REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 104 OF 2012

KENYA UNION O COMMERCIAL FOOD

AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

ATTA [K] LTD ….....RESPONDENT

J U D G M E N T

The claimant union filed claim number 1069 of 2011 on behalf of the 96 grievants herein claiming terminal benefits and damages for unlawful termination amounting to ksh.5,896,001 against the respondent. On 30/8/2011 Moi kunyumu and 21 of the grievants herein brought suit number 1458 of 2011 against the respondent claiming similar orders but without knowledge of the suit number 1069 of 2011 aforesaid. The two suits were approsed by the respondent who contended that the grievants were all casual workers who were not in any continuous service.

The two suits were consolidated and proceeded under case number 1069 of 2011 which was given a new number for Mombasa as ICC No. 104 of 2012. The parties agreed that all the 96 grievants be represented by 3 witnesses in adducing evidence and the respondent to call one witness. The case was heard on 27/2/2013 and 25/6/2013 when Samuel Baya Yaa, Ali Salim Koi and Moi Kinyumu testified for the claimant as CW1,2 and 3 while Victor Odhiambo Ouma testified on behalf of the respondent as RW1.

CW1 is the claimants Branch Secretary Mombasa and the national Assistant Treasurer for the claimant. He told the court that the claimant and the respondent have a Recognition Agreement and a Collective Bargaining Agreement (CBA). That the grievants were all members of the union and employees of the respondent but were never given appointment letters. After the enactment of new employment laws in 2007 the union asked the respondent to convert the grievants into permanent staff and pay their benefits for the period before the new law. That the respondent agreed to the request but on ground that she was to pay only leave for 3 years and issue appointment letters backdated to the respective time that each grievant was employed. That the Personnel Manager Mr. Enos Odhiambo gave him an extract from the payroll indicating each grievants earnings to calculate the leave pay for the 3 years.

That after verifying with each grievants that the information given by the payroll extract, he calculated leave pay as per appendix 7. On 18/9/2008, the 96 grievants were locked out of the work place after he submitted the claim for leave pay. The security officer denied them entry to their shift on ground that the said shift had been withdrawn.

That he went there and heard the Personnel Manager Mr. Enos Odhiambo tell the grievants that the shift had been withdrawn. That no reason was given for the withdrawal and no prior notice had been given to the grievants. That conciliation process failed after the respondent failed to attend. He contended that there were similar other cases which he participated in amicable settlement in which the respondent treaed the casuals as permanent staff because of prolonged service. He confirmed that all the 96 grievants were not members of NSSF or any other benefit scheme. He maintained that the CBA covered all employees who were members of the union including the grievants but the respondent did not apply it on the grievants. That although the grievants signed for payment daily the actual payment was done end of the week.

CW2 was employed on 6/3/1985 as a general labourer and later became a Machine Operator earning kshs252 per day but paid weekly. He was the assistant shopsteward for the claimant at the work place. He was terminated on 18/9/2008 together with 32 others in his department. The reason given was that the work had reduced and as such their shift was terminated. The termination was declared by the Personnel Manager Mr. Enos. No terminal benefits were paid to them and no termination notice was served before termination. He prayed for dues under the CBA because he was a union members.

On cross examination he admitted that he worked continuously for over 20 years except a few days when work was reduced. That in 2006 he worked continuously. That they used to sign gate register every morning they reported to work.

CW3 was employed in March 2002 in the Intake Department but later became Machine Operator in the Bram Operation Section. His daily wage was Kshs.252 but was paid weekly on Saturdays. He never went for any leave and was never asked to go. On 18/9/2008 he was in the morning shift but when he arrived he found a notice on the respondents notice board saying that there was no job. He waited with the others outside the gate until 10.00am when the Personnel Manager Mr. Enos Odhiambo and the shopsteward Mr. Ngome Shitavi came out and told them that their shift had been withdrawn due to reduction in work. There was no notice prior to the termination.

He contended that they used to sign gate register every morning but the respondent had refused to produced it in court. On cross examination he admitted that he was a casual employee but contended that he worked continuously even on Sundays sometimes. He further contended that there was wheat all the time but when it ended he used to clean the machines.

RW1 is the current personnel manager. He told the court that the grievants were casual workers for the respondent who were recruited daily depending on availability of work. That they were paid and signed to acknowledge the payment. Respondent appendix 1 is for 29.4.2006 and shows that CW2 was paid ksh.225 and signed. That the pay was daily because there was no guarantee to get the job the following day. He contended that none of the grievants served for continuous 12 months in order to qualify for leave and severance pay.

He maintained that the grievants were to be absorbed in other shifts but they refused. He contended that the documents filed by the defence were a summary of daily payments records and produced it as exhibit D.3. Referring to the employment records he demonstrated that in January 2007 CW2 and 3 worked for only 12 days.

On cross examination he confirmed that the CBA covered all the union members including causals. That there was a book at the gate for signing but he did not bring it to court. He however conceded that the grievants were excluded from clause 17 of the CBA because they were not members of the union and they did not pay union dues by check off system. After the close of the hearing the parties filed written submission and highlighted them on 17/7/2013.

I have carefully perused the pleadings and considered the evidence and the submissions and the following issues arise

1. **whether the grievants were in continuous service to the respondent**

2. **whether their contracts of service were governed by the CBA between the claimant union and the respondent.**
3. **Whether the grievants were unlawfully terminated.**
4. **Whether the grievants are entitled to the reliefs sought.**

In answer to the first question the claimants merely state that they were verbally employed on diverse dates and served continuously for different periods extending upto 30 years for some. No documentary evidence was produced on their behalf to prove the allegation of their continuous service. The defence however produced exhibit D3. Which shows that the claimants were not in a continuous service. For example the defence proved that in January 2007 the Cw2 and 3 worked for only 12 days. The entire bundle of exhibit D3 shows clearly that indeed the grievants were never in continuous service for six months which was the minimum period required under the Employment Act Cap 226 (repealed) for one to be converted into a permanent employee.

There was allegation by the claimants that without the gate register of attendance, the exhibit 3 was not full proof that the grievants were not in continuous service. I however I am persuaded by the exhibit D.3 that it represented a summary of days worked by the grievants during the period covered by the exhibit. The court therefore agrees with the defence that the claimants were casual employees who were paid daily as shown by appendix 1 of the defence when CW2 was paid kshs.225 for work done on 29/6/2006.

As regards the second issue, the claimant again contended that causal workers were covered by the CBA between the respondent and the claimant union. The respondent denied that contention for the reason that the grievants were never members of the union and they never paid union dues by check off system. The claimant has not proved that the grievants were indeed members during their service. The court observes that the preamble to the CBA clearly provides that it covered all the union members. The claimant has not proved that the grievants were members and as such the court finds that their contracts were never governed by the CBA between the union and the respondent. To that extent the claim originated by ICC 1069 of 2011 crumbles for lack of *locus standi.*

In view of the find ings on the first issue above the answer to the third question is in the negative. The grievants never served for 6 continuous months for them to qualify for a notice period of one month under the said Cap 226 (repealed). They did not also prove that after the Employment Act 2007 came into force they served for 3 months continuously for them to qualify for benefits under Section 35 of the new law. The nearest they came to proving a benefit is when they alleged that they were paid on weekly intervals. The court is however persuaded by the evidence on record that shows that payment was paid daily at the end of the day's work. Consequently the court finds that no notice was required for the termination of a casual employment of one day and the respondent did nothing unlawful by withdrawing the grievants shift. In any case the respondent has maintained that she welcomed them to serve in the other two shifts which were left but they declined.

Lastly, the court is of the opinion that the grievants both in ICC 1069 of 2011 and 1458 of 2011 are not entitled to any of the dues sought in their respective suits in view of the findings on 1st, 2nd and 3rd issues.

I make no orders as to costs.

Signed dated and delivered this 4th October 2013

ONESMUS MAKAU

JUDGE