

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 84 OF 2013

**KENYA BUILDING, CONSTRUCTION, TIMBER FURNITURE & ALLIED
INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

VERSUS

WESTCON CONTRACTORS (K) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 16.12.2011 on behalf of its members claiming unlawful declaration of redundancy of 32 employees and refusal to pay wages to the said employees arising from underpayment of wages. For 32 of the employees set out in the memorandum of claim the claimant claimed pay in lieu of the termination notice, pay in lieu of annual leave due but not taken, pay in view of underpayment making a sum of Kshs. 1, 631, 817.00. The claimant further prayed for 3 months compensation for each grievant for unlawful loss of employment, costs of the suit, and any other relief the honourable court may deem fit to grant.

The respondent filed the memorandum of response on 26.02.2013 through Cootow & Associates Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

Parties agreed to rely on the documents on record and the pleadings without calling the witnesses. The parties filed the final submissions.

The **main preliminary issue** for determination is whether the claimant's 32 members set out in the memorandum of claim were employees of the respondent. The respondent at paragraph 3 of the memorandum of response pleaded that each of the 32 grievants will have to establish existence of the employer-employee relationship. Paragraph 5 the response stated that the respondent hired casual workers when the respondent was awarded a contract by the Kenya Electricity Generating Company Limited (KENGEN) to construct an office block at the Seven Forks Hydro-Power Station and all workers were casuals hired on daily basis. At paragraph 6 the response stated that the works stopped due to a dispute between the respondent and KENGEN and arbitration proceedings were still pending between KENGEN and the respondent. At paragraph 7 the response stated that the use of redundancy was therefore misconceived as applied by the claimants in this dispute.

On the other hand the claimant pleaded that the respondent hired the grievants on diverse dates and declared the grievants redundant on 28.07.2010 and on 5.01.2011. The alleged employment record as set out in the memorandum of claim shows that none of the 32 alleged employees completed a year in service so that none would be entitled to redundancy or severance pay as envisaged in section 40 of the Employment Act, 2007.

The claimant did not provide evidence to establish the alleged employment relationship, redundancy and the justification for the remedies as prayed for. In absence of such evidence, the court finds that the claims and reliefs as urged will fail.

In conclusion the memorandum of claim is dismissed with orders that the claimant will pay the respondent's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 3rd July, 2015.**

BYRAM ONGAYA

JUDGE