



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 110 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF SUGAR PLANTATION AND
ALLIED WORKERS.....CLAIMANT**

-Versus-

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

The claimant is a trade union registered under the laws of Kenya to represent workers in sugar plantations and related industries. The claimant filed this suit against the respondent West Kenya Sugar Company Limited on behalf of casual employees numbering 495 and whose names are listed in the claim. The claimant avers that 6 other employees have been kept acting in managerial positions while another set of 43 employees have been acting in unionisable positions for longer provided in the parties CBA necessary and the respondent has deliberately declined to confirm them.

The claimant prays for the following orders –

- (i) Confirmation of all employees who have overstayed in acting capacity in accordance with the law, conciliation agreement and the CBA.
- (ii) Effecting of the employment of contract employees as per the resolution of the conciliation and or confirmation agreement of the same in line with Section 47(4), (5) of Employment Act.
- (iii) That there be compensation and payment of terminal dues in line with Section 37(i)(b) of the Employment Act for casuals who had overstayed as casuals and otherwise terminated in the pendency of these proceedings as per schedule FW3.
- (iv) Determination of employment dues and payments in line with CBA.
- (v) Absorption of all overdue casuals to permanent employees.
- (vi) Any other order the court may wish to grant as well as costs.

The respondent filed a memorandum of defence in which it avers that casual employees are not members of the union and the union has no *locus standi* to represent them. It is further the averment of the respondent that the claimant does not cover managerial employees and has no *locus standi* to represent them.

The respondent avers that it had agreed to confirm some employees who have been in acting positions in various positions and was in the process of reevaluating them before confirmation. The respondent further avers that it has been paying all the employees according to rates agreed in the CBA.

The respondent denies attending a conciliation meeting at which agreement was reached on the issues in dispute and avers that there is no conciliation report to prove such a meeting took place. The respondent prays that the claim be struck out on grounds that the claimant lacks capacity and that all complaints relating to employees in acting capacity have been remedied. The case was by consent of parties disposed off by way of written submissions.

The claimant filed written submissions on 25th February 2015 and another set of submissions. The claimant highlighted the submissions in court on 21st September 2017. The respondent on the other hand filed submissions on 22nd June 2017 and relied entirely on the said submissions.

The matter was referred to the County Labour Officer Kakamega for conciliation and the conciliation report filed in court on 1st December.

Claimant's Case

It is the claimant's case that the parties have a recognition agreement under which it is provided at Clause 28 that casual employment shall be managed in accordance with the law and further that temporary employees shall be issued with temporary employment contracts of three months renewable at the discretion of management. It is further the claimant union's case that the CBA further provides at Clause 7 that the maximum period which an employee can serve in acting capacity is 3 months after which an employee should either be confirmed or discontinue acting. The CBA further provides for acting allowance at the rate of 25% of basic salary.

The claimant submitted that the respondent kept employees in acting capacity without issuing them with letters for the acting appointments and without payment of acting allowance or confirmation into the positions in which they were acting. After engaging the respondent without success the claimant filed a dispute with the County Labour Officer who recommended that employees who were acting be confirmed in 2 weeks and that 320 long serving casuals be confirmed in 3 phases at the end of December 2011, end of March 2012 and end of June 2012. The respondent however failed to comply compelling the claimant to file the present suit.

Mr. Mulomi who appeared for the claimant submitted that the respondent was in breach of Article 41 of the Constitution on fair labour practices, Clause 7 and 34 of the CBA, ILO Convention No. 111, the Employment Act and the recognition agreement between the parties. He prayed that all employees in acting positions be confirmed and all promotions be done in line with the CBA.

On the issue of casualization of labour Mr. Mulomi submitted that Section 4 of the Labour Relations Act and ILO Convention 87 guarantee freedom of association and the right to organise. He submitted that the CBA applied to all unionisable employees. He submitted that fixed term contracts are illegal as the respondent was applying double standards leading to underpayment and discrimination of employees. He submitted that the employees were denied the benefit of the negotiated terms and the employer was in contravention of Section 37 of the Employment Act. He further submitted that fixed term contracts were exploitative to workers. He submitted that minimum terms should be applied only where there is no union. He submitted that the claimant recruited 520 employees into its membership in 2010.

Mr. Mulomi urged the court to order the respondent to confirm casual employees.

Respondent's Case

The respondent relied on its pleadings and the written submissions.

In the submissions the respondent argues that the claimant has no *locus standi* to represent the employees who are not its members. The respondent relied on the case of **BANKING INSURANCE AND FINANCE UNION (K) -V- STANDARD CHARTERED BANK** in which the court quoted with approval the case of **KENYA CHEMICAL AND ALLIED WORKERS UNION -V- POLYPIPES LIMITED**. It is further submitted that no person can be compelled to join union membership as provided at paragraph 2(d) of the recognition agreement.

On the issue of prolonged acting, the respondent submitted that all employees in acting capacity had been confirmed except three whom the union had yet to provide evidence in respect of. It is submitted that the respondent had in the past confirmed 20 out of 24 employees after the claimant submitted evidence that they had been acting for long periods.

On casualization of labour, the respondent submitted that most of the casuals had been issued with fixed term contracts. It is submitted that the respondent employs several categories of workers and that there is nothing wrong with this as was held by the court in the case of **WYCLIFFE DANIEL BENGI -V- M/S REGNAL OIL (KENYA) LIMITED** when the learned Judge stated –

“...it is now appreciated by the Court that there are various forms of employment where an employee can be sourced to work full time and on permanent terms, an employee can be engaged on contract terms based on time or work to be done, on piece work or casual terms as the case may be. These various forms of employment are recognised in the Employment Act especially under section 7 and 8 with regard to service contracts, oral and written contracts, and section 37 on the conversion of oral contracts by operation of the law.”

It is further submitted by the respondent that each employee is treated according to the category of employment. The respondent further relied on the decision in **JOWASI AMBUNDO KASINA & 5 OTHERS -V- KENAFRIC INDUSTRIES LIMITED** where the court held that –

“Piece work contracts are regulated under the Employment Act Cap 226. Such contracts end each day and the payments due to an employee at each end of day as paid are all inclusive and cannot attract other work benefits outside the piecework contract as agreed by the parties. To claim overtime, house allowance, leave and underpayments or such benefits due to a full time employee is a right not due to an employee defined under the law and one issued with a piece work contract. I make reference to sections 2 that define 'piece work contract'.”

The respondent submitted that in the spirit of addressing the issue of casualization it had converted the employment status of 655 employees

who were formerly casuals to fixed term contracts by July 2016. It is submitted that the respondent cannot apply the same benefits for all categories of workers as was held in the case of **RASHID ODHAIMBO ALOGGOH & 245 OTHERS -V- HACO INDUSTRIES LIMITED** where the court stated –

“... As casuals, the applicants were clearly not entitled to all the allowances (e.g. housing, leave, maternity etc.) paid to permanent employees and the respondent was under no legal obligation to make any statutory deductions for casual employees...”

It is submitted that the union does not negotiate terms and conditions of service for all workers and relied on the decision in **GEOFFREY MWORIA -V- WATER RESOURCES MANAGEMENT AUTHORITY & 2 OTHERS** where Ongaya J. stated that courts will very sparingly interfere in the employers’ human resource functions.

The respondent urged the court to rely on the finding in the Labour Officer’s report to the effect that –

- a) It is a constitutional right of any employee to join a union including casuals. However rights have limitation. The claimant union did not understand the import of this finding as demonstrated by their interpretation.
- b) The union is only entitled to negotiate with the company in regard to employees who shall derive benefits as per the parties’ CBA. Under the law this is a sound finding since the union regulates the obligations between the employees and the employers.
- c) The terms and conditions of employment of the casuals are not covered in the parties CBA. This is true as per the CBA. Clause 28 of the CBA categorically states that casual employment shall be managed in accordance with the applicable law.

The respondent prayed that the case be dismissed.

Determination

I have considered the pleadings, the submissions, the documents relied upon by the parties and the authorities cited.

The Law

The law on casual employment and acting are contained in both the Employment Act and the Regulation of Wages and Conditions of Employment Act as follows–

Section 37 of Employment Act

37. Conversion of causal employment to term contract

(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 ,

Section 2 of Definition of Casual Employee

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 88 of this Act shall apply.

Rule 10 of the Regulation of Wages and Conditions of Employment (General) Order provides that –

10. Acting Allowance

Where an employee is required to work for a period of not less than one month in an occupation of grade for which the basic minimum wage prescribed under paragraph 3 is higher than the basic wage normally earned by the employer, he shall be paid an acting allowance at a rate not less than the difference between that higher basic minimum wage and his basic wage.

The parties CBA also provides for the two clauses as follows –

7. Acting Allowance

An employee specifically required to perform duties of a position in a higher grade shall be entitled to Acting Allowance. The Acting Allowance shall be the difference between basic salary for the higher position and the employee's basic salary provided that;

(a) The period in which the employee shall act shall not be less than six (6) continuous working days.

(b) The company shall retain the right to discontinue acting appointments.

(c) Benefits applicable to the senior position shall not be extended to the employee in an acting capacity.

(d) An employee who is appointed to act in a higher grade shall be issued with an acting appointment letter specifying the conditions of the appointment, including the acting allowance payable and the duration of the appointment.

(e) Where an employee acts in a supervisory position, acting allowance payable shall be twenty-five percent (25%) of his/her basic pay.

(f) An employee who continuously acts in a vacant post shall be confirmed in that position within three (3) months from the date of issuance of acting appointment letter.

28. Casual/Contract Employment

(a) Casual employment shall be managed in accordance with the applicable law.

(b) Temporary employees shall be issued with temporary employment contracts of three (3) months, renewable at the discretion of management.

The issues for determination are the following –

1. Whether the claimant has *locus standi* to represent the casual employees and the employees in a citing capacity.
2. Whether the claimant is entitled to the prayers sought.

Locus Standi

The respondent has submitted that the claimant has no locus standi to represent the casual employees, relying on the case of **BIFU -V- STANDARD CHARTERED BANK**. The claimant on the other hand states that the CBA applied to all unionisable employees.

The CBA contains a clause on casual employees and acting allowance. The respondent negotiated the CBA with the claimant in which a clause was agreed upon relating to casual employees. The claimant has *locus standi* to enforce a clause in its CBA. Having agreed to negotiate the clause and having even agreed to discuss the issue and to convert some of the casual employees to fixed term contract terms, the respondent is estopped from denying the right of the claimant to represent the casual employees.

I find that by virtue of the CBA the claimant has locus standi to enforce the clause on casual employment and acting allowance.

Whether claimant is entitled to its prayers

i. Employees who had overstayed in acting capacity

Both the claimant and the respondent agreed that all employees who had acted for long periods had been confirmed except three whom the claimant named as Joseph Nengo, Nehemiah Okina and Stephen Ombui. Mr. Mulomi submitted that there are others whose names had been left out but these cannot be the subject of this suit as no attempt was made to amend the CBA to include them.

The respondent admitted that it was ready to confirm the three employees named once the claimant submitted the relevant documents.

It is the opinion of the court that there is no dispute over this matter and that the respondent should confirm the three employees once the claimant supplies the documents proving that the three had been acting longer than the period provided for in the CBA.

ii. Casualization of labour

The respondent submitted that it had converted the employment of all long serving casuals to fixed term contracts. This is in line with clause 28 of the CBA. The respondent having complied there is no dispute of the issue.

iii. Compensation and terminal dues

The claimant prayed for compensation and terminal dues in line with Section 37(1)(b). No evidence was adduced in support of this prayer. No tabulation was made to court in respect of any of the employees in respect of whom the claim was made. The issue was not even captured in the submissions of the claimant.

I find that the prayer has not been proved and dismiss the same.

(iv) The prayer for absorption of causal employees into permanent terms has been overtaken by events as the causal employees have been converted into fixed term contracts.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE