

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 439 OF 2018**

**BAKERY CONFECTIONERY FOOD MANUFACTURING &  
ALLIED WORKERS UNION (K)**

.....CLAIMANT

**VERS**

**US**

**PATCO INDUSTRIES LIMITED.....1<sup>ST</sup>**

**RESPONDENT**

**READY CONSULTANCY LIMITED.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant initially lodged this suit by a Memorandum of Claim dated 14<sup>th</sup> March, 2018, which was later amended vide an Amended Memorandum of Claim dated 2<sup>nd</sup> June, 2023. The claim concerns an alleged unlawful summary dismissal from employment of one **Albanus Kioko** (the grievant) by the Respondents.
2. The 1<sup>st</sup> Respondent entered appearance on 23<sup>rd</sup> May, 2019 and subsequently filed a Statement of Response dated 19<sup>th</sup> July, 2019. The 2<sup>nd</sup> Respondent did not enter appearance nor did it defend the suit despite prove of service.

3. Both the Claimant's and the 1<sup>st</sup> Respondent's cases were heard on 5<sup>th</sup> March, 2025. The Claimant presented the grievant; Albanus Kioko to testify in support of its case. Mr. Albanus Kioko adopted his witness statement and produced the documents filed as exhibits in the matter. The 1<sup>st</sup> Respondent presented Mr. Mohammed Ali Ahmed, their Human Resources Manager to testify on their behalf. He similarly adopted his witness statement and produced the 1<sup>st</sup> Respondent's list and bundle of documents as exhibits in the matter.
4. The 2<sup>nd</sup> Respondent did not participate in the matter.
5. Both the Claimant and the 1<sup>st</sup> Respondent filed written submissions.

### **The Claimant's Case**

6. The Claimant's case is that the grievant was employed by the 1<sup>st</sup> Respondent in March, 2009 as a white sweet charge hand earning KSh.14,650 per month. It avers that the grievant was never issued a letter of appointment.
7. It is the Claimant's case that on or about January 2015, the employment arrangements with the 1<sup>st</sup> Respondent changed when the 2<sup>nd</sup> Respondent took over under an outsourcing contract, and subsequently, a one-year contract was issued to him on 2<sup>nd</sup> June 2016. It avers that it was not informed of this outsourcing arrangement, and the grievant and others lost benefits provided under the Collective Bargaining Agreement.

8. The Claimant states that despite being under the 2<sup>nd</sup> Respondent, the grievant's work continued to be directed by the 1<sup>st</sup> Respondent's supervisors.
9. It states that during a night shift, the grievant was told by his supervisor, a Mr. Ochoga, and senior supervisor Peter, that the company boss (Mr. Said) wanted him to leave work, and he was immediately escorted out by guards and never allowed back. It avers that the grievant did not receive any termination letter or an explanation for his termination.
10. The Claimant states that the grievant reported the matter to the shop steward, who wrote to the Claimant union on 3<sup>rd</sup> December 2016. It avers that it protested the lockout by letter dated 13<sup>th</sup> December 2016, but no response came from the Respondents.
11. It states further that the matter was referred to the Labour Office, but the 1<sup>st</sup> Respondent failed to attend scheduled meetings. It states that the 1<sup>st</sup> Respondent later claimed that the grievant was not their employee, but rather an employee of the 2<sup>nd</sup> Respondent, which assertion the grievant disputes, maintaining that he was terminated by his supervisors at the 1<sup>st</sup> Respondent's.
12. It is its case that the grievant was unfairly and unlawfully terminated without notice or due process, and was further not paid his terminal dues, including salary for 24 days worked in November 2016 and leave pay for 2016.

13. The Claimant insists that the grievant having served the 1<sup>st</sup> Respondent for 7 years, deserves compensation and payment of all dues as set out in the Memorandum of Claim.

14. It is his prayer that his claim be allowed.

### **The Respondent's Case**

15. The 1<sup>st</sup> Respondent's case is that the Claimant was not its employee, and further denies that the grievant was compelled to sign a contract with the 2<sup>nd</sup> Respondent.

16. It is the 1<sup>st</sup> Respondent's case that it was the grievant's initiative to join the service of the 2<sup>nd</sup> Respondent Company as it lacks mandate to compel the grievant to join it contrary to his wishes.

17. The 1<sup>st</sup> Respondent further states that the Claimant has no valid claim against it on the premise that by the time the grievant joined the union, he was no longer an employee of the 1<sup>st</sup> Respondent.

18. The 1<sup>st</sup> Respondent states that at no time was the grievant ever instructed by its supervisors to move from the white section to the bubble section, and further that if at all the grievant was in the premises, he was no longer an employee of the 1<sup>st</sup> Respondent.

19. The 1<sup>st</sup> Respondent states that it was not its responsibility to inform the grievant to resume work as the grievant was not its employee. It avers further, that there is no relationship

between it and the grievant and that this matter should have been taken up with the 2<sup>nd</sup> Respondent.

20. The 1<sup>st</sup> Respondent's witness (RW1) told court that the grievant worked for the 1<sup>st</sup> Respondent as an outsourced employee having been outsourced from the 2<sup>nd</sup> Respondent.

21. RW1 further confirmed that the grievant herein, worked at the 1<sup>st</sup> Respondent's premises. It is his position that the Respondents have an outsourcing agreement in place, but which has not been produced in evidence.

22. It is his further position that the 1<sup>st</sup> Respondent's premises are controlled by the two Respondents herein, as the 2<sup>nd</sup> Respondent chooses staff for the various sections and the 1<sup>st</sup> Respondent provides a list of the sections to be manned.

23. RW1's evidence is that he does not know whether the grievant was issued with a show cause letter or whether he was taken through disciplinary action. He testified that he has not produced the employee records for the period 2009/2016.

24. The 1<sup>st</sup> Respondent prays that the Claimant's case be dismissed with costs.

### **The Claimant's Submissions**

25. It is the Claimant's submission that the grievant's NSSF statement shows the deductions were jointly made by both Respondents in this suit. It submits that there is consistent deduction of NSS dues from March 2009 to February 2016.

26. The Claimant submits that the circumstances of the grievant's termination from employment suggest that he was terminated verbally by one Peter who was a Supervisor of Patco Industries Limited, the 1<sup>st</sup> Respondent, which evidence has not been controverted by either of the Respondents. It is its submission that the grievant was initially employed by the 1<sup>st</sup> Respondent and subsequently issued with a contract by an outsourcing agent, the 2<sup>nd</sup> Respondent, but continued to engage in the same position.
27. It submits that during the course of executing his duties he was supervised by the supervisors of the 1<sup>st</sup> Respondent and thus effectively an employee of both Respondents.
28. The Claimant submits further that the grievant executed a key production function of the 1<sup>st</sup> Respondent which was core to its operations, and that the 1<sup>st</sup> Respondent provided the premises where the grievant worked, and was supervised and controlled by the 1<sup>st</sup> Respondent, hence the 2<sup>nd</sup> Respondent was an agent of the 1<sup>st</sup> Respondent.
29. The Claimant asserts that the grievant's purported outsourcing was unlawful and in violation of an existing recognition and collective agreement in force between the parties. The Claimant placed reliance in the case of **Wrigley EA Company Limited - Versus- The Hon. Attorney General & Others (2013) eKLR**, where the court held that ordinarily a company cannot outsource its

core functions where there is a recognition agreement in place.

30. It is its submission that the mere fact that the 1<sup>st</sup> Respondent's supervisor was responsible for directing the grievant regarding his employment including on the issue of whether his services were required and the verbal termination from employment, the 1<sup>st</sup> Respondent is equally culpable regardless of the outsourcing arrangement between the Respondents.

31. The Claimant submits that having verbally terminated the services of the grievant herein through its supervisor, the 1<sup>st</sup> Respondent cannot therefore seek to be absolved from blame and liability by merely contending that there was no direct employer-employee relationship between itself and the 1<sup>st</sup> Respondent.

32. It is the Claimant's submission that the grievant was never informed of the reasons why either of the Respondent's considered his termination from employment.

33. It submits that termination of the grievant's services fell short of the requirements of Section 41 (1) and 41(2) of the Employment Act, 2007 and his resultant termination from employment was therefore null and void.

### **The 1<sup>st</sup> Respondent's Submissions**

34. The 1<sup>st</sup> Respondent submits that no evidence was led to show that the Claimant received contribution from the 1<sup>st</sup> Respondent which is a crucial piece of evidence to give

credence to the claim, and noting that the grievant and 1<sup>st</sup> Respondent had an employment contract.

35. It submits that the evidence produced before this Honourable Court, clearly established that the grievant was employed by the 2<sup>nd</sup> Respondent, thus the circumstances leading to his dismissal, if any, should fall squarely upon the 2<sup>nd</sup> Respondent.

36. It is the 1<sup>st</sup> Respondent's submissions that the Claimant has not proved any claim against the 1<sup>st</sup> Respondent and as such, should be dismissed.

### **Analysis and Determination**

37. I have considered the pleadings, the witnesses' evidence and the rival submissions. The issues that present for determination are:-

- i. Whether the grievant was an employee of the 1<sup>st</sup> Respondent
- ii. Whether he was unfairly terminated from service
- iii. Whether he deserves the reliefs sought

### **Whether the Grievant was an employee of the 1<sup>st</sup> Respondent**

38. The Claimant's contention is that the grievant was an employee of the 1<sup>st</sup> Respondent since March, 2009. It asserts that on or about January 2015, the employment arrangements with the 1<sup>st</sup> Respondent changed when the 2<sup>nd</sup> Respondent took over under an outsourcing contract,

and subsequently, a one-year contract was issued to the grievant on 2<sup>nd</sup> June 2016. It avers that it was not informed of this outsourcing arrangement, and the grievant and other employees lost benefits provided under the Collective Bargaining Agreement.

39. The Claimant maintains that it has in place a Collective Bargaining Agreement (CBA) with the 1<sup>st</sup> Respondent, hence the alleged transfer of the grievant is a violation and flagrant breach of the letter and spirit of the recognition agreement and the CBA.

40. It is the Claimant's assertion that the grievant was terminated by a supervisor of the 1<sup>st</sup> Respondent named Peter, when he was directed to leave and not report back to work, and that this was after he had been reassigned by another of the 1<sup>st</sup> Respondent's supervisor named Mr. Ochoga to work in a different station.

41. On its part, the 1<sup>st</sup> Respondent contends that the grievant worked for it as an outsourced employee having been outsourced from the 2<sup>nd</sup> Respondent. It maintains that the grievant was never its employee, but that of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent did not defend the suit, hence its stand on the issue is not known to this court.

42. Ordinarily, and as the Claimant rightly submitted, where a labour provision contract is in place, the employees are deemed to be those of the contractor who is expected to

exercise control of the employees in all aspects including allocation of work and supervision.

43. In the instant case, it is evident that the Claimant union and the 1<sup>st</sup> Respondent have a recognition agreement and a Collective Bargaining Agreement that was valid from 1<sup>st</sup> May, 2014 to 30<sup>th</sup> April, 2017, which is the period the grievant was in the service of the Respondents. It is also evident that the grievant was transitioned from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent during the life of the CBA with no evidence of consultation with the Claimant union.

44. To validly transfer employees to an outsourcing entity, an employer with a CBA in force with an employee's union, must consult the union before such a transfer, for the sole reason that the terms of the CBA such as wages, benefits, job security, and redundancy provisions remain binding. In the case of ***Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR***, the court emphasized the need for consultation and adherence to CBA terms before outsourcing staff functions.

45. The risk of transferring unionisable employees who are covered by a CBA to an outsourcing entity, is that they may be removed from the bargaining unit/union and be employed on new terms that may be in conflict with the CBA.

46. In the case of **Maundu & 40 Others -Versus- Beirdorf E.A Limited & Another (2024) KEELRC 1504 (KLR)** the court stated thus: -

***"It was the 1<sup>st</sup> Respondent's obligation to identify the skills set, required of every Employee; the 1<sup>st</sup> Respondent would not allow any Employee to undertake any other work, other than that the Employee was recruited to perform; the 1<sup>st</sup> Respondent determined, at its sole discretion, what time the Employee begins to work; the 1<sup>st</sup> Respondent verified the suitability and ability of Employees; it was responsible for obtaining work and other permits for the Employees; the 1<sup>st</sup> Respondent undertook to comply with all obligations, statutory or otherwise, directly or indirectly connected with the services of the Employees; the 1<sup>st</sup> Respondent would provide a supervisor or manager for each Employee; such supervisor or manager ensured that the supervisor appointed by the 2<sup>nd</sup> Respondent, carried out supervisory duties in accordance with the needs of the 1<sup>st</sup> Respondent; and lastly, the 1<sup>st</sup> Respondent would pay to the 2<sup>nd</sup> Respondent, cumulative payments to cover Employees' total emoluments,***

***disbursements and insurance contributions paid on behalf of the Employees, by the 2<sup>nd</sup> Respondent.***

***The obligations of the 2<sup>nd</sup> Respondent under the contract, no doubt affirms that the 2<sup>nd</sup> Respondent became a Co-Employer with the 1<sup>st</sup> Respondent, rather than an innocent bystander, who cannot be called upon to shoulder employment liability."***

47. The 1<sup>st</sup> Respondent's witness told court that it had an outsourcing agreement with the 2<sup>nd</sup> Respondent, but which was not produced in evidence as to ascertain the parties obligations. The grievant's assertion that he was terminated by a supervisor of the 1<sup>st</sup> Respondent, coupled with the earlier reassignment of duties by yet another senior employee of the 1<sup>st</sup> Respondent, clearly points to the 1<sup>st</sup> Respondent being in control of the grievant.

48. There is therefore no doubt that though the 1<sup>st</sup> Respondent purported to outsource the grievant to the 2<sup>nd</sup> Respondent, it retained control of the job to be done, the hours of work and the supervision of the works, making it a co-employer with the 2<sup>nd</sup> Respondent and cannot afford to terminate an employee and hope to cling on the outsourcing agreement (which in any event is not before court) to escape obligation.

49. In the end, I conclude by holding that firstly, the manner in which the 1<sup>st</sup> Respondent outsourced a unionisable

employee during the life of a CBA without consulting his union, was improper and unlawful. Secondly, having retained control of the grievant even after the purported outsourcing, can only make the 1<sup>st</sup> Respondent a co-employer and his assertion that it was not the grievant's employer cannot hold.

### **Whether the Grievant was unfairly terminated**

50. The next question is whether the termination of the grievant's contract was fair. The Court in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, set the threshold of what constitutes a fair termination in the following words: -

***"For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."***

51. To meet the fairness test set out in the foregoing case, an employer has to demonstrate adherence to the mandatory provisions of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007.

52. Section 41 of the Employment Act, demands that before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, an

employer must explain to an employee in a language the employee understands, the reason(s) for which termination is being considered, and grant the employee an opportunity to make representations, either in the presence of a colleague or representative of a trade union if he is a union member.

53. From the evidence on record, the grievant's termination was initiated by the 1<sup>st</sup> Respondent. His further evidence is that he was simply asked to leave work and not return, ending his contract with the Respondents.

54. Having initiated the termination, the 1<sup>st</sup> Respondent was under duty to adhere to the law on termination, which it did not. It is evident that the grievant did not receive any communication from either of the Respondents on the termination of his employment. He was not informed of the reasons for which either of the Respondents was considering terminating his services.

55. There is therefore no doubt that the grievant's termination is both procedurally and substantively unfair, and so I hold.

**Whether the Claimant is entitled to the reliefs sought**

56. The Claimant sought a declaration that the purported outsourcing of the grievant violated the CBA between the parties herein, a declaration that the grievant's termination is unlawful and illegal, an order for payment of terminal dues, compensation for the unfair termination, costs of the suit and interests thereon.

57. In respect of terminal dues, the Claimant claims that the grievant is paid notice pay, service pay, leave pay and salary for days worked and not paid for. None of these claims have been controverted and are thus allowed as prayed.

58. The court has held that the grievant's termination is unfair and which finding entitles him to compensation pursuant to Sections 49 and 50 of the Employment Act, 2007.

59. Considering the chances, the grievant has for securing comparable employment and his length of service with the Respondents, I deem an award of eight (8) months' salary sufficient compensation for the unfair termination.

60. In the end, the Claimant's claim succeeds and orders granted as follows:-

- a) A declaration that the outsourcing of the grievant is unlawful, hence unfair.
- b) A declaration that the grievant's termination is unfair and unlawful.
- c) That the Respondents shall jointly pay the grievant:-
  - i. Eight (8) months' salary as compensation for the unfair termination at Kshs.114,224/=
  - ii. One month notice pay at Kshs.14278/-
  - iii. Service pay at Kshs.67,051/-
  - iv. Leave not taken at Kshs.10,000/-
  - v. Salary for 24 days worked in November, 2016 at Kshs.9,932/-

d) The Respondents shall further jointly bear the costs of the suit and interest from the date of this judgment until payment in full.

61. Judgment accordingly.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN  
COURT AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER,  
2025.**

**C. N. BAARI  
JUDGE**

**Appearance:**

N/A for the Claimant

Mr. Kamau present for the 1<sup>st</sup> Respondent

Ms. Esther S-C/A