REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 799(N) OF 2009

(Before Hon. Lady Justice Maureen Onyango)

GILBERT KANGANGA .....1ST CLAIMANT

ALEX MUNALA **SHIKUMI.....2ND CLAIMANT**

PROTUS OTIMO OGOLA.....3RD CLAIMANT

VERSUS

ASSOCIATED STEEL LIMITED.....RESPONDENT

JUDGMENT

The claimants herein aver that they were employed on casual terms of employment by the respondent as follows –

NAME	FROM	TO
1. Gilbert Kanganga	November 1999	26th November 2008
2. Alex Munala Shikumu	May 1997	21st February 2008
3. Protus Otimo Ogola	June 2005	20th August 2008

They aver that the termination of their services was unlawful as there was no reason for the termination and it was without payment of terminal benefits. In their memorandum of claim dated 2nd December 2009, they pray for payment as follows –

a. Payment in lieu of notice.

b. Payment of Gratuity pay of 15 days for each completed year.

c. Payment of earned leave.

d. To issue a certificate of service.

e. Interest on (a), (b) and (c) at court rates.

f. Any other remedies the court may deem fit and just to grant.

The respondent filed a memorandum of response on 14th May 2015 in which it states that the claimants were employed as follows –

Gilbert Kanganga in January 2006

Alex Munala Shikumu in November 2005 and

Protus Otimo Ogola in April 2007.

The respondent avers that the claimants engaged various unions and the matter was referred to the District Labour Officer, Industrial Area where the dispute was settled upon the respondent paying Kshs.42,000 broken down as follows –

a. Alex Shikumu Ex gratia payment of Kshs.7,000

Leave allowance of 10, 000 for 40 days

b. Gilbert Kanganga Ex gratia payment of Kshs.7,000

Leave allowance of 10, 000 for 40 days

c. Protus Otimo Ogola – leave allowance of 7, 000/- for 35 days

The respondent denies that the claimants are entitled to any further payment and pray that their claim be dismissed with costs.

The claimants filed a reply to defence joining issues with the respondent.

At the hearing, the claimants called four witnesses. WILLY SITATI SIMON (CW1) testified that he was Area Secretary of Kenya Engineering Workers Union and the claimants were members of the union. That the claimants went to his office to complain that their services had been terminated. The union wrote to the respondent on 19th September 2008 demanding payment of terminal dues pegged on Legal Notice of 2008, Employment Act, 2007, repealed Regulation of Wages and Conditions of Employment Act and Section 63(1) and (2) of the Labour Institutions Act. He referred to the calculations in appendix 1 of the memorandum of claim.

CW1 testified that the respondent did not reply. He sought a meeting on 25th September 2008 but again the respondent refused, opting for the matter to be handled by the Labour Office. He stated he was not aware of the payment made by the respondent at the Labour Office.

CW2 GILBERT KANGANGA testified that he worked for the respondent from 1999 to 26th May 2008 as a casual. He was paid weekly on Saturdays. He was paid at the rate of Kshs.250 per day and worked six days a week. He produced original copies of casual labour cards. He testified that the work on Sunday was overtime. He testified that he was not paid upon termination.

He testified that they did not collect the money deposited at the Labour Office.

He testified that he did not go for annual leave for all the years he worked. He was loading, off-loading and doing delivery.

CW3 PROTUS OTIMO OGOLA testified that he was employed by the respondent. His job entailed loading and off-loading metal bars. He was paid weekly and worked 7 days a week. He was paid Kshs.250 per day. He was employed from June 2005 to August 2008 when he was stopped from working on grounds that work was low. The respondent promised to call him but did not. He testified that the respondent deducted NSSF and NHIF but did not remit. He was not issued with certificate of service. He reported the termination of his employment to the union. His claim is for Kshs.33,500.

CW4 ALEX MUNALA SHIKUMI testified that he worked for the respondent, loading and off-loading steel, ceramics and other goods from 1997 May until 21st February 2008 when he was stopped from working. He was told that work had gone down. He reported to the union who reported to the Labour Office. He was not paid. He was claiming Kshs.96,500 having worked for 13 years. He was paid Kshs.250 per day and worked on all 7 days. He was paid overtime on Sunday. His claim was for notice, leave and gratuity.

For the respondent, ALEXANDER MURIU MAINA testified that he was the Administration Manager for ASL Limited, the respondent. He testified that the claimants were employment in 2005, 2006 and 2007 respectively and were engaged as general labourers. He testified that the respondent did not terminate their services, that the claim is not valid because the matter was dealt with and settled at the Labour Office, Industrial Area, that the respondent paid a lump sum of Kshs.42,000 as reflected in the receipt attached to the memorandum of response as document 2.

He testified that apart from the receipt there was a letter dated 10th March

2009 written to the Chief Industrial Relations Officer. He testified that the first document attached to the reply to memorandum of response (casual wage card) is not genuine but the second document is genuine. He stated that there were no cards issued with names. He stated that only one card for 2008 is genuine.

Under cross-examination, he stated that there were records of casuals but they were not filed in court. He further testified that casuals were issued with staff cards, that wage cards were marked at the end of the day by the line supervisors. He stated that card marked as exhibit 5 was not genuine but he had not filed a genuine card to prove that what was filed was not genuine.

RW1 stated that the receipt from Labour Office does not state the names of the claimants.

On behalf of the respondent it is submitted that the 1st and 2nd claimants were terminated before the regime of the Employment Act 2007 and Section 37 of the Act does not apply to them. The respondent relies on the decision of the Court of Appeal (G.B.M. KARIUKI, MWILU and

KANTAI, JJ.A) in **RASHID ODHIAMBO ALLOGOH AND 245 OTHERS -V- HACO INDUSTRIES LIMITED [2015] eKLR** that –

> "We therefore, with a lot of empathy, find that the appellants were casual workers within the prevailing laws despite the mode of payment and continuous service with the respondent. This is more so in the wake of lack of provisions similar to section 37(1) in the repealed Employment Act."

The Judges of Appeal in the ***Rashid case*** above indicated that payment after a period other than a day or employment for more than 24 hours does not necessarily remove an employee from the realm of a casual employee.

The Judges quoted Abuodha J. in **JOSPHAT NJUGUNA -V- HIGH RISE SELF GROUP (2014) eKLR** who held that:

> "It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.
>
> The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."

The Judges further held that –

> "The Employment and Labour Relations court has in the wake of the Employment Act 2007 nevertheless appreciated that failure to pay wages a*t the end of the day does not by itself remove one from the ambit of a casual worker."*

Determination

I have considered the pleadings and evidence adduced in court and further the submissions by the parties.

The first issue for determination is the law applicable to the case. The dates on which the claimants' employment was terminated is not contested.

Gilbert left employment on 26th May 2008 before the Employment Act, 2007 came into force.

Alex Shikumi left employment on 21st February 2008 and is not covered by the Employment Act 2007.

Protus Otimo Ogola left employment 20th August 2008 after the Employment Act came into force.

For Gilbert and Alex, their entitlement under the repealed Employment Act was annual leave and notice. This is because there was no provision similar to Section 37(1) of the Employment Act, 2007 in the repealed Act and their employment therefore remained on casual basis as held in the case of **RASHID ODHIAMBO ALLOGOH AND 245 OTHERS -V- HACO INDUSTRIES** (supra) and in the case of **JOSEPHAT NJUGUNA –V- HIGH RISE SELF GROUP** (supra).

For Protus Otimo, Section 37(1) applies and therefore his employment is deemed to have been converted to a monthly contract.

It is however necessary to determine the length of service to establish the entitlement of each of the claimants.

For Protus, parties are agreed that he worked for a period of three (3) years and two (2) months.

For Gilbert, the casual cards produced in court run from January 1999 and in the absence of the records by the respondent, which they were bound to keep under the repealed Employment Act and the Regulation of Wages and Conditions of Employment Act, I hold that Gilbert worked with the respondent from 1st January 1999. He is however entitled to annual leave for six years (under Section 4(1) of the Limitation of Actions Act) and not from 2006 as submitted by the respondent.

Likewise the respondent did not produce employment records for Alex to controvert his evidence that he started working in May 1997, yet the respondent was by law required to keep and produce such records.

I will therefore grant both Gilbert and Alex six (6) years leave. At 21 days, each of them is entitled to leave in the sum of Kshs.31,500.

For Protus, his employment is deemed to have been converted to regular terms and he I thus entitled to service pay, leave and notice. I award him leave for 38 months at Kshs.16,625, notice of one month (Kshs.250 x 30) Kshs.7,500 and service pay of 15 days per year worked Kshs.11,250.

For Gilbert I award him leave of Kshs.31,500 and one month's salary in lieu of notice Kshs.7,500.

Alex is also awarded leave Kshs.31,500 and notice Kshs.7,500.

The claimants are not entitled to gratuity as neither the law applicable for them nor their terms provided for the same.

In summary I enter judgment for the claimants as follows –

Gilbert Kanganga Kshs.39,000

Alex Munala Shikumi Kshs.39,000

Protus Otimo Ogola Kshs.35,375

The respondent shall also issue certificate of service to the claimants. The respondent shall pay claimants' costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE