



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1108 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

MATHEW MUNYAO AND 133 OTHERS.....CLAIMANT

VERSUS

GENERAL PLASTICS LIMITED.....RESPONDENT

JUDGMENT

The suit herein is filed by 134 claimants who allege that their employment was unfairly terminated by the respondent by way of a lock out. They aver that they were employed by the respondent at different times between January 1999 and October 2010 in various capacities as general labourers, machine operators in production lines, stores, quality control and as drivers.

The claimants allege that the respondent had two classes of employees with one category on regular terms and the other employees on casual terms of employment. That following the enactment of the new labour laws, the respondent issued them with short term contracts around March 2008.

Upon expiry of the contracts the respondents introduced yet another contract which according to the claimants had more stringent terms and required them to make an application, be subjected to an interview and also provided for discriminatory terms on working hours, wages, leave and termination.

The claimants refused to sign these new contracts which were to be effective from 4th October 2010 to 2nd October 2011. After discussions with the claimants the respondent reverted to the old contracts dated 3rd November 2010.

The claimants filed Cause No. 456 of 2011 alleging discrimination. Upon being served with summons, the respondent terminated their employment.

On 3rd May 2011 all casual employees who had not signed the new contracts were denied entry at the respondent's gate. They were paid off and issued with contract discharge forms and certificates of service.

The claimants aver that they were discriminated against as their colleagues who were members of the union but did the same work had better terms of employment. That they raised the issue several times with the respondent but there was no change. They referred to minutes of a meeting held on 9th February 2011 between the respondent's management and representatives of the contract workers.

The claimants pray for the following remedies in the Amended Memorandum of Claim dated 30th September 2013 and filed on the same day

1. An order of reinstatement for each and every Claimant without loss of income and payment to them of all the claims as claimed in Cause No. 546 of 2011.
2. A declaration that the contracts of service issued to the claimants are **unlawful, null and void** and should be expunged from the records of the claimants to be replaced by appointment letters effective the dates of entry and not to victimize any of them.
3. An Order directed at the Respondent to release to the Claimants all money held by the Respondent arising out of the current

Collective Bargaining Agreement and the regulation of wages (general) (amendment) order, whichever is more favourable from the period of service of each Claimant to date as contained in the schedule herein for the following items:-

- i. Underpayment on wages and overtime, general wages order – 2½ years
- ii. Housing allowance at 20% of appropriate salary CBA 2½ years. As given to permanent employees and members of CBA carrying out equivalent jobs.
- iii. Leave days balances paid 21 days instead of 23 or 28 whole period -CBA's given to permanent employees and members of CBA carrying out equivalent jobs.
- iv. Travel subsidy -CBA - whole period. As given to permanent employees and members of CBA carrying out equivalent.
- v. Leave travelling allowance - 2½ years CBA as given to permanent employees and members of CBA carrying out equivalent jobs.

OR TO THE EQUIVALENT

1. A declaration that the contracts of service issued to the claimants were unlawful, null and void and that their employment was that which was consistent with the law as permanent employees.
2. An order directed at the respondent to pay all the claimants herein terminal dues arising out of each one's length of service as itemized in the schedule herein amounting to Kshs.116,373,998/= (One Hundred and Sixteen Million, Three Hundred and seventy Three Thousand, Nine Hundred and Ninety Eight Only)
3. The issuance to them of proper certificates of service
4. Full compensation for unlawful termination to each one depending on the number of years of service.
5. Cost of the suit.
6. Any other relief the court deems fit to grant.

The respondent filed Memorandum of Reply on 9th August 2011 in which it states that the collective bargaining agreement did not cover the claimants, that the claimants were paid according to the Regulation of Wages (General) Order and that the respondent did not breach any law. The respondent avers that the claimants voluntarily signed their contracts and are bound by the terms thereof. The respondent denies locking out the claimants and avers that the claimants' contracts lapsed on 2nd May 2011 whereupon they were paid all their lawful dues and issued with certificates of service. The respondent avers that it is not a party to Cause No. 456 of 2011.

At the hearing, four (4) claimants testified. For the rest of the claimants, parties agreed to adopt their witness statements in view of the numbers involved and the similarity in the evidence. The respondent called one witness GEORGE GICHIA who testified that the 134 claimants were on short term contracts on and off. That the last paragraph of the contract stated it superseded all previous contracts. He testified that the last contract expired on 2nd May 2011 and none of the claimants applied for renewal even after the respondent communicated to them to apply. The respondent therefore paid them all their outstanding dues and all of them signed discharge vouchers. Each of them was paid for days worked, earned annual leave, and overtime. From the payments due, the respondent made statutory deductions.

He testified that none of the claimants was forced to sign the contract of employment. He denied that there was any underpayments, that the daily wages paid to the claimants was inclusive of house allowance and there was no outstanding leave. He testified that the claimants were not entitled to notice pay, travel allowance or gratuity, that the prayers are based on the CBA but none of them was a member of the union. Further that the CBA was not applicable to the claimants.

Under cross examination RW1 testified that he was employed by the respondent in 1998 and was at work on 3rd May 2011 when the claimants were denied entry into the work place as they did not have valid contracts since their contracts had expired. He testified that the police were called in to maintain law and order as the claimants had started crowding at the gate, that none of the employees was chased away.

He testified that the notice to employees on fresh contracts was on the notice board.

He admitted that he did not have proof that all the contracts of the claimants lapsed on 2nd May 2011, and admitted that some employees had contracts commencing 1st October 2010 and lapsing on 30th September 2011, and therefore had not lapsed as at 3rd May 2011.

Submissions

In their written submission, the parties have reiterated the facts in the pleadings and the evidence adduced in court.

The issues for determination are the following –

- 1) Whether the contracts of the claimants were lawfully terminated.
- 2) Whether the claimants were discriminated.
- 3) Whether the claimants are entitled to the reliefs sought.

Whether the contracts of the claimants were lawfully terminated

It is not in dispute that the claimants were employed as casual employees at different times by the respondent and were engaged to carry out different duties. From the evidence on record, the claimants worked more or less continuously without any written contracts until in 2008 when, following the enactment of the new labour laws, the respondent placed them on six months fixed contracts which were later renewed for one year.

It is the claimants' case that following the review of the CBA for permanent employees in 2011, they demanded to be paid similar wages as the permanent employees. At this time they were on one year contracts.

In response the respondent issued fresh contracts to the employees which some employees signed and others did not sign. Those who signed were allowed to work while those who did not sign were not allowed into the factory. The claimants are among those who did not sign.

In view of the foregoing I find that the refusal to allow the employees to access the work premises amounted to unfair termination as it was intended to coerce them into signing fresh contracts while the previous contracts had not expired.

Whether the claimants were discriminated

The claimants allege that they were discriminated as compared to the employees who were engaged on permanent basis. They have attached a copy of the CBA for the period 1st September 2008 to 30th August 2010. It is evident from a comparison of the same and the contracts signed by the grievants that they were engaged on inferior terms.

Clause 26 of the said CBA provides –

“26. Casual Employees

The company retains the right to employ casual labour from time to time on the basis of its own operational requirements and as provided for as per the Employment Act. Casual labour employees shall be paid at the appropriate daily rates applicable as governed by the General wages guidelines/order prevailing.”

I would not consider this discriminatory as a trade union has a right to negotiate better terms and conditions of employment for its members. The claimants were not members of the union and the union had no business negotiating terms on their behalf.

I however find this to constitute unfair labour practices as both the workers covered by the union and the claimants worked together under the same roof yet they were paid differently.

The Employment Act at Section 5 provides that –

5. Discrimination in employment

(1) It shall be the duty of the Minister, labour officers and the Industrial Court—

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

(b) to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

It is a fact of life that a lot of employees carry out similar jobs but are paid differently for various reasons, some of which are justified such as

seniority, merit and skill.

Since the claimants were not members of the union, they are not entitled to benefits from the CBA negotiated by the union as doing so would require them to pay agency fees as provided under Section 49 of the Labour Relations Act which they have not offered to pay and have not been invited by the union to pay.

I therefore will not make any further finding on this head.

Whether the claimants are entitled to the reliefs sought

The claimants prayed for the reliefs in the Amended Claim as set out above.

The claimants having been on fixed term contracts at the time of termination of their employment which have since lapsed, and further in view of the provisions of Section 12(3)(vii) of the Employment and Labour Relations Court Act which limits reinstatement to 3 years from date of termination, the claimants are not entitled to an order for reinstatement. Reinstatement is further only justifiable in exceptional circumstances which the claimants have not proved.

Prayer (b) is incapable of being granted in view of the fact that the claimants actually signed the contracts issued to them. Further, ordering the issuance of appointment letters to employees who are no longer in employment would be tantamount to reinstatement which as I have stated above, the claimants are not entitled to.

The claimants are also not entitled to prayer (c) as they were not members of the union and were not paying agency fees to the union to entitle them to benefit from the terms of the CBA negotiated by the union.

On the alternative prayer, I have already found that the termination of the employment of the claimant's was unlawful and I declare accordingly.

Having worked for the respondent for periods exceeding one month, the claimants are entitled to certificates of service covering the period they were in the employment of the respondent.

Having found the claimants to have been unfairly terminated and further that they had been in the employment of the respondent for periods ranging from one year to 11 years and taking into consideration the fact that the claimants were engaged on inferior terms as compared to their counterparts who were members of the union, I order compensation as follows –

Length of service	Compensation
10 years and above	10 months
8 years but less than 10 years	8 months
5 years and less than 8 years	6 months
3 years but less than 5 years	4 months
Under 3 years	3 months

I also order the respondent to pay annual leave due for the period worked by each of the claimants based on 21 days annual leave per year.

The parties are directed to use the records of NSSF contributions to determine the years of service and to move the court should they not agree on the tabulations.

The respondent shall pay claimants' costs for this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE