent violated the appellants' fundamental rights not to be subjected to inhuman and degrading treatment.*
- *Whether the appellants' fundamental right to associate was violated by the respondent's refusal to provide them with letters of appointment.*
- *Whether the appellants were held in slavery and servitude*
- *Whether the appellants are entitled to payment of their salaries and wages earned but not paid by the respondent.*

The respondents on their part raised the following three issues:

- ***Were the appellants casual employees?***
- ***Did the respondent subject the appellants to inhuman treatment, slavery and servitude?***
- ***Did the respondent violate the appellants' freedom of association?***

10. Bearing in mind the nature of the claim from which the appeal arises we see that the following as the main issues for our determination:-

- ***Whether the appellants were casual employees***
- ***Whether the appellants were subjected to inhuman treatment, slavery and servitude by the respondent in violation of sections 73 and 74 of the retired Constitution***
- ***Whether the appellants' freedom of association as enshrined in section 80 of the repealed constitution was violated.***

Related to the main issue is the nature of the working relationship between the appellants and the respondent leading to the institution of the claim at the High Court in the first instance. We shall be commenting on these issues in the course of our judgment on the main issues we have set above.

11. This being a first appeal and the duty of the first appellate court having been succinctly summarized by the East Africa Court of Appeal in **SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123, 126** as follows:

***“Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally,”***

12. At the outset, we wish to point out the context within which we have to make our determination in this appeal. The grievances complained of arose sometimes around the year 1999 when the originating motion was filed. The case was determined and the judgment that has been appealed from was delivered in March 2007. As at that time, the applicable Constitution, the Employment Act and Regulation of Wages and Conditions of Employment Act were not as elaborate as they presently are following respective repeal and promulgation. It is as a result of the inadequacy of the provisions of the above laws that there was need for their repeal and improvement. Had the situation leading to this appeal occurred more recently, the courts would perhaps reach different outcomes on the facts.

13. Our consideration of the issue whether the appellants were casual employees, there is no dispute by parties that there was no letter of appointment issued to the appellants. The respondent contends that the appellants were casual employees while the appellants hold the contrary view. **Section 2** of the repealed Employment Act defined a casual employee to mean 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. The period prior to the enactment of the Employment Act 2007 is aptly captured in **SILAS MUTWIRI V HAGGAI MULTI-CARGO HANDLING SERVICES LIMITED [2013]EKL** thus:

***“The Employment Act, 2007 has now created a fundamental shift from the previous Employment Act, Cap 226 with regard to who a casual employee is. This followed many***

*decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status.”*

14. With the enactment of the Employment Act 2007, considerable attention is paid to provisions of **section 37** thereof which provides for conversion of casual service to permanent employment. In particular, **subsection 37(5)** provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners’ case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee. The Employment and Labour Relations Court has not hesitated to infer permanence in erstwhile casual service under the above provision. See **PETER WAMBUGU KARIUKI AND 16 OTHERS V KENYA AGRICULTURAL RESEARCH INSTITUTE[2013] eKLR and SAMWEL OKINDA APONGA & ANOTHER V MATCH MASTER LIMITED [2015] eKLR.** The Employment and Labour Relations court has in the wake of the Employment Act 2007 nevertheless appreciated that failure to pay wages at the end of the day does not by itself remove one from the ambit of a casual worker. For instance, Justice Abuodha in **JOSPHAT NJUGUNA V HIGH RISE SELF GROUP [2014] eKLR** held that:

*“It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.*

...

*The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.”*

The learned Judge of the Employment and Labour Relations court went ahead to coin the term “a monthly casual worker” as an exception to the casual worker contemplated under section 2 of the Employment Act. This casual worker “*sui generis*” therefore enjoys the protection accorded to regular or permanent employees by **section 35(1)(c)** of the Act. However, since the issue of termination of employment has not arisen in the proceedings before us, we can only comment that the continuous service by the appellants would have been relevant if the appellant’s termination from employment was in issue. We therefore, with a lot of empathy, find that the appellants were casual workers within the prevailing laws despite the mode of payment and continuous service with the respondent. This is more so in the wake of lack of provisions similar to section 37(1) in the repealed Employment Act.

15. Turning to the next issue of whether the appellants were subjected to inhuman treatment, slavery and servitude by the respondent in violation of **sections 73 and 74 of the retired Constitution**, we note that the appellants’ argument is that the violation resulted from their being treated and engaged as casuals for a long period of time ranging from two to seventeen years. Further, the appellants argue that they were held to servitude and slavery by being paid less than decent wages and not well remunerated for overtime, not forgetting the appellants’ non enjoyment of other full benefits as enjoyed by other permanent employees of the respondent. On this, the trial judge found that the existing employment relationship was on a voluntary basis and that there was no compulsion on the part of the appellants to continue working for the respondent. There is evidence that payments were made by the respondent to the appellants both for the wages and overtime through the signatures appended by the appellants against their pay as tabulated by the respondent. It was not brought to our attention that there was a dispute of any under-payments of the figures in issue.

16. We are mindful that employment relationships are not commercial contracts, and the Court must strive to achieve the delicate balance between the need for our national economic development, and the protection of the dignity and economic well-being of an individual employee. The law presumes that an employee is paid for actual work rendered which is determined at the commencement of the work from the parties negotiations. (See **JOHN BENSON GITHINJI V ATTORNEY GENERAL & 4 OTHERS [2014] eKLR**). We have also perused the record and heard from the appellant on their workings on how they were underpaid in relation to the provisions of the now repealed Regulation of Wages and Conditions of Employment Act Cap. 229 but did not make much progress. We note that the appellants neither quoted any provisions of the said Act nor led evidence to compare the said statute with what they were actually paid. The appellants merely annexed the collective bargaining agreement in the pleadings, placed extracts of the said statute under their list of authorities and made a blanket allegation of breach. With respect, we expected the appellants to be more specific in this respect and not to send the court into a fishing expedition on their behalf. It is trite law that the onus to prove a fact and discharge the evidentiary burden is on he who alleges, in this case, the appellants. In the absence of such proof, the claim remains an allegation and fails.

17. Both parties seem to be in agreement as to what amounts to inhuman treatment, slavery and servitude in the modern context. The point of departure is whether the appellants have demonstrated any violations that reach the threshold of a Constitutional breach. Having found that the appellants were casual workers within the prevailing laws, the conduct of the respondent towards the appellants has not been found to be beyond the statutes governing employment relationship even before considering the conduct against the constitutional provisions. From the foregoing, we are not persuaded to depart from the finding by the High Court judge that the appellants' rights under **sections 73 and 74** of the Constitution were never violated. We therefore agree with the trial judge that there was no violation of **sections 73 and 74** of the Constitution by the respondent.

18. On whether the appellants' freedom of association as enshrined in section 80 of the retired Constitution was violated, the appellants' contention is premised on their inability to join or form a trade union mainly owing to their lack of an employment letter issued by the respondent. In considering this issue, it is vital to appreciate the antagonistic challenges this court and other relevant institutions are likely to face towards the realization of the right to fair labour practices. These challenges include as difficult policy considerations that inform decision making in determining disputes relating to fairness in employment and labour relations and prescribing appropriate remedies. (see **PETER WAMBUGU KARIUKI AND 16 OTHERS V KENYA AGRICULTURAL RESEARCH INSTITUTE [2013] eKLR**) In that regard, two dilemmas have emerged for which it is not easy to envision the evolution of employment and labour relations and the role of the law in that evolution. The dilemmas have been expressed in the following terms:

*“...These are first whether to promote collective labour relations founded on effective bargaining which can only be based on strong trade unions, or whether to encourage the progressive dilution of „bargaining? in favour of the more ambiguous „information and consultation standards?...The second dilemma is to determine the extent to which it is legitimate to qualify management prerogatives, which some employers would like to exercise subject to little or no restriction, by individual employment rights.”*

(See Richard Painter & Ann Holmes, **Cases and Materials on Employment Law**, Oxford University Press, (2002) 4<sup>th</sup> Edition at page 9).

On one hand some employees want to bargain collectively through trade unions whilst others wish to enjoy their individual freedom to contract with their employers. Whether unionisable or not, an employee is still afforded the legal protection under the labour laws and the Constitution. It is in furtherance of this protection that the appellants had the recourse to the court as they did notwithstanding their lack of membership of a trade union. Similarly, the appellants had the legal option of instituting proceedings to enforce their right to join or form a trade union under the Constitution just the same way they filed the proceedings in the High Court.

19. Without belabouring the point any further, we agree with the trial judge that the question of formation or joining a trade union is something that was beyond the exclusive control of the respondent. The union members did not make any aggressive attempt to recruit the appellants. Moreover, having found that the appellants were legally casual workers within the law, we find that the respondent did not violate the appellants' right to associate under section 80 of the constitution.

20. In conclusion, we would state that the issues raised before us for consideration pertaining to the employment relationship are what are now generally known as "fair labour practices". These practices have gained description protection not only under the labour law statutes but also gained constitutional protection under **Article 41** of the Constitution of Kenya 2010. This follows a progressive realization that workers especially those at the lower level that continued to face abuse and difficulties in their conditions which was well exploited by employers taking advantage of the unemployment in the country. The courts are increasingly appreciating the need to balance the need for economic development and concerns for social justice as espoused under the Constitution 2010 of Kenya. Unfortunately, in the struggle to improve the situation there had to be martyrs to bear the brunt of the otherwise repressive laws that would not survive repugnancy to the present Constitution. The appellants herein have been caught up in the vagaries of such laws that have fortunately been since repealed. As we stated earlier, we really empathize with the appellants, just like the trial judge, for what they have gone through in the circumstances. We are mindful of the peculiar nature of employment contracts as was captured in **NJOROGE MUIGAI VS SYSTEM INTERGRATION LTD [2013]eKLR** as follows:-

*“Employer and employee interests are frequently diametrically opposed. The parties tend to make no investment in the other, beyond the immediate exchange of a shilling for labour. The dealing is at an arms’ length and the employment relationship ignores the realities of interdependence, intimacy, and mutual investment of work.”*

21. The upshot is that this appeal is dismissed as lacking merit. On the issue of costs, we note that the appellants believed their constitutional rights were violated by their employer. We do not consider them vexatious litigants and the proper order is that each party shall bear their own costs.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of September,2015.**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**