



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 163 OF 2013

BETWEEN

KENYA PLANTATION AND AGRICULTURAL

WORKERS' UNION..... CLAIMANT

VERSUS

KEEN KLEENERS LIMITED.....RESPONDENT

Rika J [Decision]

CA. Mr. Kombe

Radido J [Trial]

CA. Ms. Midian

Ms. Guserwa instructed by J.A.Guserwa & Company Advocates for the Claimant

Ms. Isoe instructed by Mogaka Omwenga & Company Advocates for the Respondent

ISSUES IN DISPUTE: 1. UNFAIR AND UNLAWFUL TERMINATION

2. RECOGNITION AGREEMENT

AWARD

[Rule 27[1] [a] Industrial Court [Procedure] Rules 2010

1. This dispute was initially filed at Nairobi, as Cause Number 1321 of 2011, in which the Claimant Union characterized the issues in dispute as refusal by the Respondent to deduct and remit trade union dues; refusal to sign the recognition agreement; and unlawful lockout, redundancy, termination or dismissal of 44 Employees. It was transferred to industrial Court Mombasa on 6th June 2013.

2. The Claimant filed an Amended Statement of Claim on 7th March 2012, while the Respondent filed an Amended Statement of Response on 21st September 2012. Three of the Grievants testified before Justice Radido on 27th March 2014, when the Claimants' case closed. The Respondent called its General

Manager Mr. Richard Kipnetich Koech, who testified on 22nd July 2014, bringing the hearing to a close. The Parties confirmed the filing of their Final Arguments on 9th October 2014.

3. Judge Radido who heard the dispute was transferred to Nakuru before he could write his decision. The undersigned, replaced him, and has been tasked with writing this decision.

4. It must regrettably be noted, that when a Judge has to write a decision on a matter he / she did not try, there are certain limitations. He/she has not physically seen the Witnesses and has no benefit of assessing their demeanour. There are procedural orders made in the course of the hearing, which the incoming Judge cannot act on. For instance, in this case the Trial Judge ordered certain documents filed by the Respondent on 22nd May 2014, to be admitted after the Claimant had closed its case. Reasons for the decision would be given in the Judgment at the end of the hearing. Obviously the incoming Judge is not in a position to give such reasons and Parties may feel the Court has not served justice in full measure to them. Lastly the handwritings of Judges differ, and the incoming Judge may not always find his/her predecessor's handwriting legible. Typing of proceedings consumes more time, unnecessarily delaying the outcome. Fortunately the handwriting of the outgoing Judge in this dispute is not a challenge, in the eyes of the incoming Judge. The Court is not completely disabled, and having pointed out the limitations, shall bring the dispute to a closure, as laid out in the following paragraphs.

5. The Claimant is a registered Trade Union representing the Unionisable Employees in the Plantations and Agricultural sector. The Respondent is a registered Limited Liability Company, which engages in the business of conserving the environment, for Bamburi Cement Company at Bamburi Cement Company's premises in Lafarge Diani, Bamburi Estate and Mtamboni- all in the coast region.

6. The Claimant alleges to have recruited 129 Unionisable Employees of the Respondent in the Months of May, June and July 2011. Among the Recruits were the Grievants. The Respondent summoned the Grievants to its Head Office at Tudor, and informed the Grievants it had hence reduced their working days, from 6 days in a week to 3 days, a decision which the Employees viewed as retaliation for their choice to join the Claimant Union. They were subsequently locked out, dismissed or had their contracts terminated. The Claimant forwarded Check-Off Lists and a draft Recognition Agreement to the Respondent, which the Respondent did not act on

7. The Grievants had worked for the Respondent from the year 2007. They were not availed salary in lieu of notice, annual leave pay, severance pay and overtime on leaving employment. The Claimant prays the Court to Award:

- a) Reinstatement of the 44 Grievants without loss of benefits;
- b) In the alternative, the Grievants be paid salaries for days worked; 1 month salary in lieu of notice; annual leave in any; overtime if any; severance pay at the rate of 15 days' salary for each complete year of service; and 12 months' salary in compensation for unfair termination

8. Dzogolo Swalehe Juma testified he was hired as a Gardener by the Respondent, on 24th March 2007. He was paid monthly and had a written contract. He ceased working on 1st August 2011. He found the gates to the Workplace locked. He had served continuously from 2007. The Supervisor informed the Grievants Respondent's business had diminished, and issued them termination letters. The Grievants had enlisted with the Claimant Union 3 months earlier. The Grievants were asked by the Supervisor to choose between Union Membership and dismissal. Dzogolo opted to remain with the Union and was dismissed. During his 3 years of service, he did not take annual leave and was not paid in lieu of leave. His contract was to lapse on 31st July 2011. He does not wish to be reinstated.

9. Dzogolo testified in cross-examination that he signed a contract running from 1st March 2011 to 31st July 2011. Previously he served on other short term contracts. He was paid monthly through the Bank. He was dismissed on 1st August 2011. He expected his contract to be renewed as was the routine. The Respondent had a contract with Bamburi Cement. Dzogolo was among the Employees who signed the

Check-Off Lists. He was paid his salary for July 2011. He did not take annual leave for the whole employment period. He was not paid in lieu of annual leave. He worked continuously. Clause 5 of the contract stated employment was subject to availability of work. The Supervisor informed the Employees the Employer wished them to abandon the Union. All who refused to do so were dismissed. On redirection Dzogolo re-affirmed he expected his contract to be renewed. All the 44 Grievants joined the Union and were dismissed.

10. Mwanaidi Juma Mwabaraza and Hamisi Bakari Lidago were like Dzogolo employed by the Respondent as Gardeners, in 2007. They were placed on periodic contracts, joined the Claimant Union and were advised by the Employer to recant their Membership, refused to do so and were consequently dismissed. They too did not take annual leave, were not given notice before termination, and considered themselves to have been unfairly dismissed. They expected their contracts would be renewed.

11. The Respondent agrees that the Grievants were its Employees. However, their contracts were not terminated by the Respondent; they expired. There was no redundancy. The contracts ended after the Employees had worked for the fixed period of time. The amount of work, and number of workers required at Lafarge Ecosystem Diani, was determined solely by Bamburi Cement Limited. The Respondent's work was determined by the Local Purchase Orders and Work Schedule. The Employees were made aware at the time of their recruitment that their continuity in employment, was subject to the availability of work. The Respondent denies that the Grievants are entitled to the prayers sought. On recognition, the Respondent does not refuse to sign the Recognition Agreement, but argues that the draft Recognition Agreement forwarded by the Respondent referred to 'Panda Flowers Keen Kleeners Limited,' an entity unknown to the Respondent.

12. Richard Kipngetch Koech testified he has worked for the Respondent for over 10 years. The Respondent is in the business of garbage collection; office cleaning; yard cleaning; fumigation; and manpower supply. The Respondent was contracted by Bamburi Cement at its Diani Bio-fuel Project to provide manpower. Bamburi Cement Supervisor would train, allocate duties to the Employees and determine their numbers. Bamburi Cement Limited would pay the Respondent Kshs. 430 per Casual Employee per day. The Respondent undertook to pay the Casual Employees at least 62.5% of Kshs. 430 per day in wages.

13. The Respondent in turn placed the Grievants on fixed term contracts. There was no obligation on the part of the Respondent to extend the contracts. Extension would be subject to availability of work. The Respondent paid statutory dues to the relevant Bodies from the Grievants' wages. Mr. Koech identified from the Respondent's Bundle of Documents, cheques paid out to the Union by the Respondent in trade union dues. The Respondent has not been charged with any offence for non-remittance of statutory deductions.

14. The Respondent retained Attendance Registers for its Employees. Some of the Grievants' names were captured in the Registers. Mwanaidi worked for 21 days in May 2007. She was off duty for 3 days. Dzogolo worked for 21 days, taking off duty for 3 days and was absent for 1 day. Hamisi Bakari worked for 21 days and was off duty for 3 days. The Grievants were paid for the 21 days worked.

15. At the end of each contract, the Grievants were paid their dues which included uniform refunds. Where annual leave was not paid, it was captured in the Employees' records. Lists on accrued leave were prepared. Alfian Salim was paid 21 days of annual leave, while Dzogolo was paid 19 days of annual leave. The lists showed those who were paid final dues. The Respondent has not yet signed a Recognition Agreement with the Claimant Union, but was remitting trade union dues. The Recognition Agreement forwarded to the Respondent by the Claimant did not have the correct name. Initially the names on the Check-Off Lists did not have the full names and identity card numbers of the Employees. The Respondent started deducting and remitting trade union dues after these names and numbers were supplied.

16. The Diani Project was unique. Hiring was limited to the site of the Project, and hiring of Employees done through the Local Administration. Their numbers was based on the requirements of the Client, Bamburi Cement Company Limited. These numbers rose with the coming of the rains, because this was

the planting season. The jobs were seasonal. The contract between Bamburi and the Respondent was to this effect. Bamburi Cement sourced Labour through e-mails, phone calls or at the Site. These numbers fluctuated.

17. Bamburi Cement Limited raised Purchase Orders for Labour. Payments were based on actual work done. Bamburi determined the number of Casual Employees required. The Grievants' contracts expired. The Respondent still has some Employees at Diani, of whom about 90% are Members of the Claimant. The Respondent continues to honour its obligation to deduct and remit trade union dues with regard to these Employees. It did not terminate the Claimant's contracts on the basis of their Trade Union Membership.

18. Bamburi Cement held meetings with Respondent's Employees every Monday. They were kept informed of the changing scope of work. The Grievants did not return their Gate Passes and Uniforms to Bamburi Cement as required. They could not be paid their Deposit for the Uniforms.

19. Koech testified on cross-examination that there are 43, not 44 Grievants. There was no prayer for refund of N.S.S.F contributions. From the Respondent's Bundle of Documents Number 3, some Grievants were shown to have worked from 2007 to July 2011. Alfan's name appears on the Registers from December 2007. Abdallah Juma served from January 2008 to July 2011. He served throughout. He signed a contract effective from 1st March 2011 to 31st July 2011. It was not the first contract he signed. It was a 5-month contract. Termination could be done, through issue by either Party of 1 month written notice, or payment of 1 month salary in lieu of such notice. The Respondent did not give Employees notice.

20. The Grievants also signed undertakings after signing the contracts. The contracts took precedence over the undertakings. The Grievants received their salary at the end of the month. They were on contract. Their contracts ended on 31st July 2011. The Witness could not say if they were locked out after this. They were paid through their Bank Accounts at the end of July 2011. Final Dues were paid to Dzogolo. These were payable at the end of the contract. The pay slips capturing these payments were not availed to the Court. No document showing the final dues paid was made available to the Court. Koech was emphatic however, that payments were made through the respective Grievants' Bank Accounts.

21. The Records show some Employees were not paid outstanding leave days. Halima Shika claims 12 outstanding leave days. According to the Respondent's Records, she was owed 21 days. The Grievants were not paid because they did not clear with the Respondent by surrendering their Uniforms. The Respondent has not counter-claimed anything from them. They have not been paid because the dispute has been pending in Court. They took their rest days as shown in the Records. The Respondent did not stick to the 8 hours of work in a day spread over 6 days in a week. In July 2011, there were 1300 man hours, and 2080 man hours required in September. These added man hours would require more Employees. 50 Casual Employees were employed in August 2011. The Grievants were not advised the numbers required had gone down. The contract with Bamburi was to run for 2 years and was in place at the time the Grievants' contracts were brought to an end. The Respondent has no problem in recognizing the Claimant Union. Some payments are due to the Grievants. The Respondent would pay these if ordered by the Court to do so.

22. Redirected, Koech testified that the Respondent has complied with the requirement for deduction and remittance of trade union dues. Some leave days have not been paid to the Grievants. A summary of these is as shown in the list supplied by the Respondent. There was a letter indicating Casual Employees would be reduced to 60. At the date Koech gave evidence, the number stood at 35. The number kept changing. The Grievants' contracts lapsed on 31st July 2011. They were not denied the right to join the Trade Union, or dismissed for joining the Trade Union. They were aware of the date the contracts were to automatically lapse. July 2011 salaries were paid except for 5 days. There were some days of outstanding leave. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards: -

23. There is no objection from the Respondent in principle, on granting recognition to the Claimant

Union. The only reason why the Respondent did not accede to the Claimant's demand for recognition was that the wrong name, 'Panda Flowers Keen Cleaners Limited' was given in describing the Respondent, instead of the correct name 'Keen Cleaners Limited.' ***The prayer for recognition is allowed. The Respondent shall, within 30 days of this Award, sign a Recognition Agreement with the Claimant union. The Claimant Union shall forthwith, forward to the Respondent, a fresh Draft Recognition Agreement with the correct Respondent's name.***

24. On the question of whether the Grievants' contracts of employment were unfairly and unlawfully terminated, the Court has taken into account that the Grievants were employed on short term contracts as Gardeners. The contracts were for periods running from 1 to 6 months. The various contracts are attached to both Parties' Bundles of Documents. The Respondent characterized these Employees as Casual Employees, in its pleadings and evidence. The agreement between the Respondent and Bamburi Cement was for supply of Casual Employees.

25. The majority of the Grievants worked continuously, albeit under these periodic arrangements from 2007 to 2011. They cumulatively served for continuous working days of not less than 1 month. They served for years, between 2007 and 2011. They were paid monthly and the Respondent would therefore be incorrect to treat the Grievants as Casual Employees. Section 37 of the Employment Act 2007, demands the Grievants are treated as regular Employees, enjoying the full benefits and protections afforded under that Act.

26. Upon termination of the last contract on 31st July 2011, the Respondent had an obligation to issue the Grievants notice under Section 35 [1] [c] or pay the 1 month salary in lieu of notice under Section 36 of the Employment Act 2007. The periodic contracts themselves incorporated the requirement for 1 month or salary in lieu of notice. Besides the notice or notice pay, the Employment Act 2007 would extend the benefit of paid annual leave of not less than 21 working days; consideration for service pay or severance pay in case of redundancy; overtime pay; salary for days worked; and compensation, reinstatement or re-engagement in case of finding the termination to have been unfair.

27. From the evidence of the Respondent, it was in a contract with Bamburi Cement Company, rendering environmental services at Bamburi Cement Company's Lafarge Project at Diani. The Grievants were recruited to assist Bamburi in planting and nurturing trees for its Bio-fuel Project. This was seasonal work, governed by the rain patterns; when rain fell in abundance, work was available in equal measure, and Employees to do this work needed; and when the rain was scarce, there was scarce work, requiring diminishing of the labour force.

28. While the Court appreciates that seasonal employment arrangements are a reality of the agricultural and plantations sector, the Court has in the past emphasized the need for protecting Employees from the ravages of triangular relationships. In this case the Respondent is described as a Company involved in the sale of labour. It did so through Local Purchase Orders in which the Bamburi Cement Company would quote its labour requirements, name the price and the Respondent oblige by recruiting and supplying 'Casuals.' The two Companies seem to have treated labour like a commodity, complete with a Local Purchase Order. Labour is not a commodity.

29. Such a triangular relationship, where human beings are purchased through LPOs, is to be discouraged. There is no good reason why Bamburi could not engage these Employees directly. The Employees continued to be supervised by staff from Bamburi in their work, and Bamburi set the minimum wage which the Respondent was obliged to pay the Grievants. Bamburi was in control of the workplace, directed and trained the Workers, and determined their minimum wage. The only reason why it would recruit through the Respondent was to avoid the regulatory burdens imposed on Employers under the Employment Act 2007. This type of labour arrangement encourages commoditization and casualization of labour and should be avoided.

30. The Respondent was not under obligation, based on the contracts expiring 31st July 2011, to renew the contracts of the Grievants. The Industrial Court has ruled that fixed term contracts carry no expectation of renewal. However, the Parties had a relationship running from 2007. Contracts had

routinely been renewed from 2007 to 2011.

31. The Respondent states the Grievants' contracts expired and they were not unfairly dismissed on account of their joining the Claimant Union. There was allusion also, to diminished volume of work at Lafarge, which as the Claimant holds, would mean a redundancy situation. Either way, it was for the Respondent to prove the reason for termination under Section 43 of the Employment Act 2007.

32. The Respondent, while showing that the Grievants' contracts lapsed on 31st July 2011, did not discount the Grievants' evidence that they genuinely and legitimately expected renewal. The Parties as noted had been in a relationship, from 2007. In between 2007 and 2011, the Grievants' contracts had been renewed without fail. After July 2011, in the month of August 2011, the Respondent recruited another 50 Employees. If this Court understood the evidence of Mr. Koech correctly, in July 2011, the Respondent had 1,300 man hours. In September 2011, 2,080 man hours were required, calling for more Employees. Why then let the Grievants leave on 31st July 2011, Grievants who had been trained by Bamburi Cement, and worked for Bamburi Cement from 2007?

33. The Claimant alleges the Grievants were denied renewal for no other reason than their association with the Claimant Union. The Respondent denies this had anything to do with unionization, directing the mind of the Court to the fact that at least 90% of the remaining Employees are Members of the Claimant Union and had not been victimized. In addition, the Respondent has faithfully been deducting and remitting trade union dues.

14. The Court is not able to agree entirely with the Claimant that the Respondent victimized the Grievants on account of their opting to join the Claimant Union, in view of this fairly strong evidence from the Respondent. The Respondent has likewise demonstrated its respect for its Employees right and freedom of association, by conceding the prayer for recognition of the Claimant Union. It cannot therefore be fair of the Court to conclude, that the Respondent declined to renew the Grievants' contracts, to punish them for joining the Trade Union.

15. To prove the reason for termination nonetheless, is an obligation imposed on the Employer by the law. It is not sufficient for the Respondent to say that the contracts died a natural death; it should have, given the long relationship it has had with the Grievants, and its recruitment of other Employees immediately after the Grievants left, shown why it could not grant the Grievants renewal. While the general principle is that fixed term contracts carry no expectation for renewal upon expiry, each relationship must be examined in its own context. In this case the Employees have shown they were ordinarily employed by the Respondent on continuous, short term contracts, beginning 2007, which were renewed years on end, at the end of every period. Such renewal had become automatic. There was legitimate expectation of renewal, and the Respondent went on to employ no less than 50 new Employees in August 2011, while declining to renew the contracts of the 43 Grievants a month earlier. To this extent, the Respondent failed in showing a valid and fair reason for not taking the Grievants' contracts beyond the 31st July 2011. It was not a refusal to renew dictated by any reason from the Respondent or by extension, from Bamburi Cement Company. The contracts issued to the Grievants, stated renewal was subject to availability of work. There is nothing on record to show diminished work as of 31st July 2011. In short, termination of the outgoing contracts combined with the refusal to consider renewal, would be deemed unfair termination under Section 43 as read with Section 45 of the Employment Act 2007. The prayer for reinstatement is not the preferred remedy going by the evidence of the 3 Grievants who gave evidence for all the Grievants. It would also not be legal, practicable and reasonable given the passage of time from the date of termination, and the recruitment of many other Employees to fill the positions previously held by the Grievants. ***Each of the 43 Grievants shall be paid 4 months' salary in compensation for unfair termination.***

16. ***The claim for 1 month salary in notice pay is well founded in law and fact and is granted.***

17. The Court is not persuaded that there was a redundancy situation. The Respondent, while arguing in general that Bamburi determined the number of Employees depending on the volume of work, did not concede that termination was on the basis of a redundancy situation. The Claimant suggested termination

was on the basis of either redundancy, or on account of the Grievants' enlisting in the Claimant Union. There was no clear case of redundancy. ***The prayer for severance pay under Section 40 of the Employment Act 2007 is in the view of the Court misplaced and is rejected.***

18. There was no proper evidence given on overtime pay. The Claimant did not provide the Court with details of the agreed number of working hours; specific hours worked in excess of the permitted hours; the details of the Grievant putting in such excess hours; and the period during which such overtime work was undertaken. The prayer was bare, not established through the available employment records, or by the evidence of the Grievants who testified. ***The prayer for overtime pay is declined.***

19. The Grievants told the Court they were paid their dues for the month of July 2011. Mr. Koech agreed with them, but stated on redirection that "July 2011 salaries were paid save for 5 days and leave." ***The Respondent shall pay to the Grievants 5 days' salary acknowledged as outstanding in July 2011.***

20. The contracts concluded by the Parties allowed the Employees one-three-quarter days paid leave monthly, on completion of each continuous calendar month. There were no complete records supplied by the Employer, showing that this annual leave clause was implemented. The Attendance Registers show a majority of the Employees working for 26 days in a month. The columns for annual leave almost invariably indicate zero. The contracts stated annual leave pay would be incorporated in the monthly pay. The Court has not seen this captured in the Grievants' pay slips attached to the Statement of Claim. ***The Court grants that each Grievant shall be paid annual leave pay as tabulated in the Schedule attached to the Claimant's Submissions.***

21. *The Court in sum Orders:-*

a) The Respondent to sign the Recognition Agreement with the Claimant Union within 30 days. The Claimant Union to forthwith submit to the Respondent a rectified Draft Recognition Agreement.

b) Each of the 43 Grievants shall be paid by the Respondent within 30 days of the delivery of this Award, 4 months' salary in compensation for unfair termination; 1 month salary in lieu of notice; 5 days' salary outstanding in July 2011; and annual leave pay as tabulated in the Schedule attached to the Claimant's submissions.

c) No order on the costs

Dated and delivered at Mombasa this 14th day of November 2014

James Rika

Judge

