



Bakery Confectionary, Food Manufacturing & Allied Workers Union v Manji Foods Industries Limited (Cause 932 of 2018) [2024] KEELRC 1466 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1466 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 932 OF 2018
NZIOKI WA MAKAU, J
JUNE 12, 2024**

BETWEEN

**BAKERY CONFECTIONARY, FOOD MANUFACTURING & ALLIED
WORKERS UNION CLAIMANT**

AND

MANJI FOODS INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. Through an Amended Memorandum of Claim dated 4th July 2023, the Claimant Union claims against the Respondent the unlawful lock out and/or termination from employment of Mr. Lawrence Juma, and the non-payment of his terminal dues and entitlements. The Claimant averred that the Respondent employed Mr. Juma (hereinafter “the Grievant”) as a Turn Boy with effect from 14th November 2012. That the Grievant was tasked with the responsibility of loading items from the company store onto the delivery trailer and making deliveries of goods to the Respondent’s customers as per the dispatch instructions from the management. The Claimant contended that neither was the Grievant issued with a letter of appointment setting out his terms and conditions of employment at the time of his employment nor was he issued an itemized pay slip showing particulars of payments made when he received his monthly wages. That at the time of his exit from the Respondent Company, the Grievant was earning a daily wage of Kshs. 639/- payable on a daily basis with effect from February 2013. Furthermore, the Grievant was paid an additional amount of Kshs. 70/- in respect of any overtime plus a standard out of town allowance of Kshs. 1,750/- in respect of journeys made outside of Nairobi. That prior to February 2015, the Grievant earned a sum of Kshs. 550/- per day. The Claimant’s case was that the Grievant worked continuously for the Respondent from the date of his engagement and rendered services to Company until the day of his exit. That despite the Respondent not having issued the Grievant an appointment letter, he was deemed a regular employee of the Company by operation of the law and is rightfully entitled to enjoyment of the terms and conditions



of employment stipulated in the collective agreement (CBA) in force at the time between the Claimant and the Respondent.

2. It was the Claimant's averment that on 26th September 2016, the Grievant reported to work and the security personnel manning the gate advised him that they were under strict instructions not to allow him access the Respondent's premises. That upon further inquiry, the Grievant was informed that denial of his entry related to an incident of 24th September 2016 when the Company's vehicle was impounded by Nairobi City County traffic marshals due to a minor traffic infraction. That subsequently, the Grievant was verbally informed that he had conspired with the Nairobi City traffic marshals to have the Company vehicle impounded so that he would benefit from a kick back from the fines imposed on the vehicle. The Claimant went on to narrate that the Grievant thereafter contacted the Shop steward and a meeting was later held at the Company's premises in the presence of the Manager Mr. Vijay, the Shop steward, the Respondent's Human Resource Manager, the Store Manager and the Assistant Store Manager. That during the said meeting, the Grievant was informed that his lock out was because of his attitude towards work as fronted by the Respondent's Store Manager. That however, the Respondent had never issued the Grievant with any formal communication on his alleged unsatisfactory conduct and/or performance at the workplace prior to the lock out.
3. The Claimant further averred that the Grievant had expressed his concerns over his safety and well-being while undertaking deliveries as he was forced to ride behind while inside the trailer, which had minimal or no ventilation at all and further, the transported items could easily fall on him while undertaking deliveries. That when he requested to be housed alongside the driver in the carriage component of the trailer, which was much safer, the Store Manager characterized him as having a bad attitude towards his work. It was the Claimant's stance that at the aforementioned meeting, the Respondent declined to allow the Grievant back to work and he subsequently lodged a formal complaint with the Union on 3rd October 2016. That consequently, the Claimant addressed a letter to the Respondent dated 10th October 2016 demanding the reinstatement of the Grievant back to his duties but the said letter did not elicit any response. The Claimant noted that on 24th October 2016, it reported a trade dispute to the Minister over the Grievant's lock out from duty and that through a letter dated 18th November 2016, a Conciliator was appointed to act on the dispute. It contended that the Conciliator endeavoured to resolve the dispute through scheduling various meetings that however failed to take off at the instance of the Respondent, who cited unexplained unavoidable circumstances and further failed to proffer any apologies. That consequently, the Minister issued a Certificate dated 26th May 2017.
4. According to the Claimant, the Grievant was never involved in any disciplinary misconduct for the period he was engaged by the Respondent and maintained a clean and untainted employment record. That the Respondent's conduct of locking out the Grievant from his duty station was unlawful, illegal, unjustified, and eventually led to termination of his employment. It asserted that the said termination of the Grievant's services was unfair and unlawful by dint of lack of notice and lack of adherence to basic disciplinary procedures as enshrined in law. The Claimant thus seeks one month's pay in lieu of notice, underpayment in wages from January to September 2016, leave pay and leave travelling allowance and 12 months' wages compensation for unlawful termination of employment as particularised in the Amended Memorandum of Claim. It further prays for issuance of a declaratory order to issue that the Grievant was unlawfully locked out and subsequently unfairly terminated by the Respondent, interest on payment of the Grievant's dues, certificate of service, cost of the suit, and any other relief deemed fit and appropriate.



Respondent's Case

5. The Respondent replied, through its Amended Answer to the Memorandum of Claim dated 14th August 2023, that the Grievant was not an employee of the Company. That in the alternative and without prejudice, if the Grievant was an employee of the Respondent, then he was a daily-wage contracted worker whose wages were payable daily and/or as agreed between him and the Respondent, which is also denied. It further denied that the Grievant was locked out and/or terminated from employment as alleged or at all, asserting that the Grievant left the Respondent's premises on his own volition after consistently refusing to obey lawful instructions and by virtue of his aforesaid contract ending by effluxion of time. The Respondent averred that all dues lawfully and contractually payable to the Grievant were paid in full and that this Court lacks jurisdiction to entertain the present Claim, as the claims sought are statute barred.
6. The Respondent averred that the alleged meetings before the Conciliator stood overtaken by events because there was no dispute capable of resolution as sought by the Chinese. That the Grievant was given an opportunity to respond to allegations of his constant refusal to obey lawful instructions, but he refused to respond and resorted to walking out. The Respondent therefore prays that the Claimant's Claim be dismissed with costs for being premature. That the Grievant's relationship with the Respondent having been contractual and the Respondent having complied with all its financial obligations as ascribed under the Contract, the Claimant is not entitled to notice pay, underpayment in wages, and leave pay and leave travelling allowance. It further asserted that the claim for compensation must fail because the Grievant was not wrongfully terminated or at all.

Evidence

7. The Grievant (CW1) stated under cross-examination that he worked all days except on Sundays and that he was paid on a daily basis, meaning he would not get paid if he did not show up at work. He confirmed being a member of the Claimant Union from 2013 and remitted union dues and that his designated place of employment was the store.
8. The Respondent's witness, Mr. Christopher Nzioka (RW1), testified that the Grievant was a general worker in the finished goods store and that his pay was all inclusive. RW1 stated that he had received complaints on the Grievant's insubordination and use of vulgar language against colleagues and therefore wanted the Grievant to defend himself before the meeting. He contended that they were called for two (2) scheduled meetings but the Conciliator was absent on the two occasions and that they had nevertheless gotten a letter indicating a deadlock. Whereas RW1 denied in his testimony that the Grievant was a member of the Union, he asserted under cross-examination that he could not confirm whether the Grievant was a member of the Union. He confirmed that they remitted through check-off and that the deduction is 2.5% agency fees for unionisable members but could not confirm that the Grievant worked for the Respondent for 4 years. RW1 clarified in re-examination that union dues are deducted from all members that have expressed interest in joining the Union while agency fees are paid by unionisable employees.

Claimant's Submissions

9. The Claimant submitted that the issues for determination before the Court are as follows:
 - a. Whether the Grievant was a member of the Claimant Union;
 - b. What was the legal status of the Grievant's employment and what were his terms of engagement?



- c. Whether the Grievant was unlawfully terminated from employment or whether he voluntarily left employment;
 - d. What remedies are available to the Grievant?
 - e. Who is to bear the cost of the proceedings?
10. It was the Claimant's submission that RW1 extensively tendered evidence denying the Grievant's membership with the Claimant Union even though such issue was neither raised in their witness statement nor addressed in the Defence document and further, the said witness could not confirm the Grievant's membership. It argued that if at all the Grievant was not a member of the Union as alleged, the Shop steward would not have intervened with the management on behalf of the Grievant and the Respondent would not have then convened a session to discuss his conduct while acting on the invitation of the Shop steward. The Claimant urged the Court to find on a balance of probability that the evidence on record confirms that the Grievant was a member of the Claimant Union.
11. The Claimant submitted that having established that the Grievant was a unionisable member of the Claimant, the CBA executed between the parties was effectively binding on the Respondent in line with the provisions of section 59 of the [Labour Relations Act](#). That the Grievant was thus entitled to enjoyment of the terms spelt out in the CBA just like the rest of the unionisable employees. It asserted that it was pursuant to the Recognition Agreement between the Union and the Respondent that parties signed a CBA that codified terms and conditions of employment of unionisable employees. That clause 45 of the CBA makes provisions for engagement of employees on casual terms by reiterating the provisions of section 37 of the [Employment Act](#), 2007 on the definition of a casual employee. That clause 33 of the CBA states that, every employee of the company whose terms are covered by this agreement shall receive a letter of appointment in the form shown at Appendix B attached to this Agreement.
12. It was the Claimant's submission that since the period of engagement for casual employment amounts in the aggregate of not less than one (1) month, where a casual employee works beyond the period contemplated, that employee is considered a regular employee entitled to issuance of a letter of appointment as dictated under clause 33 of the CBA. The Claimant argued that the Grievant was condemned to work as a casual beyond the period contemplated under the Act and the CBA and ought to thus be deemed a regular employee entitled to all perks set out in the CBA. In addition, that engaging the Grievant on casual terms in perpetuity and outside the provisions of the CBA was unfair labour practice. The Claimant cited the case of [Bakery Confectionery Food Manufacturing & Allied workers Union \(K\) v Kenafri Industries Limited](#) [2018] eKLR in which the Court held that any deviation from the CBA terms without following the negotiations procedure was a violation of the terms and conditions set out therein. It was submitted by the Claimant that section 45 of the [Employment Act](#), 2007 provides that for any termination to be considered fair, the reasons informing that termination must be valid. In essence, termination of an employee should on all fours be premised on a valid reason and secondly, the employment must have been terminated based on fair procedure per [H. Young \[EA\] Limited v Samuel Gikumba Mbiuki](#) [2020] eKLR. It further noted that section 43 of the Act states that the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. That the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer as provided under section 47(5) of the [Act](#). That once an employee demonstrates that the reason for termination is invalid, section 47(5) shifts the burden of proof on the employer to justify the reasons for termination.



13. The Claimant argues that in the instant case, the Grievant was not issued with any show cause letter setting out particulars of any allegations of misconduct against him and no invitation letter was sent to him prior to the meeting called by the Respondent regarding his lock out. That while the Respondent accused the Grievant of insubordination, no particulars were provided on the specific conduct deemed as amounting to insubordination and its contention that he used abusive language against the security guards was never substantiated. According to the Claimant, the Respondent had therefore failed to demonstrate the validity of the reasons leading to the termination of the Grievant's employment and this Court must find that the termination was unfair. It invited the Court to apply the findings of the Court in the case of *Philip Amwayi Wokinda v Rift Valley Railways Limited* [2018] eKLR, wherein the Court of Appeal in its analysis of evidence adduced during trial held that whereas the respondent failed to discharge its burden under section 43 of the Act, the appellant discharged the burden of proof that was shifted to him under section 47(5) of the Act. It further relied on the case of *Peter Wangai v Egerton University* [2019] eKLR in which this Court held that where there is no genuine reason leading to termination of employment, proceeding to dismiss the employee amounts to unfairness.
14. As whether the Grievant's termination was based on fair procedure, the Claimant cited section 41 of the *Employment Act* 2007, which sets out the minimum statutory procedures to be adopted in cases where an employee faces allegations of misconduct. It noted that RW1 conceded that no show cause letter was issued to the Grievant setting out particulars of allegations of misconduct to allow him respond and that no evidence was tendered of any disciplinary hearing having been held for the Grievant to be heard. That not even the minutes of the impromptu session had with the Shop steward and Grievant was availed before this Court considering it was after such meeting that the Grievant was never allowed back to work. It was the Claimant's further submission that the Respondent's contention that the Grievant was not terminated but left employment on his own volition and by effluxion of time is not supported by any evidence. That the Respondent's own evidence was that the Grievant was not issued with any letter to inform him of their decision or outcome of the said meeting. The Claimant asked the Court to thus find that the Grievant was evidently unlawfully terminated from employment without regard to the procedural steps set out in law and that as such, the same was substantively unfair, illegal null and void.
15. The Claimant asserted that the Grievant is therefore entitled to the reliefs sought in their Amended Memorandum of Claim as provided for in the CBA. Further, the Claimant submitted that they had demonstrated that the Grievant's services were unlawfully terminated by the Respondent and he is therefore deserving of compensation as provided for under section 49 of the *Employment Act*, 2007. It argued that the Grievant was subjected to abrupt job disruption and has suffered immense loss of opportunities as a result of the unfair termination from employment. It urged the Court to thus grant maximum compensation as pleaded and to be persuaded by the decision of the Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR.

Respondent's Submissions

16. According to the Respondent, the issues that this Court must address are whether or not the Claimant has jurisdiction to represent the Grievant; whether or not the Grievant was a daily wage contracted worker; whether the Respondent unlawfully terminated the services of the Grievant without paying him his dues and benefits; and whether the Claimant is entitled to the prayers as outlined in its Amended Memorandum of Claim on account of the Respondent's alleged transgressions.
17. The Respondent submitted that the Claimant Union has no capacity to represent the Grievant who was never a member of the Union. That the CBA governing the relationship between the Claimant and the Respondent never included daily wage contracted persons as unionisable and is only restricted



to casuals and permanent and pensionable employees. It argued that the Claimant's representative role is thus not fitting for the Grievant and that the said Union lacks locus standi to represent the Grievant in this matter. That in the absence of a proper suit instituted by the Grievant in his personal capacity before this Court, there is no valid matter capable of the Court's resolution. It was the Respondent's submission that they had evidenced that the Grievant was a daily wage contracted worker/general labourer with specific daily tasks. That RW1 produced records showing that the Grievant was paid on a daily basis and evidencing that he was not at work for a continuous period as alleged. That the Grievant having accepted the said contract, he was bound and section 37 of the *Employment Act* does not apply in the instance case due to the existence of validly executed contracts containing terms of engagement between the parties thereto. The Respondent cited the case of *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* [2017] eKLR in which the Court of Appeal affirmed the position that a court of law cannot purport to rewrite a contract between parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

18. The Respondent further submitted that the Grievant was never unlawfully terminated as alleged or at all and that there was procedural fairness in the manner the disciplinary issue was handled. That RW1 testified that in view of the termination of the Grievant's contracts by effluxion of time i.e. at the end of the day, it became untenable to retain him in the Respondent's service. That it was clear that the Grievant's contracts placed no obligation on the Respondent to maintain his services upon the expiry of the day and his engagement with the Respondent therefore ended at the end of the day after payment was done. The Respondent referred the Court to the daily contracts annexed to the Respondent's List of Documents dated 14th August 2018 marked as Exhibit 1 and submitted that the amounts indicated therein show that the wages fell way above the minimum scale and were inclusive of the 15% house allowance.
19. It was the Respondent's submission that the Court should order that the Grievant is not entitled to the prayers sought. That having found that the relationship between the Grievant and the Respondent ceased at the end of the specific task and provision for payment thereof done each day, he is not entitled to notice pay and, in any event, claims for notice pay, leave and underpayment constitute continuing injuries as set out under section 90 of the *Employment Act*, 2007 and must thus be rejected in totality. On this submission, it relied on the Court's definitions of "continuing injuries" in *John Kiiru Njiiri v University of Nairobi* [2021] eKLR and in *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR. That further in the case of *Serab Wairimu Kihara v Nokia Solutions Branch Operations* [2021] eKLR, this Honourable Court dismissed the entire claim for being statute barred. The Respondent further submitted that the claim for maximum compensation is a discretionary remedy not available to the Claimant since the Grievant was not wrongfully terminated as alleged or at all.
20. The claim before the Court was initially a trade dispute reported to the Ministry of Labour in relation to lockout. It later emerged there was a dispute between the Union and the Respondent in respect of the Grievant Mr. Lawrence Juma following his termination from employment after the initial lockout. The Grievant had worked for the Respondent for 4 years from 14th November 2012 to 26th September 2016.
21. Despite asserting there was no valid representation by the Claimant Union, the Respondent failed to demonstrate there was no nexus as the Grievant was the basis of a letter the Respondent even authored to the Ministry of Labour in 2017. It did not disavow the connection then and it is surprising that the Respondent chose the hearing of the case to assert this. The Respondent did not raise any preliminary objection asserting there was no connection between it, the Claimant and Grievant. The Claimant is the appropriate union in the sector, the Grievant was a member and therefore capable of representation by the Claimant Union at conciliation and before this Court. Nothing turns on the



point of representation and I reject the arguments put forth by the Respondent in attempting to resist the claim on that ground. In spite of the Respondent vehemently asserting that the Grievant was a daily casual worker whose contract terminated at the end of the day, the evidence before me indicates the Grievant was engaged on duties as a turnboy which duties the Grievant performed for more than 30 days continuously to bring his contract within the purview of section 37. It is inconceivable that the Respondent can engage a turnboy to escort its products for delivery on casual basis every day. If that is the practice it has been engaged in it would hardly be surprising if it suffers monumental losses of its products since such a critical role is given to a casual who can take off at any time and who has no connection to the company as an employee who is on contract. Granted the Claimant was a turnboy, I find and hold that the Grievant was employed as a contract worker whose contract renewed each month after the first few months of his service. He therefore was entitled to safeguards unlike a daily casual whose contract would terminate at the end of the day. The Claimant indicated the Grievant received underpayment in wages to the tune of Kshs. 1,832/- a month. As the issue of pay is a continuing wrong, despite the Respondent having failed to pay a proper wage to the Grievant, the sum he will be able to recover will only relate to the last 12 months of his service in terms of section 90 of the [Employment Act](#).

22. Relating to the termination, the Grievant was locked out of the Respondent's premises after an incident occurred on 24th September 2016 wherein a vehicle belonging to the Respondent was impounded by the Nairobi City County traffic marshals due to a minor traffic infraction. The Grievant was therefore not given the opportunity to defend himself against allegations of misconduct regarding the incident. The Respondent asserts it gave the Grievant a chance to explain himself and that nothing came of it. The Respondent did not attach an invite to such a meeting, there were no minutes to demonstrate there was such a hearing and as a consequence I find and hold that the termination that ensued after the traffic incident and the alleged abuses hurled at the security officials of the Respondent was contrary to the provisions of section 41 of the [Employment Act](#) as there was no invite to a hearing where the conduct of the employee would be discussed in the presence of a fellow employee with an explanation that the said hearing could result in termination of the employee's services. Having failed to prove there were reasons for the termination in terms of section 43 as read with sections 45 and 47 of the [Employment Act](#), the Respondent was guilty of an unlawful dismissal.
23. The Claimant made many attempts to resolve the dispute at the conciliation level on the strength of the letters from the Ministry of Labour officials seeking interposition in the matter. Only one elicited a response from the Respondent. That is the letter of 24th April 2017 from the Ministry of Labour and Social Protection which was responded to by the Respondent on 5th May 2017. The Claimant sought one month's pay in lieu of notice, severance pay, leave travelling allowance, underpayment in wages, 12 months wages as compensation, interest at court rates as well as certificate of service and costs of the suit. The Grievant is however, entitled to the following reliefs only:-
 - a. One month's pay in lieu of notice – Kshs. 19,850/-
 - b. Underpayment for 9 months – Kshs. 16,488/-
 - c. 12 months salary as compensation – Kshs. 238,200/-
 - d. Costs of the suit.
 - e. Certificate of service in terms of section 51 of the [Employment Act](#).
 - f. Interest on the sums in a), b) and c) above at court rates from the date of judgment till payment in full.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

