



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO E006 OF 2020

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VS

KENYA GENERAL INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In its Memorandum of Claim dated 6th October 2020 and filed in court on 9th October 2020, the Claimant cites the issues in dispute as *'confirmation of all long serving fixed term employees to permanent and pensionable terms, victimization of Claimant's members on account of trade union activities/affiliation and or unprocedural outsourcing to replace the Claimant's members.'*
2. The Claimant states that the parties have a valid Recognition Agreement and have negotiated various Collective Bargaining Agreements (CBAs), the last one having been signed on 16th November 2018.
3. The Claimant further states that all the unionisable employees of the Respondent are its members who contribute union dues on a monthly basis.
4. The Claimant adds that out of the Respondent's unionisable workforce, only 3 employees are deemed to be permanent, while 35 are termed as casuals and/or on continuous fixed term contracts.
5. The Claimant avers that at the time of negotiating the current CBA, the Respondent had 59 unionisable employees in its workforce but due to the current dispute, 23 of them had been terminated.
6. According to the Claimant, the parties' CBA only provides for casual, probation and permanent employment and not continuous fixed term contracts, which the Claimant terms as illegal.
7. The Claimant accuses the Respondent of breaching Article 41 of the Constitution on fair labour practices as well as Section 37 of the Employment Act.
8. The Claimant's prayers are as follows:
 - a) A declaration that the continuous fixed term contracts issued by the Respondent are in violation of the parties' CBA and therefore null and void;
 - b) An order compelling the Respondent to confirm all the 34 employees, as per Appendix 3 of the Memorandum of Claim, to permanent and pensionable terms backdated to date of first engagement;
 - c) In the alternative, an order directing the Respondent to pay the said employees their service gratuity and/or severance pay for all the years they have been in employment before engagement on permanent and pensionable terms;
 - d) Reinstatement of the terminated employees without loss of benefits and in the alternative, payment of their service gratuity in line with the parties' CBA plus 12 months' salary in compensation for unlawful, unfair and unprocedural termination;
 - e) Costs of the suit.

The Respondent's Case

9. In its Memorandum of Response dated 4th August 2021 and filed in court on 5th August 2021, the Respondent states that the parties in the employment relationship maintained fixed term contracts and there was no violation of the law.

10. The Respondent further states that due to economic hardships brought about by the Covid-19 Pandemic, it was unable to commit to different terms of employment.

11. The Respondent adds that it would be impracticable to restrain it from outsourcing the required services, which is a cheaper and more economic option.

12. The Respondent takes the position that it reserves a business and managerial prerogative to make decisions regarding its business strategy to stay afloat.

13. The Respondent denies breaching Article 41 of the Constitution or Section 37 of the Employment Act.

14. The Respondent further denies declaring any employees redundant and states that non-renewal of fixed term contracts does not translate to declaration of redundancy.

15. The Respondent states that it bears no obligation to renew any fixed term contract and adds that fixed term contracts carry no rights, obligations or expectations beyond the date of expiry.

16. The Respondent avers that the Claimant Union has not demonstrated that the Respondent has failed to apply the terms of the CBA.

Findings and Determination

17. At paragraph 11 of the ruling on the interlocutory application filed by the Claimant alongside the Memorandum of Claim I stated the following:

“Looking at the Claimant’s application and the Respondent’s response, it is evident that the issues which the Court is called upon to determine are convoluted matters of fact requiring viva voce evidence.”

18. Despite this clear pronouncement by the Court, the Claimant still chose not to call any testimony in support of its claim and instead opted to file written submissions.

19. By its Memorandum of Claim, the Claimant seeks a wide range of remedies being, conversion of fixed term contracts to permanent and pensionable terms; payment of service gratuity and/or severance pay; reinstatement and compensation for unlawful termination.

20. After setting out these elaborate prayers, the Claimant needed to call evidence in support of each one of them. Specifically, the Claimant needed to demonstrate that the fixed term contracts were indeed contrary to the parties’ CBA, establish the basis for the claim for service gratuity and/or severance pay and lay a case for unlawful termination of employment.

21. These are matters of fact that could only be proved by hard evidence not general statements or submissions.

22. On the whole, I find and hold that the Claimant failed to prove its entire claim which therefore fails and is disallowed.

23. Each party will bear its own costs.

24. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OCTOBER 2021

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JUDGE

Appearance:

Mr. Makale for the Claimant

Mr. Onyony for the Respondent