

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC CAUSE NO E611 OF 2022**

**KENYA ENGINEERING WORKERS UNION.....**  
**.....CLAIMANT**

**VERSUS**

**KHETSHI DHARMSHI & CO LIMITED.....**  
**.....RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant is a trade union which is registered in the Republic of Kenya and represents workers in the engineering sector in the Republic. On the other hand, the Respondent is a limited liability company whose business is in the aforesaid sector.
2. The Claimant has members amongst the Respondent's workforce pursuant to which the parties entered into a Recognition Agreement. They have negotiated Collective Bargaining Agreements as a result.
3. Sometime in August 2021, the Respondent wrote to the Claimant to notify it of its intention to send some of its employees on unpaid leave for two weeks. Some of the affected employees are members of the Claimant.

4. The Respondent's contention was that it was experiencing low sales at the time. As such, it contended that it could not keep all employees at work since there was no work for them.
5. The Claimant objected to the Respondent's proposal. It demanded that before the proposal was implemented, the parties should have a meeting to discuss the matter.
6. It would appear that the Respondent did not accede to the Claimant's request. As such, the parties did not convene a meeting to review the matter.
7. In view of the foregoing, the Claimant reported a trade dispute to the Ministry of Labour and Social Protection. Following this report, a conciliator was appointed to resolve the trade dispute.
8. The evidence on record shows that the conciliator held meetings with the parties following which, he made some findings and recommendations on the way forward. The conciliator was of the view that the Respondent may have had legitimate reasons to send the affected employees on unpaid leave in view of the ravages of the Covid pandemic on businesses at the time. However, he said that the decision was improperly made before the parties had consulted over the matter. As such, he recommended that the Respondent pays the affected employees their withheld salaries and allows them to resume duty without loss of benefits.

9. It would appear that the Respondent did not comply with the recommendations. Hence the filing of this suit.

**Issues for Determination**

10. Based on the evidence on record, the issues for determination are as follows:-
  - a) Whether the Respondent's decision to send the affected employees on unpaid leave was legitimate.
  - b) Whether the Claimant is entitled to the reliefs which it seeks through this action.

**Analysis and Determination**

11. The bone of contention between the parties is whether the Respondent acted lawfully to send the affected employees on unpaid leave. According to the evidence on record, the Respondent wrote to the Claimant on 10<sup>th</sup> August 2021 informing it that it had experienced low sales for four months. It contended that although production continued, there were no sales to clear the finished products resulting in a built-up of finished products in its stores.
12. In view of this, the Respondent proposed to scale down production with the consequence that some employees were to be rendered idle with no work to perform. Hence the proposal to send them on unpaid leave on rotational basis.
13. As the record shows, the Claimant protested this proposal. It contended that the parties had not consulted on the matter yet the decision had far reaching consequences on the livelihoods of the affected employees.

14. Although the Claimant asked for dialogue over the matter, it appears that the Respondent did not yield to this request. Hence the dispute.
15. The Claimant has provided evidence to show that the Respondent went ahead to implement the contested decision by sending the affected employees on unpaid leave before consultations were held on the matter. As such, it is without doubt that the impugned decision was unilateral.
16. In the court's view, the Respondent's decision was informed by its operational requirements. Under sections 40 and 45 of *the Employment Act*, an employer is entitled to make such a decision subject to complying with certain legal requirements.
17. Such decision may result in employees losing their jobs unless mechanisms for obviating the impending redundancy are implemented. In this case, the Respondent appears to have elected to obviate a possible redundancy declaration by sending the affected employees on rotational leave.
18. Although the Respondent resorted to the aforesaid action, there is no indication that it consulted the affected employees or their trade union on the matter. This was in violation of the law which requires parties embroiled in such matters to consult on them (see ***Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR)***).
19. Importantly, since the Respondent's decision was going to affect the employees who were to proceed on unpaid leave,

the law on fair administrative action obliged it (the Respondent) to engage the employees and their trade union on the matter (see section 4 of *the Fair Administrative Action Act*). As the record shows, this was not done.

20. Having regard to the foregoing, the court is satisfied that the Respondent's decision to send the affected employees on unpaid leave was unlawful. It is so declared.
21. The next issue for determination is whether the Claimant is entitled to the reliefs which it seeks through this action. Having declared the Respondent's decision as unlawful, it follows that the affected employees are entitled to recover the salaries that were irregularly withheld from them. As such, the court orders the Respondent to reimburse the affected employees all their withheld salaries less the deductible trade union dues which are to be remitted directly to the Claimant.
22. The amounts to be paid to the affected employees are subject to the statutory deductions which were applicable at the time of implementation of the impugned decision.
23. The Respondent will pay interest on the amount at court rates from the date of the improper withholding of the affected employees' salaries.
24. The court notes that the parties are not in agreement regarding the exact number of employees who were affected by the impugned decision. Whilst the Claimant states that the decision affected 247 employees who were its members, the Respondent asserts that only 208 employees were

impacted. The parties are also not in agreement on the exact deductions which were made against the affected employees' salaries. Because of this, the court is unable to determine the exact amount which the Respondent is to reimburse.

25. Having regard to the foregoing, the court directs the parties to appear before the Deputy Director of the court within 10 days of this decision in order for him to ascertain the following:-
  - a) The exact number of the Claimant's members who were affected by the impugned deductions.
  - b) The exact amounts which were deducted from every of the affected employees based on Respondent's payroll.
26. The matter will thereafter be placed before the court for the final pronouncement on the exact amount that the Respondent will be obligated to reimburse the affected employees.
27. Each party will bear own costs of the case.

**Dated, signed and delivered on the 19<sup>th</sup> day of March,  
2026**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

## **ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**