REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1464 OF 2016

(*Before Hon. Lady Justice Maureen Onyango)*

JULIUS ARISI AND 90 OTHERS…..…….…….CLAIMANT

VERSUS

RESEARCH INTERNATIONAL EAST AFRICA LIMITED….RESPONDENT

JUDGMENT

The 1st Claimant, Julius Arisi suing for himself and on behalf of 213 others filed suit in High Court Civil Case No. 429 of 2003 by a Plaint dated 12th May, 2003. The Plaintiff alleged that the Respondent was in breach of the Employment Act and the respective contracts of employment in failing to provide various employment benefits. The Plaintiff sought judgment for specified sums for each Plaintiff for benefits claimed and a mandatory order restraining the Respondent against terminating the Plaintiff's employment.

On 20th June 2003, the Respondent applied to have the Plaintiff's suit struck out. The Application was dismissed by an order of Kariuki J on 13th October 2003. This order was set aside and substituted with an order of the Court of Appeal striking out the suit of the 2nd to 214th Plaintiffs. On 4th July 2008, 89 of the 213 plaintiff's filed a fresh suit being High Court Civil Case No. 297 of 2008. The two suits were consolidated on 13th February 2009.

The Plaintiffs in the suit were employees of the defendant at various times holding different positions as interviewers, data processors, researchers, retail auditors, human resource assistants, archivists and support staff. The Defendant on the other hand is a limited liability company offering market research services involving collecting data on behalf of clients, tabulating it and writing reports on the findings.

In April 2003, the Defendant asked its employees to sign a standard letter of employment which the Plaintiffs interpreted to be a breach of contract of employment. The majority of the employees including the Plaintiffs, refused to sign the letters and demanded to be paid terminal benefits including overtime, leave/maternity leave, medical allowance, house allowance and severance pay before they could sign the said letters. Their position was that the Defendant further breached their contract of service by failing to pay for the claimed rights during the subsistence thereof.

It is contended that on 11th April 2003, and 2nd May 2003 meetings were held at the Labour Office in Industrial Area between the Respondent's and Claimant's representatives in an attempt to resolve the dispute but no agreement was reached.

That the Respondent asked the employees to hand back the signed standard letters by 5th May 2003 which deadline was extended to 9th May 2003. That the Labour office informed the employees that those who would not have signed the letters by then would be effectively terminating their employment. The Defendant thereafter terminated the services of employees who had declined to sign the letters and insisted on payment of the benefits demanded on 12th May 2003.

Claimant's evidence

The Claimants filed witness statements in Court on 25th October 2018, setting out their respective claims. Their evidence on the facts giving rise to the suit are that they were all permanent employees of the Respondent who worked for the Respondent throughout, without any break. That they were issued with various documents by the Respondents such as payslips, job identification cards, certificates of service and termination letters.

They aver that they were supposed to work from Monday to Friday from 8 am to 5 pm, with a lunch break between 1 pm and 2 pm but due to pressure of work, they worked on Saturdays and even on Sundays and Public Holidays. They aver that on Saturdays, they were supposed to

work from 8.00 am to 1.00 pm which is an equivalent of 6 hours but they worked up to 6.00 pm or even 7.00 pm. On average, this translated to 5 hours overtime every Saturday. That every hour worked outside the working hours was treated as overtime and they were entitled to be paid at the rate of one and a half times (1.5 times) of the daily wage, which was never paid by the Respondent.

They contend that they all filled Wage Sheets for payment which were referred to as Weekly Wage Sheets kept by the Respondent who should be in a position to produce them to confirm how many hours they worked on each Saturday or on each day.

The Claimants state that they worked throughout the year including all public holidays, and there is no time they were laid off or allowed rest days. That the Respondent had clients like Kenya Breweries, Unilever, Smithkline Beecham, Eveready Kenya, Cadburys Kenya, Coca Cola Kenya and many others who provided continuous projects for the company so the term casual employees does not apply to them.

That in the year 2003, things began to change. The Respondent's new Managing Director introduced new regulations. The respondent introduced new short term contracts. A meeting was called by the Managing Director to discuss workers issues. The Respondent's CEO, Melissa Baker, wrote a letter addressed to all staff dated 28th April 2003 stating that all the years they had worked for were to be carried forward so there was no need for fear or panic. In addition, the letter stated that any accrued leave days and overtime would be paid in case an employee left the company.

That the Claimants then convened a meeting seeking to know what would happen to their past worked years. This meeting was attended by the then Human Resource Manager, Fidelis Mbagara, and Officials from the Ministry of Labour. That this is when the management decided to give them short term contracts which they declined, after which they were given termination letters on 12th May 2003. They urge the court to allow the Claim as drawn.

Respondent's Evidence

The Respondent filed a Witness Statement by one Gloria Akinyi Mwangi, the Respondent's Human Resource Business Partner for East Africa who joined the Respondent in May, 2015. She states that she had reviewed the plaintiff's employment records and was familiar with the facts giving rise to the suit.

That the Plaintiffs were hired as casual employees on a project by project basis. That from her own experience while working with the Respondent it would not have been possible to employ the Plaintiffs on a permanent basis from the nature of the work they were doing. That the computations presented to Court are done on the basis that they worked on a permanent basis which was not the case.

She further stated she was aware that there were different projects that were being undertaken by the respondent at the time the claimants were employed. Some would run for short periods such as one week while others would run for longer periods such as several months. That there was an obvious value in using experienced interviewers and editors for different projects. That interviewers were hired on a casual basis paid a daily rate but received pay on a weekly basis.

Ms Mwangi stated that at the material time the Defendant did not issue pay slips as each casual would sign against a sheet at the time of collecting their pay. The interviewers used to be paid out in the field. As such the plaintiffs were not entitled to leave, house allowance, rest days and overtime.

That between 22nd March 2003 and 1st May 2003, the casuals sent emails to several officers of the defendant from an email address **casuals@yahoo.com** which emails contained abusive language. In the said emails they threatened to negatively influence the defendant's clients to ruin the Defendant's image.

She stated that the defendant decided to issue letters in early 2003 about the same time the Plaintiffs had made a report to the Ministry of Labour in Industrial Area. That the defendant designed letters to be signed by the casual employees and made it clear to the Plaintiff's that signing the same was voluntary. Many of its employees opted not to sign.

That on 2nd and 9th May 2003, there were meetings between the Defendant and casual staff representatives before the labour officer where the labour officer confirmed that the casual staff who had been working continuously were only entitled to two benefits; leave and overtime. It was also agreed that for a casual staff to be entitled to leave he must have worked for 26 consecutive days earning him 1.75 days of leave.

With respect to overtime, it was agreed that the employees would be paid double the wage rate if they worked on a rest day or a public holiday and one and a half times the daily wage if they worked beyond working hours during weekdays. The labour officer advised the Defendant to calculate leave for 24 months and overtime for 12 months calculated backwards from May, 2003. That severance pay was not payable as the situation was not a redundancy.

The casuals were dissatisfied with the decision of the labour officer and still insisted on payment of house allowance, medical allowance, severance pay, payment for the notice period and other deductions.

That in the meeting of 2nd May 2003, the casuals were advised that the standard letter of employment signified continuous employment and would safeguard their rights and was not meant to terminate their employment. They were advised to sign the letters by 5th May failing which they would be terminated. Some employees signed and others did not prompting the Defendant to extend the deadline. Even after extension of the deadline some Casuals did not return the letters. Due to backlog of work the Defendant was forced to terminate the casuals who had not resumed work by giving them 7 days' notice and hired other staff to clear the backlog.

She stated that the 1st Plaintiff, Julius Arisi was terminated for misappropriating company funds and disobeying company procedure which

he acknowledged and the sum was deducted from his final pay.

Claimant's Submissions

It is submitted that the Claimants' were permanent employees of the Respondents by virtue of the fact that they had been in employment for periods ranging between one (1) year to twenty (20) years. That they worked continuously without breaks for the entire period of employment. That they were offered letters of employment which they were not content with as in their view they were already permanent and pensionable employees. They cite the case of ***Kenya Union of Commercial Food & Allied Workers vs Hebatulla Brothers Limited (2002) eKLR*** where it was held that 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 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.

That the demand of the Respondent requiring them to sign the short term contracts was not a reason for termination and therefore the termination was unfair. Further that the termination was unlawful as the respondent did not settle their terminal dues as required by law. They therefore pray for the claim to be allowed.

Respondent's Submissions

The Respondent submits that the nature of its work was that of market research, to conduct short term field work and data processing projects for a variety of clients. That casual workers are employed on a project by project basis. No claimant had a contract of employment with the respondent and that the Claimants were paid wages on a daily rate which was accumulated and paid on a weekly basis.

On the termination of employment, it is submitted that the same was proper and fair as the plaintiffs were given 7 days' notice and they were asked to collect their dues in respect of accrued leave and overtime from the District Labour Officer. That the Claimants on their own admission state that they refused to sign the letter of employment leading to their termination. The Respondent refers to a text from ***G.H.L. Fridman 'The Modern Law of Employment' London: Steven and Sons 1963, at page 446*** where the author outlines the relationship between an employer and the employee and states:

> ***…****The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully and if by his own act he prevents himself from doing so, the master may dismiss him. There are thus two aspects of the employee's duty under the contract of employment. He must provide a satisfactory performance of the work he has contracted to do; and he must act faithfully and in accordance with the interests of his employer."*

That the termination was done in line with section 16 of the Employment Act Cap 226 (repealed) by giving the seven days' notice. They also cite the case of ***Kenya Revenue Authority Vs Menginya Salim Murgain (2010) eKLR*** where it was held that prior to 2007 employers had no obligation to observe rules of natural justice.

As to the remedies sought it is submitted that under the Regulation of Wages Order of 2002 and 2003 a daily wage is consolidated with house allowance. That annual leave and pay in lieu thereof was paid through the District Labour Office and that even if the same was payable the same should fail for want of particulars. Overtime, rest days, public holidays and maternity leave claim should also fail for want of particulars.

It is submitted that severance pay is not payable as the Claimants were terminated for cause and were not declared redundant.

They also submit that the claims accruing before 4th July, 2002 are statute barred and should be dismissed. They pray that the entire suit be dismissed.

Determination

1. Whether the Claimants were permanent employees of the Respondent

2. Whether the terminations were wrongful and unlawful

3. Whether there was breach of contract

4. Whether the Claimants are entitled to the reliefs sought

In view of the fact that the employment of the claimants was terminated in 2006, the applicable law is the repealed Employment Act (1976). This statute did not provide for unfair termination of employment. The employer at that time did not have any obligation to comply with the requirements of natural justice and termination was at the pleasure of the employer provided he either gave notice or payment in lieu of such notice.

The plaintiff's aver that they worked for periods ranging from 1-20 years which is sufficient time for the employment to have converted to a permanent employment. Cap 226 section 2 thereof defined casual employee as a person 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. From this definition and from the evidence of both parties it is clear that the Claimants worked longer than 24 hours at a time and were thus not casuals.

The repealed Employment Act (1976) recognised the mode of payment under Section 5 as follows –

5. When wages due.

(1) In the case of a contract entered into under which entitled -

(a) when a task has not been completed, at the option of his employer to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on the completion of the task;

(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month or on the completion of the work. whichever date is the earlier.

(2) Subject to subsection (1), the times when wages shall be deemed to be due shall be as follows -

(a) in the case of a casual employee, at the end of the day;

(b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

(c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

(d) in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively :

Provided that the provisions of this section shall not affect an order or award of the Industrial Court, or an agreement between an employee and his employer the relevant terms of which are more favourable to the employee than the provisions of this section.

(3) Where an employee is summarily dismissed for lawful cause, he shall be

paid on dismissal all moneys, allowances and benefits due to him up to the date of his dismissal.

(4) Upon the termination of every contract of service -

(a) by effluxion of time, it shall be the duty of the employer and not of the employee to ensure that the employee is paid such of the entire amount of the wages earned by or payable to him and of the allowances due to him as have not hitherto been paid;

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of wages and other allowance earned by him since the date of his dismissal,

(5) No wages shall be payable to an employee in respect of a period during which he is detained in custody or serving a sentence of imprisonment imposed under any law.

The repealed Employment Act just like the Employment Act 2007, did not make any reference to the term "*permanent employee*". As observed in the case of ***Francis N. Gachuri -V- Energy Regulatory Commission (2013) eKLR*** there is no such concept as permanent employment in Kenya, even in cases where the employer expresses the nature of employment as permanent and pensionable. All employment contracts have termination clause either provided expressly or implied by reference to the termination notice clause in the Act.

Further, the repealed Employment Act did not have a provision similar to Section 37 of the Employment Act, 2007. There was therefore no question of conversion of a casual or short term contract to regular employment unless this was expressly provided for in the terms of employment, which is not the case herein. The repealed Employment Act did not have any provision limiting the period within which an employee could serve as a casual or temporary employee. The interval of payment of salary determined the length or notice or pay in lieu of notice. An employee could serve on causal terms indefinitely.

In ***Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR*** Radido J. held:

"Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee."

The argument by the claimants that they become permanent and pensionable by virtue of the length of service is not supported by the law prevailing then.

As rightly admitted by the parties prior to 2007, an employer could terminate an employment relationship for cause or without cause. The Respondent's averment that it terminated the employment relationship for the reason that the claimants failed to sign contracts and this failure was affecting the business as there was an impasse cannot be faulted as it had no obligation to give any reason for the termination.

Reliefs sought

The Claimants in their statements have tabulated their claims to include annual leave, house allowance, public holidays and rest days worked, overtime, pay in lieu of notice and severance pay.

Annual leave, public holidays, overtime

These heads have not been proved. The Claimants have not provided any documentation to prove that they are entitled to the same or how they arrived at the said figures. Documentation provided by the Respondent shows that the Claimants were paid for overtime and no proof to the contrary was provided. This heads are thus not payable

House allowance

Section 9 of the Employment Act Cap 226 (Repealed) provides:

> **Every employer shall at all times, at his own expense provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to his wages or salary, as will enable the employee to obtain reasonable accommodation.**

However, under the Regulation of Wages and Conditions of Employment Act (General) Order all hourly and daily rates of pay are inclusive of house allowance. The claim for house allowance is therefore without merit as the plaintiffs were paid a daily wage that was inclusive of house allowance. The claim therefore fails and is dismissed.

Severance pay

This head arises as a result of a redundancy and the facts of the instant case do not constitute a termination by redundancy. This claim is therefore not payable and is dismissed.

Conclusion

In the final analysis, I find that the entire claim has not been proved and is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE