



Kenya Engineering Workers Union v Kenya General Industries Limited (Cause E021 of 2022) [2024] KEELRC 1478 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1478 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E021 OF 2022**

M MBARŪ, J

MAY 16, 2024

BETWEEN

KENYA ENGINEERING WORKERS UNION CLAIMANT

AND

KENYA GENERAL INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. In a ruling delivered on 30 October 2023, the court allowed the claimant to prosecute claims for Francis Mwai and Felix Otieno Okoth. During the hearing on 19 March 2024, the claimant indicated that Francis Mwai is since deceased.

Felix Otieno Okoth testified in support of his case.

Claim

2. The claimant is a trade union and the respondent is a limited liability company. Parties signed a Recognition Agreement and negotiated several collective agreements (CBAs).
3. The claim is for several grievants. The only claim that proceeded for hearing is that of Felix Otieno Okoth (the grievant). His case is that he was employed by the respondent company from March 2018 until June 2021. The basic wage was ksh.25, 000 plus ksh.4, 000 house allowance.
4. The claim is that all unionisable employees in the service of the respondent were covered under the CBA and the mandatory provisions of Section 57 of the *Labour Relations Act*, 2007 (*LRA*). The respondent unlawfully terminated the grievant's employment on account of a fixed-term contract claiming that the same has not been renewed when the same was not subject to the CBA. Any procedures with regard to the grievant were supposed to be handled within the provisions of the CBA which the respondent failed to do.



5. The grievant worked for the respondent for 10 years and was termed as a casual in violation of his rights. Clause 30 of the CBA provides that casual workers should be converted under Section 37 of the [Employment Act](#). There were no valid grounds upon which the respondent employed the grievant on a fixed-term contract contrary to the CBA. At the end of employment, the grievant was entitled to be paid his gratuity per the CBA as held in the case of [Kenya Leather Workers Union v Bata Shoes Co](#), (K) Cause No.245 of 2014.
6. The claim is seeking the following;
 - a. A finding that there was unfair termination of employment contrary to the CBA;
 - b. Payment of gratuity per the CBA;
 - c. Notice pay of one month per the CBA;
 - d. 12 months compensation for wrongful termination of employment;
 - e. Costs.
7. The grievant testified in support of his case that he was employed by the respondent in the year 2015 at a wage of ksh.15, 000 per month. His employment was terminated for joining the union and after registration for a dispute for payment of better wages. The reason leading to dismissal was that the union was demanding more wages.
8. Mr. Okoth testified that the claimant had a CBA with the respondent but the respondent went against the CBA and issued the grievant and other employees three (3) months contracts. In total, he worked for 7 years as a crane operator. During the course of his employment, he was issued with a warning due to damage to the corrugated sheet in the year 2020. The damage was a result of rolling sheets and the matter involved other employees. Several employees were severed with a similar warning notice.
9. The grievant testified that his employment was terminated unfairly when he demanded better wages. He should be paid notice, compensation, and gratuity per the CBA.
10. Upon cross-examination, the grievant testified that he started working for the respondent in the year 2015 as a casual and would be paid weekly. He then got 3 months contract with a week's break. His last contract was from 19 June to 20 August 2020. The respondent did not allow him to work without a contract. On 7 July 2020, he was dismissed before his contract ended. He reported the matter to the claimant union and despite efforts to negotiate the matter, there was no settlement.

Response

11. In response, the respondent admits that the parties have a Recognition Agreement and have negotiated CBA. The grievant was employed from March 2018 to July 2020. He was retained on short term non-continuous contracts in different capacities. His last wage was ksh.23, 695.73.
12. The contract expired and was not subject to automatic renewal. The grievant was not a permanent employee and hence the CBA did not apply to him. In the dispute, the claimant failed to exhaust the provisions of Section 62 of the [LRA](#) and Section 15 of the [Employment and Labour Relations Court Act](#) and the claim sought was without merit and should be dismissed with costs.
13. In evidence, the respondent called Mohamed Iqbal Koraya the human resources director who testified that the grievant was employed from the year 2018 and not 2015 as stated. He worked until 7 July 2020 and not 2022 as stated. The grievant was dismissed from his employment on 7 July 2020 for breach of health and safety rules per the company policy. The respondent is a manufacturing company dealing in



the manufacture of galvanized corrugated iron sheets. Employees are required to keep strict workplace safety and health regulations and any breach can result in serious damage. The grievant was found to be in breach and notice of summary dismissal was issued. His employment was governed under his contract terms.

14. Mr. Iqbal testified that there is a Recognition Agreement with the claimant but the CBA only got registered by the court on 13 April 2022 after the grievant had ceased his employment. His work was not continuous and each contract ended and his terminal dues were paid.
15. Mr. Iqbal testified that the grievant had warning letters issued to him for poor work and failure to adhere to safety standards. Each warning was copied to the union representative. The letter of summary dismissal was not copied to the claimant union but the union representative on the shop floor was aware of the CBA violations. The respondent followed the due process in terminating employment. The grievant was paid for days worked until 7 July 2020.
16. At the close of the hearing, parties filed written submissions.
17. The claimant submitted that the grievant was dismissed for joining the union which resulted in victimization contrary to Articles 36 and 41 of *the Constitution*. This was unfair Labour practice and contrary to the CBA negotiated and executed between the parties. Under clause 46(c) of the CBA termination of employment should follow the due process which the respondent failed to adhere to and the claims made should be awarded.
18. The respondent submitted that Section 47(5) of the *Employment Act*, 2007 (the *Act*) requires a claimant to discharge its burden of proof with regard to a claim that there is unfair termination of employment. Upon this, an employer is required under Section 43 of the *Act* to justify the reasons for termination of employment. The grievants testified that his employment was terminated due to unionization but admitted that on 7 July 2020, he was issued with a notice of summary dismissal for breach of company health and safety regulations. In the case of *Protus Wanjala Mutie v Ango African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR, the court held that where the claimant fails to discharge the burden under Section 47(5) of the *Act*, there is no *prima facie case* to warrant a response.
19. In the case of *Ali Omar Mwanyuni v Kwale International Sugar Co. Ltd*, the court held that in Section 47(5) of the *Act*, an employee alleging unfair termination of employment carries the burden of proof. An employee who is prevaricated on the date of termination cannot be said to have discharged the evidential burden placed under the law.
20. The respondent submitted that the claim for gratuity is not due as held in the case of *Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho* [2017] eKLR. The grievant was on a fixed-term contract from 19 January to 17 August 2020 and was dismissed due to a breach of safety regulations. He cannot claim gratuity as he was not a permanent employee. Notice pay and compensation is not due in a case of summary dismissal that is justified.

Determination

Recognition between the parties is admitted.

21. Following recognition, parties negotiated a CBA dated 13 April 2022. It is not indicated whether the signed CBA has since been registered for the court for enforcement.
22. The grievant testified that his last day as the employee of the respondent was on 7 July 2020. This was way before the CBA under which he had based his claim was executed.



23. A CBA only becomes enforceable within the provisions of Section 59(5) of the [LRA](#);
 - (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.
24. Without the claimant proving the CBA registration with the court, any claim under it is lost.
25. The respondent's case is that the grievant was employed under a fixed-term contract. The last contract covered the period of 19 January 2020 and was due to lapse on 18 August 2020. Indeed, an employer is granted the prerogative to organize its employees and issue term contracts. This is allowed under Section 10(3) of the [Act](#). A fixed-term contract is lawful and valid. Even where there is a CBA regulating terms and conditions of employment, to issue a category of employees with term contracts is not unlawful. Term contract cannot be negated by a CBA as such a provision is lawful as held by the Court of Appeal in the case of Civil Appeal No. 18 of 2018 [Transparency International Kenya v Teresa Carlo Omondi](#) [2023] eKLR.
26. In this case, the CBA is not indicated as having been registered. Even in a case where the same was registered, termination of employment was on 7 July 2020 due to gross misconduct, and in which matter the claimant did not challenge that the grievant was in breach of safety and health regulations. The grievant admitted that he was issued with a warning and the shop floor representative of the claimant was notified of the same. The claimant's case is that the grievant was victimized due to unionization and union activities. These claims are at variance with what took place on the shop floor.
27. The admission by the grievant that he was issued with notice of summary dismissal for workplace misconduct thus addressed and not challenged, the assertion by the claimant that termination of employment was due to unionization is without any basis. The employee was on the shop floor, he committed misconduct and was issued with a warning. He went ahead and breached workplace regulations, such resulted in the termination of employment for good cause. The claimant cannot justify a claim that there was a wrongful and unfair termination of employment.
28. On the evidence at hand, summary dismissal arose out of gross misconduct. Notice pay and compensation are not due to the grievant.
29. On the claim for gratuity, such arises from the referenced CBA dated 13 April 2022. As noted above, the CBA cannot be enforced until registration with the court.
30. Ultimately, the claimant is seeking payment of its costs. It was apparent to the court during the hearing that the grievant's representative was ill-prepared for the hearing. In between proceedings, efforts were made to frustrate the hearing. This stood out. It is sad. Workers on the shop floor join a trade union for a day such as this. To be represented in court by a competent and willing union representative. The grievant joined the claimant union to benefit from such service which was sadly missing. To hence claim for costs would negate the very essence of what is noted above. The claimant will meet the costs due to the respondent.
31. The court brings to the attention of the grievant the matter in [Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers](#) [2013] eKLR. My humble view is that the grievant expected that the claimant union representative would protect him in the performance of that role, as well as discharge its obligation to him as a Member faithfully, honestly, with care and diligence. This was outstandingly lacking. Despite the CBA not being registered, the grievant was entitled to quality representation in court.
32. Accordingly, the claim is found without merit and is hereby dismissed with costs to the respondent.



DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

