



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2497 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENAFRIC INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant, Kenya Shoe and Leather Workers Union filed a memorandum of claim on 14<sup>th</sup> February 2012 for orders

- 1) That the court be pleased to order and direct the respondent, to issue fresh appointment letters to the grievants to take effect from the date of their respective employment as the conciliator had recommended.
- 2) That the court order and direct the respondent to pay severance pay and unattended leave as they had tabulated
- 3) Costs of the application.

The claimant submits that it has a valid collective agreement with the respondent and that paragraph (a) of the said agreement was wrongfully implemented. The parties had met on 28<sup>th</sup> October 2008 at the Federation of Kenya Employers before Mr. L.W. Kariuki and the parties mutually agreed that;

- 1) The 150 monthly contract employees shall be converted to permanent employment.
- 2) Fourteen (14) casual employees shall be made permanent.
- 3) The remaining 40 casuals shall be paid their leave, years of service, notice and be released.
- 4) Care and due process shall be taken to see to it that shop stewards are retained and converted to permanent employment.
- 5) The dispute reported to court is hereby closed.

When the dispute arose, the claimants reported the matter to their union who on 27<sup>th</sup> April 2012 wrote to the respondents seeking to have a meeting and resolve the matter. The matter was later on referred to the Minister for labour and the conciliation process began and culminated in the conciliator issuing a certificate of conciliation and recommendation. The claimant agreed to adopt the report while the respondent declined to accept the same and sent a letter dated 22<sup>nd</sup> November 2012 to the ministry of labour indicating their position. The claimant maintains that under the agreement they were not supposed to forfeit the years they had served at the respondent. They were also to be confirmed in line with the CBA and that the appointment letters were to contain the date of each persons date of engagement at the respondent which the respondent failed to do. This the claimant submits is unlawful and infringes on their basic right to paid leave within the meaning of Section 28 of the Employment Act. This to the claimant was ill intentioned and with wrong motives. The claimant also states that severance pay at 15 days and unattended leave days, being 21 days per annum are some of their basic rights and it was the respondents right to pay for the same as had been done for some of their colleagues. They maintain that by keeping them on casual terms or fixed term contracts is contrary to Section 37 and 42 of the Employment Act 2007.

The matter came up for hearing on 17<sup>th</sup> October 2018 and the court ordered that the parties proceed by way of written submissions. The

claimant filed submissions in support of the claim on 30<sup>th</sup> November 2018. It is submitted that the respondent wanted to effect changes to the composition of the employees by changing terms of employment and effect layoffs. The claimant got into negotiations on behalf of its members and the terms of the agreement were as stated above. According to the claimant, the respondent implemented terms 2, 3, 4 and 5 but improperly and unlawfully implemented term 1 affecting a majority of their members. This was done by issuing employment letters to the employees converted to permanent status with employment letters showing that the employees had just been employed as permanent instead of indicating the date when they first joined employment. The claimant contends that the respondents action meant that those who had been in long service of the respondent did not deserve anything for the many years except the letters showing that they were now on permanent terms. The members felt discriminated against as their colleagues who had been laid off were paid accrued leave days, notice and service for the number of years they had served. This prompted the members to seek assistance from their union office and the conciliation process began. It is the claimants' submission that it was clear from the action of the respondent that the earlier contract of employment had been terminated and the employees retained were embarking on a new contract of employment. The affected employees have tabulated what they are owed depending on salary and period of service and attached it to the claim.

The claimant invited court to consider that the respondent categorized the employees into two groups. This were those to be retained and those to be released. It is claimed that the employees to be released were paid their dues while those to be retained were only given letters to show they were now on permanent terms. Accordingly, the employees ought to have been absorbed as per term 1 from the day of their first employment with the attendant benefits being NHIF, NSSF, annual leave and other relevant entitlements under the Employment Act, the Constitution of Kenya, labour laws and regulations in Kenya and internationally. The letters took effect from 28<sup>th</sup> October 2008 and did not factor the years previously worked. During the conciliation process the respondent maintained that the redesignated employees were to lose the years lost under the different designations.

The claimant maintains that the issuance of the letters does not in any way affect their right under the law. The respondent should have adhered to the conciliators recommendation and given the members letters which had been backdated to the first time they joined the respondents employment. The failure to backdate the letters is termed by the claimant as an attempt by the respondent to avoid responsibilities vested on the employer by law. The claimant relies on Article 41 of the Constitution of Kenya where every employer is expected to practice fair labour practices and not to discriminate against any employee or group of employees and this includes fair remuneration and payment for services rendered. The respondent was not allowed by law to choose how he was to deal with the employees as their rights were provided for by law. The claimant disagrees with the conduct of the respondent while terminating the contracts of the employees. The employees deserved a proper and lawful termination and the due process required when terminating an employment contract and forming new contracts in law was to be followed.

To support the claim that the termination was unlawful, the claimants relied on the provision of Sections 35, 36, 38, 40, 41 and 43 of the Employment Act and where the law is not followed, then the termination is unlawful/ unfair under Sec 45. On the letters that the employees received, the claimant maintains that they are only letters and not employment contracts as provided by Sec 9. The claimant also relies on the following cases;

***Silas Mutwiri V Haggai Multi-Cargo Handling Services Limited [2013]***

***OI Pejeta Ranching Limited V David Wanjau Muhoro***

The respondent filed a memorandum of reply to the claim on 28<sup>th</sup> February 2013. The respondent avers that there was an agreement on 28<sup>th</sup> October 2008 and the dispute between the parties was resolved and the union demands have been implemented. The agreement made no provision that those whose employment had been converted to permanent employment were to have their letters of appointment backdated to the dates they first joined the respondent. They agree that the claimant reported a trade dispute to the minister on 10<sup>th</sup> July 2012 and a conciliator was appointed. They submit that the conciliator disregarded the agreement between the claimant and respondent in making recommendations not in line with the said agreement. The respondent did a letter to the minister on 22<sup>nd</sup> November 2012 expressing his disagreement with the recommendations. The respondent denies that the conversion to permanent status was wrongfully implemented, that the dispute was first handled by the unions shop stewards and branch secretary. They also deny that the matter was duly reported to the minister for labour and human resource development in line with the provisions of Sec 62 of the Labour Relations Act 2007 and that the conciliator issued a certificate of conciliation and recommendation.

The respondent submits that there is no cause of action in the claim as there is no way the clause on backdating the letters of appointment could have been overlooked or implied as it is of a great financial implication to the respondent. The respondent maintains that it never paid any NSSF monthly contribution for the claimants' members as they worked intermittently therefore never completed any aggregate calendar month. The respondent asserts that the claimant wants to use the court process to illegally include clauses not provided for in the agreement. The respondent contends that the reporting of the matter is malicious since the agreement was entered into by the Chairman of the claimant who is deceased and cannot dispute the claim. The respondent contends that the agreement was mutually entered into with neither party being under duress or misrepresentation of facts and the claimant is estopped from reneging a document that has existed for four years. According to the respondent the agreement has been implemented to the letter and the claimant should demonstrate that the agreement is void for being entered into under duress or a misrepresentation of facts had occurred.

The respondent raised a preliminary objection pursuant to Sec 90 of the Employment Act. The objection was in regard to limitation of time. They submitted that the matter was time barred and should be dismissed for being brought to court after the lapsing of three years from the signing of the agreement. The parties were ordered by court to file their written submissions and serve. The respondent submitted on the preliminary objection that the claimant failed to seek leave to file claim out of time and no attempt has been made by the claimant to seek for enlargement of time. They continued that the respondent will be prejudiced irreparably as it will be denied a chance to a fair trial and the opportunity to reasonably access witnesses as well as evidence if the preliminary objection is not upheld. They sought to have the preliminary objection upheld and the claim dismissed. In their response to the preliminary objection, the claimants submitted that it is misplaced, lacks facts and has no legal basis. They urged the court to dismiss the same and order costs to the claimant. The ruling on the preliminary objection was delivered on the 16<sup>th</sup> February 2018 with the learned judge finding it misplaced and dismissed the same.

In their written submissions, the respondents gave a factual background and stated that the main issue for determination was when the course of action arose. They noted that they had raised a preliminary objection indicating that the claim violates Sec 90 of the Employment Act. They submit that in their opinion the claim arises out of an agreement entered into on 28<sup>th</sup> October 2008 and failure to fully implement the same. According to the respondent the cause of action arose on the date the agreement was entered into and the claimants could only file a claim on 28<sup>th</sup> October 2011 but on the contrary the filed on 13<sup>th</sup> January 2013 a year and 3 months out of the stipulated time and had not sought leave.

The respondent avers that the issues of limitation like jurisdiction go to the root of the suit and should be dispensed with first. The respondent states that the court should only grant the prayers sought. Granting prayer 1 would be an exercise in futility as most of the employees that entered into the CBA on 28<sup>th</sup> October 2008 have since left the respondents employment and this was acknowledged by the claimant. In fact, only 42 out of the 128 employees remain with the respondent and are on permanent terms since the CBA. Backdating letters of appointment for parties who are non-existent would be an injustice to the respondent, a mockery of the judicial process and would create an absurdity. They submit that parties are bound by the terms of a CBA they enter into and the terms of the CBA in question provided for the conversion of 150 monthly contract workers to permanent terms and it did not state that their letters should be backdated to the date of joining the respondent.

On severance the respondents state that it is paid to employees made redundant or their positions have become redundant, those who have resigned or retired. The issue of redundancy does not apply and therefore the claim for severance is misplaced and ought to fail. It is also submitted that the employees joined the respondent at different years and therefore the members claim for leave days could not be same number of days for all the grievants. The respondents invited court to look at the tabulation of leave days done by the claimant indicating that leave days for an employee who had worked for 10 years was the same for an employee who had worked 3 years. There is also no basis provided for the 42 days provided. In conclusion the respondent submits that the claimant has not demonstrated the prayers sought and the claim should therefore fail.

### **Determination**

I have considered the submissions by the parties. The claimant's case is anchored on the agreement dated 28<sup>th</sup> October 2008. There are no minutes of what transpired before the agreement was entered into. The agreement is as follows –

*“AGREEMENT REACHED BETWEEN KENAFRIC INDUSTRIES LIMITED*

*AND*

*KENYA SHOE AND LEATHER WORKERS UNION*

*Conversion of:*

- (a) 150 monthly contract workers to permanent*
- (b) 14 casuals to permanent*
- (c) Payment of 40 casuals the leave days and be released.*

*The parties after serious negotiations under the Chairmanship of Mr. L. W. Kariuki of FKE have now mutually agreed that:*

- 1. 150 monthly contract employees shall be converted to permanent employees.*
- 2. 14 casuals shall be made permanent.*
- 3. The remaining 40 casuals shall be paid their leave, year of service and notice and be released.*
- 4. Care and due process shall be taken to see to it that shop stewards are retained and converted to permanent employment.*
- 5. The dispute reported to the court is hereby closed.*

*SIGNATURES:*

*MANAGEMENT SIGNED*

*UNION SIGNED*

*CHAIRMAN SIGNED*

*DATE 28<sup>th</sup> October 2008”*

The agreement does not refer to backdating of the date of conversion of the contract employees and casuals to the date of appointment. The

claimant does not deny that the respondent complied with the agreement. The only complaint is that the confirmation of permanent status should have been from date of engagement.

I find the claim by the claimant to be without merit, the respondent having complied with the agreement reached by the parties.

I have further considered the notice of preliminary Objection filed by the respondent. I find the claim herein to be a continuing wrong as the grievants were in service and the issues raised concerned their terminal dues with regard to the period when they served either on fixed term contract or on casual terms of employment. The parties continued discussing the issue until a deadlock was reached when the claimant filed the dispute with the Minister for Labour.

In any event, the service that was the subject matter of the dispute covered the period before the Employment Act, 2007 came into force and the limitation period would therefore be 6 years.

For the foregoing, reason the preliminary objection is without merit.

Having found no merit in both the claim and the preliminary objection, the claim stands dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**