



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 51 OF 2013

FRANCIS RUNJI KARINGI)
JOSEPH WAWERU)
JOHN KAGIRI)
SIMON KARIUKI).....
CLAIMANTS
PETER MURIMI)
MARTIN WACHIRA)

(Suing on their own behalf and on behalf of other listed employees of China Hebei Water Conservancy Engineering Bureau)

VERSUS

**CHINA HEBEI WATER CONSERVANCY ENGINEERING
BUREAU.....RESPOND
ENT**

RULING

1. On 5th December, 2013 I made an order that to effectively manage and determine this case, counsel for the parties address the court by way of written submissions on the following issues:
 - (a) **The status of the claimants. That is to say whether they were casual employees or not.**
 - (b) **The minimum wage order applicable at the time when the claimants were working for the respondent and as a sub issue, the actual amounts of wages paid vis-a-vis the minimum wage order.**
2. The court has received submissions by the parties on these two issues.
3. According to the claimants' counsel, the claimants worked for a period exceeding three months and their contracts terminated on diverse dates in February, 2013. Counsel submitted that L.N. 94 of 2004 was the applicable legal notice during their employment by the respondent.
4. This legal notice, counsel submitted provided under paragraphs 5 and 19 that a continuous period of two weeks is sufficient to convert a casual employee to a contract employee with rights and

protections regarding basic minimum wage, house allowance, hours of work, overtime, holiday with pay, annual leave and other related provisions.

5. On the issue of the actual amount of wages paid and the amount claimed as per the wage order, counsel submitted that his clients ought to have been paid Kshs.36,234,002 but were actually paid 27,459,908 leaving a wage deficit of Kshs.36,234,022. Counsel annexed the bank statements of the claimants over the period they claim to have worked for the respondent to show how they were paid and how much.
6. The respondent on its part submitted that the question whether or not a person is employed as a casual employee depends on the mutuality of intention at the outset of the employment and the nature of the work; this would normally include its regularity, its hours and the obligations imposed on the employee. According to counsel therefore, casual employment is where one is employed to work when and if needed.
7. Counsel in the above regard submitted that the respondent in the line of its work engages various individuals as casual employees and the job cards are signed on a daily basis and payment provided for at the end of each day. According to counsel, there was no regular pattern of work since there were days and seasons when the casual workers were not needed. To demonstrate this contention, counsel annexed a copy of the Muster Roll to show that the claimants were absent from work on some days. Counsel further drew the attention of the court to the inconsistency in the amounts paid. She submitted this was so because the amount paid was only for the days worked based on the availability of work.
8. The crucial issue to be determined in this matter is the nature of engagement between the claimant and the respondent. Whereas the claimants' counsel has vehemently maintained that his clients were regular employees, the respondent's counsel maintained that they were casual employees.
9. I have perused and critically analysed the documents filed by either side in support of their respective positions and the following issues emerge:
 - (a) **It is not in dispute that the respondent hired the services of the claimants after the respondent was assigned a contract to rehabilitate the water canals at Mwea Rice Plantation.**
 - (b) **For ease of access and security on site the claimants were issued with job cards.**
 - (c) **The claimants signed daily worksheets indicating the amount payable to them.**
 - (d) **Payments to the claimants were sent to their respective accounts with KCB as exhibited by the various bank statements attached to the memorandum of claim.**
10. Section 2 of the Employment Act has distinct definitions for a casual employee and an ordinary employee. A casual employee is defined as “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time. On the other hand an employee is a person employed for wages or salary and includes an apprentice and indentured learner.
11. The critical distinction between an ordinary employee and a casual employee, therefore, is that a casual employee is paid at the end of each day and is not engaged for more than 24 hours at a time.
12. As has been observed earlier in this ruling the common and undisputed issues between the claimant and the respondent are that first, the respondent hired the claimants' services after it was assigned a contract to rehabilitate the water canals at Mwea Rice plantations; second, the

claimants signed daily worksheets indicating the amounts payable to them daily which amounts were paid monthly into their respective Bank Accounts.

13. From the foregoing, it seems to me that the claimants' worked for the respondent for more than 24 hours and were not paid at the end of each day of work as contemplated by section 2 of the Employment Act. To this extent, even though the original intention of the respondent may have been to hire the claimants' as casual workers, the nature and frequency of their engagement transformed the claimants' status from casual employees to term contracts employees within the meaning of section 37 of the Employment Act which provides in the relevant portion as follows:

37(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,.....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.

14. Subsection (3) of this section further provides that 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 the Act had he not initially been employed as a casual.

15. The court having so found, is empowered by section 37(4) of the Act to vary the terms of service of a casual employee and may in doing so declare the employee to be employed on terms and conditions of service consistent with the Act.

16. In the case before me, the claimants allege that their contracts were terminated contrary to law. This implies that they are no longer working for the respondent. Besides the respondent has also claimed that the nature of it's work is such that it does not require to keep a consistent workforce since the nature of the work it engages in, is seasonal and depends on the awarding of the contract to undertake the works. In the circumstances the court cannot order that the claimants be employed as contemplated under section 37(4).

17. To conclude this issue, the court orders as follows:

(a) The claimants having been employed consistently for more than 24 hours and paid monthly, they ceased to be casual employees but became term contract employees within the meaning of section 37(1) of the Employment Act.

(b) The claimants' counsel jointly with counsel for the respondent with the assistance of Embu County Labour Officer do verify and calculate the terminal benefits due to each and every claimant in accordance with the period worked for the respondent prior to termination of service.

(c) The terminal benefits be limited to the following:

(i) One month salary in lieu of notice.

(ii) House allowance at the rate of 1/3 of the monthly salary.

(iii) 21 days leave with pay per year where any claimant is found to have worked for an aggregate period of 1 year or more.

(iv) Service pay at the rate of 15 days pay per each year of service.

(d) Counsel for the parties with the assistance of the Embu County Labour

Officer to identify the applicable wage order to be used in calculating the claimants' terminal benefits.

(e) Should there be a difference between the minimum recommended wage and the wages actually paid to the extent that the wage paid is lower, the difference should be worked out in respect of each claimant.

(f) Parties return to this court within 60 days of this ruling to produce a report in line with the directions above, for perusal and adoption by this court as its final order.

18.It is so ordered.

Dated at Nyeri this 31st day of March, 2014.

ABUODHA J. N

JUDGE

Delivered in open Court in the presence of Odimuor Kelly Counsel for the Claimant and in the presence of Ombongi Counsel for the Respondent.

ABUODHA J. N.

JUDGE