REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2199 OF 2015

PETER KARANJA NDUNGU.....1ST CLAIMANT

JOHN WAWERU N.....2ND CLAIMANT

CARLOS NGEREZA A.....3RD CLAIMANT

JOHN MUSYOKA W.....4TH CLAIMANT

STEPHEN MATHENGE C.....5TH CLAIMANT

RUBEN MWANGI M.....6TH CLAIMANT

JOEL WAINAINA N.....7TH CLAIMANT

MOSES ONYANGO.....8TH CLAIMANT

DISMAS KARIUKI.....9TH CLAIMANT

MORRIS OCHOLA.....10TH CLAIMANT

AMBROSE MUTAMBUKI.....11TH CLAIMANT

BONFACE MUTISYA M.....12TH CLAIMANT

ASBORN WAFULA O.....13TH CLAIMANT

PETER MANYWARI.....14TH CLAIMANT

PATRICK WAKABI M.....15TH CLAIMANT

KEPHA NGUGI.....16TH CLAIMANT

JOHN NDEGWA M.....17TH CLAIMANT

ROBERT MWANGI W.....18TH CLAIMANT

ERNEST ODEYA O.....19TH CLAIMANT

LEONARD KISINGU N.....20TH CLAIMANT

THOMAS KASOA.....21ST CLAIMANT

BONFACE KINUTHIA M.....22ND CLAIMANT

KELVIN OMONDI O.....23RD CLAIMANT

DANIEL KIMEU.....24TH CLAIMANT

SILAS MANANI.....25TH CLAIMANT

NASHON OTALO.....26TH CLAIMANT

KENNEDY OMONDI O.....27TH CLAIMANT

JOSEPH MUKOYANI J.....28TH CLAIMANT

SHADRACK OPONDO.....29TH CLAIMANT

SILVESTER OWINO.....30TH CLAIMANT

VINCENT MWABISHI.....31ST CLAIMANT

JAMES KANGETHE.....32ND CLAIMANT

ISAAC KIVINDYO.....33RD CLAIMANT

PETER MUINGAI KABERIA.....34TH CLAIMANT

BERNARD MUKOSI.....35TH CLAIMANT

DAVID OPIYO O.....36TH CLAIMANT

-VERSUS-

BIDCO OIL REFINERIES LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th June, 2020)

JUDGMENT

The claimants filed the memorandum of claim on 20.11.2015 through Rakoro & Company Advocates. The claimants prayed for judgment against the respondent for:

a. A declaration that the continued renewal of term contract by the respondent between 1991 and 2015 constituted permanent and continuous engagement of employment.

b. A declaration that the termination of the claimants on 13.05.2015 was unfair and unlawful.

c. An order compelling the respondent to pay the claimants terminal benefits amounting to Kshs.7, 865, 777.00.

d. The respondent to pay the costs of the claim and interest.

e. Certificate of service to be issued to each claimant.

The claimants' case as pleaded is as follows. By contracts entered on diverse dates between 1991 and 2012 respectively, the respondent employed the claimants and the claimants worked for the respondent on shift system and continuously. From January 2015 the claimants were put on written contracts but they were not given copies of the contracts but they had been in continuous service prior to signing of the contracts. Each was promoted and their salaries had increased over time. In January 2015 the claimants discussed with the respondent about their benefits for years worked variously between 1991 and 2012. That was prior to the signing of the written contracts. The respondent promised to pay them service charge, house allowance, leave allowance, and travelling allowance but by March 2015 had not yet fully satisfied the claimants who raised the grievances with the respondent and the respondent promised to pay them the benefits by May 2015. The claimants were stopped from work on 13.05.2015 because they were accused of participating in unlawful strike and gross misconduct at the respondent's premises on the said date.

The claimants' further case is as follows. They reported the issue to their Kenya Chemical and Allied Workers Union and the Labour Officer

stating that the respondent's allegations were false but the respondent refused to allow the claimants back to work even after speaking to the union officials or Labour Officer. On 14.05.2015 the claimants reported at work but they were locked out and their Advocate issued the demand letter dated 19.05.2015 in that regard. The respondent's Advocate replied by the letter dated 25.05.2015 and forwarded the show-cause letters dated 19.05.2015. The claimants replied the show-cause letters by the claimant's Advocate's letter dated 08.06.2015. The claimants were invited to disciplinary hearing by the letters dated 13.07.2015 as forwarded through their Advocate by the respondent's letter dated 20.07.2015. Some claimants attended the disciplinary hearing as was scheduled while others did not attend. The respondent subsequently terminated the claimants' employment on 18.08.2015. The claimants' case is that their stopping from work on 13.05.2015 and their eventual summary dismissal on 13.08.2015 was illegal, unfair and quite unlawful because the respondent did not follow the law, the parties' collective bargaining agreement (CBA) and the rules of natural justice. The claimants were locked out and stopped from work without notice and valid reason on 13.05.2015. They were dismissed summarily from work on 13.08.2015 without any reasonable cause, without payment of their full terminal benefits for the period they worked for the respondent (variously) between 1991 and 2015. Further the claimants worked continuously for the respondent and as such by the operation of the law from June 2008 were deemed to be permanent employees and not casual workers as alleged by the respondent and the Court should convert their employment from casual to permanent terms as contemplated under section 37 of the Employment Act, 2007.

The claimants claim the amount of money particularized in paragraph 19 of the memorandum of claim upon the headings of one month pay in lieu of the termination notice; leave arrears; service pay; one week unpaid in April 2015; and 12 months' pay in compensation.

The respondent by the notice of appointment filed on 11.01.2016 appointed Oraro & Company Advocates to act in the suit and G. Ogalo-Omondi Advocate appeared in that behalf. The respondent filed on 24.03.2016 the memorandum of reply. The respondent denied the claimants' alleged dates of appointment but admitted that it employed the claimants as casual workers. The respondent's further case is as follows:

a. On 10.03.2015 the claimants went on unprotected strike without giving any notice to the respondent, stopped all production operations and issued threats and warning to other workers not to report at their workstations. By the letter dated 16.03.2015 the respondent reported the unprotected strike to the District Labour Officer.

b. The claimants again went on unprotected strike on 24.03.2015 and on 27.04.2015 and each time the respondent heard their grievances and responded to them both verbally and written resulting in the claimants returning to their work stations. During the various unprotected strikes, the respondent incurred huge losses in production and shut down of operations.

c. By the internal memo dated 16.04.2015 the respondent comprehensively responded to the claimants' grievances which were about house allowance; service pay; reducing working hours; reducing casual workers to manageable numbers; and leave pay. The respondent particularly stated as follows:

i. The respondent complied with gazette Regulation of Wages Order, 2013. The daily wage was paid inclusive of house allowance (i.e. the minimum daily wage is paid inclusive of house allowance) and it was Kshs.432.40.

ii. As per section 35 of the Employment Act, 2007 the claimants were not entitled to service pay because with respect to all claimants the respondent had made the relevant contributions to National Social Security Fund (NSSF).

iii. On working hours, the respondent had run two shifts for many years but had reviewed the daily shift operations and had decided to implement a three shift system within the month of May, 2015 and the exact date was being worked out.

iv. The management was in the process of reviewing the number of casual workers in order to improve processes and enhance happy healthy living amongst workers.

v. Leave pay shall be paid as provided for under the Employment Act, 2007. The amount would be transferred to the claimants' respective bank accounts on 23.04.2015.

d. Having responded to the grievances, the claimants had no reason to go on further unprotected strikes. However, on 13.05.2015 the claimants participated in unprotected or unlawful strike stopping all the respondent's machines and productions in the Packing Department, Internal Material Management Department, and Soap Department. The claimants mobilized a group of 73 workers to strike. They went on unprotected strike and failed or neglected to return to their respective workstations despite lawful order or directive to return to work by the respondent. Thereafter the claimants absented themselves from their places of work together with assigned duties and committed acts of breach and lawlessness in the respondent's premises. The respondent issued show cause letters dated 19.05.2015 setting out the particulars of allegations and which were the reasons for termination per the respective letters of summary dismissal.

e. The claimants replied to the show cause notices, they were invited to disciplinary hearing, the claimants' Advocate wrote the letter dated 20.08.2015 following up on the disciplinary hearing, some claimants opted not to attend disciplinary hearing, and each was subsequently terminated by letter of summary dismissal dated 13.08.2013. The dismissal was upon the grounds in the show-cause letter namely:

i. Participation in an unprotected or unlawful strike on 13.05.2015.

ii. Absenting themselves from the workplace or assigned duties.

iii. Unlawfully forcing other employees to participate in the unprotected strike.

iv. Failing to adhere to the setout grievance procedure under the CBA.

v. Failure or refusal to obey lawful and proper command by stopping production and refusal to obey the instructions to return to their places of work and perform work which had been allocated to them to perform.

f. The respondent denied that the claimant was entitled to the claims and prayers made. The respondent prayed that the statement of claim be dismissed with costs.

The claimants' witness (CW) was the 1st claimant, Peter Karanja Ndungu. The respondent's witness (RW) was Zipporah Mburu, the respondent's Human Resource Officer at all material times.

The Court has considered all the material on record as well as the submissions filed for the parties and determines the matters in issue as follows:

First, there is no dispute that the parties were in a contract of service. The respondent employed the claimants in what parties called casual employment. The claimants were paid on weekly basis at an accumulated daily rate. The dispute is whether the casual employment converted to one subject to minimum terms and conditions of service under the Employment Act, 2007 as per section 37 of the Act and which states, **" (1) Notwithstanding any provisions of this Act, where a casual employee— (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service. (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days. (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more 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 this Act had he not initially been employed as a casual employee. (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act. (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.**"

The Court has considered the evidence. By the internal memo dated 16.04.2015 the respondent accepted to pay for leave per the provisions of the Employment Act, 2007. Section 28 of the Act prescribes that annual leave accrues after working for an aggregate period of 12 months. The evidence is that each of the claimants was subsequently paid the leave allowance on 23.04.2015. The Court returns that by that evidence each claimant had served an aggregate term of over 12 months. Within the provisions of section 37 of the Act, the Court returns that the casual service had converted to term contract subject to the minimum terms of service under the Act. In any event RW testified thus, "**They worked 5 days per week. Is 20 days per month. It was for the whole year without a break. Leave allowance was paid per Labour Office advisory. It was aggregated. 3 years was paid. We paid 3 years back (2012, 2013, 2014). It was prior to termination. It was the grievance. They said they did not understand the tabulation**." The Court finds that the claimants worked for the respondent for a long time without a break and obviously in aggregate for more than the 3 months envisaged in section 37 of the Act. The work performed lasted for more than 3 months and despite the termination, the work was available and continuing to be available.

Second, the Court returns that the termination of the claimants' employment by way of the respective letters of summary dismissal was not unfair or unlawful in substance or procedure. Each claimant was served with a show-cause notice through their Advocate; each replied through the Advocate; each was given chance to attend the disciplinary hearing and subsequently the letter of summary dismissal issued. The Court returns that the due process of a notice and hearing as per section 41 of the Act was complied with.

It was submitted for the claimants that the respondent ought to have issued 1st and 2nd warnings per clause 17 of the CBA. However, the Court finds that the clause is clear that it applied to cases other than where, in the respondent's opinion, the employee had engaged in a misconduct or unsatisfactory performance that did not warrant a termination or summary dismissal, and, a warning in writing could issue by way of the warning letters. In the instant case, the evidence was that the respondent had formed an opinion that the misconduct alleged against the claimants would lead to summary dismissal and the Court finds that therefore, the warning regime as per the CBA did not apply in terms of the parties' own agreement.

The claimants further urged and it was submitted for them that the invitation to attend disciplinary hearing was short. The Court considers that the claimants were represented by Advocate throughout the process, the Advocate received the invitations but never raised with the respondent the issue that the time allowed was too short for some of the claimants to attend. The Court therefore finds that the line of such argument is an afterthought. RW while testifying that 4 out of 73 affected employees attended the hearing, she also testified that she did not know how many of the employees actually attended. Those of the claimants who may not have been accorded enough time to attend did not move such evidence including the evidence that indeed they informed the respondent, for instance, to increase the time allowed. Thus, the Court finds that the disciplinary procedure as invoked by the respondent in that regard will not be faulted on that account alone especially that the claimants had an Advocate but never raised such a complaint or objection during the disciplinary proceedings.

The Court has considered the evidence on the reasons for termination. CW testified thus, "**On 13.05.2015 forty (40) of us congregated outside Zipporah's office. Shop steward was absent. He was not in our shift. Leave allowance was paid on 23.04.2015 on our accounts. Prior to that there was no tabulation on the amount. I was given Kshs. 16,000.00. I was paid at bank on a date I do not recall. Main reason we wanted Zipporah to address us was to give breakdown on leave paid…**." CW testified that they resumed work thereafter but their supervisor called them out and the security personnel lead them out of the respondent's premises and the following day

they were locked out. RW testified thus, "**On 13.05.2015 the claimants reported. At 8.00am they stopped machines and came to Human Resource Department. We spoke to them. They raised grievances that were being addressed from previous strikes and grievances. They were a group of 73 out of 1100 workers. They refused to resume work. It became a security issue. Security personnel were called in. They never reported to work after 13.05.2015. They were escorted out of the compound. Those were the events.**"

The evidence is clear and it is common ground that on 13.05.2015 the claimants left their respective duty stations and went to Zipporah's office to present grievances. For that break in service delivery, it is clear to the Court that the respondent was entitled to lament that the claimants shut down the machines and production suffered. Were the claimants entitled to present grievances in the manner they did on that morning? Clause 18 of the CBA in force as exhibited for the claimants is clear. Step1 in grievance handling provides that the employee or group of employees shall present the alleged grievance either verbally or in writing to their immediate supervisor. There was no evidence that the claimants complied with that first step in their main grievance that morning and being the demanded breakdown of the pay in lieu of annual leave they had each received at their bank accounts. CW testified that the only time they interacted with their supervisor was when they were called out by the supervisor and told to leave. Step 2 in grievance handling is that if the supervisor fails to resolve the grievance satisfactorily in 2 days, the employee or group of employees may submit the alleged grievance through the shop steward to the complainant's Team Leader. Step 3 is that if not satisfactorily resolved in 3 days, the complainant may submit the alleged grievance through the shop steward to the Human Resource Department of the Company who will convene a grievance resolution committee within 3 days. CW testified that on that material morning the shop steward was absent. The Court finds that the claimants failed to comply with the grievance management procedures and in the processes adversely shut down the respondent's machines, unfairly stopped work and must have occasioned the respondent serious losses as alleged, claimed and submitted for the respondent. The Court finds that the respondent has established the root cause of the dismissal, it was genuine or valid as at the time of termination as per section 43 of the Act, and it related to the claimants' capacity and conduct as per section 45 of the Act.

Thus the Court returns that the termination was not unfair in procedure and substance. While making that finding the Court has further considered that the respondent had acted fairly and responsibly towards amicably resolving the claimants' grievances and the claimants action of stopping respondent's machines and operations to go to Zipporah's office on the material morning was irresponsible as it breached the grievance management procedures as had been agreed upon between the parties.

While making that finding the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus, **"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."**

The Court finds that in the instant case, the parties had agreed upon a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The respondent and the claimants had clearly subjected themselves to that procedure and within the procedure, the respondent had taken steps towards amicable resolution of the grievances. Nevertheless, on the material morning, the evidence is that the claimants suddenly and without reasonable excuse or justifiable cause abandoned their respective work stations and confronted the respondent's Human Resource Department and Officer in total breach of the agreed grievance management procedure. The Court holds that where a genuine grievance management procedure is in place and the employer has by all indications been willing to implement or abide by that procedure, it is not open for the employee to disregard the procedure and abandon work or thereby affect the employer adversely and as it occurred in the present case.

Third, are the claimants entitled to the remedies as prayed for? The Court makes findings as follows:

1. As the summary dismissal was not unfair or unlawful, the claimants have failed to establish a case for compensation in terms of section 49 of the Act. Similarly, the Court finds that in view of the gross misconduct, the respondent was entitled to dismiss with a shorter notice than was agreed upon per section 44 of the Act and the claim for one month pay in lieu of termination notice will crumble.

2. As submitted and urged for the respondent, the respondent made the NSSF contributions and the claim and prayer for service pay or gratuity will fail per section 35 of the Act. The claim as based on clause 16 of the CBA will not succeed in view of the summary dismissal and the terms of that clause. The clause provides that an employee who is retired by the respondent including retirement on medical grounds or terminated by the respondent or resigns from the respondent will be entitled to the pension benefits earned by the employee during his or her employment period. The claimants earned pension benefits by way of contributions to the NSSF and the respondent has confirmed they are entitled accordingly. The Court therefore finds that clause 16 of the CBA has been complied with and been fully satisfied by the respondent and the claimants are not entitled to any further claims under the clause.

3. CW testified that the respondent paid leave arrears but provided no breakdown or pay slip. As submitted for the respondent, no evidence was provided by the claimants to justify the claims for leave arrears as claimed. On a balance of probability, the Court returns that pay in lieu of annual leave was effected per CW's evidence and no evidence has been provided to justify the present further claims in that regard.

4. Each claimant prays for **Kshs.3, 765.00** for one week worked and not paid in April 2015. RW testified that the leave arrears were paid. RW offered no evidence of payment of the amount as claimed. In absence of any other material on record, on a balance of probability, the Court returns that the claimants are entitled as claimed.

5. The Court finds that the claimants are each entitled to a certificate of service per section 51 of the Employment Act, 2007.

6. Looking at the parties margins of success, the respondent will pay 50% of the claimants' costs of the suit.

In conclusion judgment is hereby entered for the claimants against the respondents for:

1. Payment by the respondent to each of the claimants a sum of **Kshs.3, 765.00** by 01.08.2020 failing interest to be payable thereon at Court rates from the date of filing the suit until full payment.

2. The respondent to deliver to each claimant a certificate of service within 30 days from the date of this judgment and per section 51 of the Employment Act, 2007.

3. The respondent to pay 50% of the claimants' costs of the suit.

4. In view of the prevailing Covid 19 situation, there be stay of execution until 01.08.2020.

Signed, dated and **delivered** in court at **Nairobi** this **Friday, 12th June, 2020.**

BYRAM ONGAYA

JUDGE