Kenya Union of Hair & Beauty Workers v Style Industries Limited (Cause 450 of 2018) [2024] KEELRC 2020 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2020 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 450 OF 2018

NZIOKI WA MAKAU, J

AUGUST 1, 2024

BETWEEN

KENYA UNION OF HAIR & BEAUTY WORKERS ..... CLAIMANT

AND

STYLE INDUSTRIES LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant Union filed this claim in March 2018 on behalf of 86 Grievants and through the Further Amended Statement of Claim dated 22nd January 2024, seeks the following reliefs against the Respondent:

    a. A declaration that the termination of the Grievants is wrongful, is unfair and therefore unlawful.

    b. A declaration that the termination of the Grievants was in violation of Article 41(1) and Article 41(2)(c) of the *Constitution*.

    c. Maternity leave pay of 3 months' for each employee who proceeded on unpaid maternity leave.

    d. Compensation in terms of section 49(1)(c) of the *Employment Act* 2007 to be assessed.

    e. General damages for violation of section 5(3)(a) of the *Employment Act* 2007, Article 27, Article 41(1) and Article 41(2)(c) of the *Constitution* at the rate of Kshs 1,000,000/- per Grievant.

    f. Exemplary damages

    g. Aggravated damages

    h. Costs of the Claim

i. Interest on (c), (d), (e), (f) and (g) above at the rate of 14% p.a.

j. Any further or better relief as the Court deems just to grant.

2. It was the Claimant's averment that the Grievants are its members and former employees of the Respondent, employed on diverse dates and in various positions and that a majority of them were General workers at the time of termination of their employment. The Claimant contended that sometime in August 2016, the Respondent began an onslaught against the Grievants in a bid to reduce numbers of its employees in the Claimant's membership and began by terminating the services of around 333 employees. That it consequently reported a dispute to the Ministry of Labour but the matter stands unresolved. The Claimant's case is that whereas the Grievants were not on fixed term contracts, they were terminated from employment by being informed that, "the Company will not renew your contract that expires today, 30th August 2016". That upon filing of this suit, the Respondent proceeded to forge signatures of the Grievants and inserted them on fixed term contracts to make a case for inter alia expiry or lapsing of fixed term contracts. That in the alternative but without prejudice to the foregoing, the Respondent unlawfully and unilaterally converted open-ended contracts to fixed term contracts before terminating them. Moreover, that even if the Grievants were on proper fixed term contracts, the Respondent violated the Grievants' bona fide and legitimate expectation of continuous employment arising out of the perpetual renewal of the fixed term contracts over periods of several months or years.

3. The Claimant averred that as pleaded and outlined in the Claim, the practice at the Respondent was for female employees to take unpaid maternity leave, which is a discriminative, abhorrent and gross unfair labour practice. It submitted that it was further an unfair labour practice to terminate employees who did not have written contracts of service and that the move to weaken the Claimant Union's reach of the Respondent's unionisable employees violates the Grievants' and Claimant's freedom of association protected under Article 41(2)(c) of the *Constitution* and is also discriminative contrary to Article 27.

4. In response, the Respondent filed a Statement of Defence dated 25th August 2018, wherein it averred that the Claimant Union does not have a recognition agreement with the Respondent Company for purposes of negotiating, representing and filing a suit on behalf of any employee of the Respondent herein. It argued that the Grievants were on individual fixed term contracts with the last term contract ending on 30th August 2016. That the Grievants signed off and declared they had no further claims after being paid all their terminal benefits and acknowledging receipt of the same as full and final settlement. It was the Respondent's averment that the Claimant Union lacks the legal mandate to file the suit herein against the Respondent.

Claimant's Submissions

5. On the issue of the Claimant had mandate to file this suit, the Claimant submitted that the question of whether a trade union is entitled to represent employees in a Court where there is no recognition agreement has been settled by the Court of Appeal in the case of *Modern Soap Factory v Kenya Shoe and Leather Worker Union* [2020] eKLR to effect that a union can represent its members even without a recognition agreement, that recognition is only required for purposes of collective bargaining and not representation, and that all the union needs is for the employees to be its members, demonstrated by check-off forms. The Claimant submitted that in this case, the Grievants' names appear on various pages throughout the check off forms in the Claimant's Second Bundle. It argued that the fact that the payslips given to the Grievants do not have union dues deductions does not mean they were not union members and actually confirms that the Respondent declined to deduct union dues as required of it.

That an employer cannot rely on its own wrong of failing to deduct and remit union dues and then state that an employee is not a union member by virtue of that.

6. The Claimant further submitted that the Grievants' case is that they were not working based on any fixed term contracts and that their termination of employment was done with a view to reduce union membership. It noted that the Handwriting Expert Report at pages 398 to 408 of the Claimant's Second Bundle demonstrates that the purported three signatures do not align with CW2's true signature. That the Respondent did not make any attempt to challenge these findings at all and did not bring its own expert. The Claimant posited that having further established that the Grievants were not on fixed term contracts, the Respondent was required by law to then have both a valid reason for terminating their services and give them a hearing before termination of employment as required under sections 41, 43, 45 and 46 of the *Employment Act*. That given there was no hearing or any valid reason given by the Respondent, termination of the Grievants' services was thus unfair and unlawful and also a violation of Article 41(2)(c) of the *Constitution* as read with sections 46(c) and (f) of the *Employment Act*, which outlaw termination on account of union membership or activities. That it was also discriminative on the ground of conscience contrary to Article 27 of the *Constitution* and an unfair labour practice contrary to Article 41(1) of the *Constitution*.

7. It was the Claimant's submission that CW2 testified that she was denied salary when she was on maternity leave despite applying at least two (2) weeks before her commencement of maternity leave. It argued that section 29(4) of the *Employment Act* requires only 7 days' notice of intention to take maternity leave and CW2 produced maternity medical documents and that if she proceeded on maternity leave, the Respondent should be able to demonstrate that it paid her. That however, the Respondent did not demonstrate that CW2 was not on their pay roll in 2014. The Claimant opined that the practice of not paying women salary while on maternity leave is abhorrent and a violation of Article 27 of the *Constitution* and section 5(3) (a) of the *Employment Act*, which forbid discrimination on the grounds of inter alia sex and pregnancy.

8. The Claimant thus prays for maximum compensation and general damages for violation of various provisions of the *Constitution* as read with the *Employment Act*, considering the foregoing submissions and guided by sections 49(4) and 50 of the *Employment Act*. It proposed an amount of Kshs. 1 Million as appropriate for such general damages for each Grievant and asserted that the Grievants were also entitled to exemplary and aggravated damages (at Kshs. 2 Million each), considering a Grievant was denied salary while on maternity leave. They finally pray that costs be awarded as costs follow the event. In support of its submissions on the reliefs sought, the Claimant cited and relied on several authorities as set out in its Submissions.

9. The Respondent did not file any submissions.

10. The Grievants were employees of the Respondent. That is not in doubt. However, the transient nature of some aspects of production meant that the majority of the Grievants were seasonal employees. They were therefore not in the category of workers who were on long term contracts at the Respondent. They therefore were not entitled to receive the benefits long term contract employees had since they served for relatively short periods of time spanning 3 or less months and even in the periods in question did not work for the entire duration of the months in dispute. The Grievants were General workers as they readily admit in their statement of claim. The Respondent however participated in subterfuge and corrupt practices by forging the names and signatures of some of the employees. This was uncalled for and highly suspect in as far as resisting the claims of the Claimant. The Claimant has sought aggravated and exemplary damages in addition to the claim for 1 million per Grievant (there are 86 of them) and also maternity leave dues – 3 months for the employees who went on maternity leave. Only one Grievant availed evidence that she proceeded on leave without due payment. There was no evidence

was led as to the claims for exemplary and aggravated damages. The only relief the Claimant gets in respect of the Respondent's actions is an award of one months' salary as compensation for the unlawful termination for each of the 86 Grievants and the one Grievant whose maternity leave payment of 3 months salary is due and payable. The parties are to tabulate the sums due per grievant based on their individual earning per month. Each party will bear their own costs for the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF AUGUST 2024

NZIOKI WA MAKAU

JUDGE