



**Bunny Industries Limited v Tailors & Textiles Workers Union (Civil Appeal 386 of 2017) [2022] KECA 857 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 857 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 386 OF 2017  
W KARANJA, S OLE KANTAI & KI LAIBUTA, JJA  
JUNE 10, 2022**

**BETWEEN**

**BUNNY INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**TAILORS & TEXTILES WORKERS UNION ..... RESPONDENT**

*(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Nduma Nderi, J.) dated 15th September, 2017 in ELRC Cause No. 1567 of 2010)*

**JUDGMENT**

1 This is a first appeal from the Judgment of the Employment and Labour Relations Court (ELRC) – (Nduma Nderi, J.) delivered on 15<sup>th</sup> September, 2017. In the Memorandum of Claim filed in that court by Tailors and Textile Workers Union (the respondent) against Bunny Industries Limited (the appellant) it was claimed that the appellant had wrongly dismissed 7 employees who were union members of the respondent. They were named as Rissi Anyango, Ephraim Vidah, Shem Mengesa, Kenedy Odhiambo, Mary Njoki, Joseph Owidi and David Musyoka. It was claimed that the said employees, who had worked for the appellant for respectively stated periods of time, had reported to work on 30<sup>th</sup> June, 2005 but at 10 a.m. on that day, a supervisor entered the plant where they worked as machine operators, switched off the machines and ordered them to vacate the premises, their casual employment having been terminated. The matter was reported by the respondent to the Minister for Labour and Human Resources Development, and an investigator was appointed to investigate the dispute, but had not filed a report, and this forced the respondent to file the claim on behalf of the said employees/union members (called “grievants” in the Memorandum of Claim). The claim was tabulated in a schedule (“Table 2”) attached to the Memorandum of Claim, and it was prayed that the court find that dismissal of the employees was wrongful; that the court finds that the grievants were unlawfully declared redundant; that reinstatement be ordered without loss of service and that the court orders for payment of terminal or redundancy benefits as set out in the said Table 2. The appellant



- delivered a Statement of Defence where the claim was denied the appellant stating that there was no Recognition Agreement or Collective Bargaining Agreement between it and the respondent; it denied that the respondent had the necessary *locus standi* to represent the said employees.
- 2 We are required by Rule 29 of the [Court of Appeal Rules](#) to reappraise the evidence and make inferences of facts in a first appeal like this one. We do not have the benefit of hearing or seeing the witnesses, an advantage that the trial Judge has, and we must give due deference to that. In *Peters v Sunday Post* [1958] EA 424 this is what the predecessor of this Court said of the mandate of a first appellate court:
- "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."
- 3 One of the grievants, Rissi Anyango testified before the Judge on her own behalf and on behalf of her colleagues. She stated that she had been employed by the appellant as a tailor in January, 2000 but that, on 30<sup>th</sup> June, 2005 she and her colleagues were ordered to go home. They reported that matter to their union (the respondent) and the matter was escalated to the Minister, but that there was no resolution. She stated that they had not been given reason for termination; that they were not paid house allowance; that they were not allowed to take annual leave; that they were underpaid; they were not given Certificate of Service and they should be compensated for wrongful dismissal. She further stated that relevant statutory deductions were made from her wages in respect of National Hospital Insurance Fund (NHIF), National Social Security Fund (NSSF) and Pay As You Earn (PAYE).
- 4 The appellant's Human Resource Manager gave evidence but this was expunged from the record when she failed to attend court to be cross- examined. She was replaced by John Nganga Gitari, the appellant's Foreman Supervisor who testified that the grievants were employed by the appellant as casual employees and paid a daily rate at the end of each week. In June, 2005 officers of NHIF visited the appellant's plant and required to register all employees to be members of NHIF but the grievants resisted stating that they objected to deductions being made from their wages. They were then dismissed. The witness denied that the grievants were members of any union and stated that the grievants were paid terminal dues.
- 5 The Judge analysed the evidence and found as issues for determination whether the respondent had *locus standi* to represent the grievants; whether the grievants were employed as casual employees or whether they were permanent employees; and finally, whether the grievants were entitled to the reliefs sought.
- 6 On whether there was *locus standi*, the Judge found that there was evidence presented before him that the grievants paid union fees Ksh.200 per month to the respondent and this entitled the respondent to represent them in terms of Section 13 of the [Employment and Labour Relations Court Act](#) as read with Rule 5(11) (a) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#).
- 7 On whether the grievants were casual or permanent employees, the Judge analysed Section 37 (1) of the [Employment Act, 2007](#) and found that, although the grievants had initially been employed as casual employees, the fact that they had worked for continuous long periods exceeding one month their employment had converted to permanent terms. He found that such employment could only be terminated in terms dictated by the [Employment Act](#).
- 8 On the evidence, the Judge found in favour of the appellant to the effect that the grievants had resisted being registered as members of NHIF; that they had become unruly and that separation from employment in those circumstances was lawful; and that the grievants had failed to show that termination from employment was wrongful or unfair. On the specific reliefs sought the Judge found



that the appellant had wrongly treated the grievants as casual employees and had not granted them annual leave to which they were entitled; that the grievants were not registered with NSSF, and were therefore entitled to gratuity equivalent to 15 days salary for each completed year of service; that they were not entitled to leave travelling allowance as they had not proceeded on leave; that they were entitled to wages for the days worked up to termination of employment; that they were entitled to 1 month salary in lieu of notice; and that the grievants had failed to prove that they had been underpaid and had also failed to prove that they were entitled to 15% salary for house allowance. The Judge also found that the grievants were not entitled to compensation as the termination was lawful and, in the end, the Judge awarded the grievants the award in the said Table 2 to be shared on salary arrears (Ksh.55,440); notice pay (Ksh.71,280); annual leave (Ksh.309,120); gratuity (Ksh.154,440), all to the grand sum of Ksh.590,280 with interest and costs and, since no application had been made to strike out the names of 2 of the grievants who had been re-employed by the appellant, they were still entitled to terminal benefits awarded, except in respect of payment in lieu of notice.

9 The Notice of Appeal filed was against the whole decision.

10 There were 5 grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its lawyers M/S Bali-Sharma & Bali-Sharma Advocates. It is contended that the Judge erred in law in entering Judgment against the appellant when the grievants did not testify "... save one who had no authority to do so on behalf of other six grievants...". It is also contended that the trial court erred in holding that the respondent could represent the grievants when there was no Collective Bargaining Agreement between the appellant and the respondent; that the Judge erred in holding that the grievant's casual employment converted to permanent basis. On ground 4:

"4.That the judgment lacked finality in substance and was purely permissive, as the Court found that Appellant had no intention of terminating the Claimant's employment."

11 The appellant's final complaint in ground 5 is that the trial court erred in making awards in favour of the grievants when the court had found that termination from employment was lawful.

12 When the appeal came up for hearing before us on 9<sup>th</sup> March, 2022 on a virtual platform, the appellant was represented by learned counsel **Mr. Mahan.Bali-Sharma** while the respondent was represented by Mr. Alfred Nyabena.

13 Counsel for the appellant submitted that, having pronounced that termination of the grievants from employment was lawful the Judge became *functus officio* and could not proceed to make the awards that he made. According to counsel, the awards could not be made where six out of seven grievants had not testified.

14 In supporting the Judgment counsel for the respondent submitted that the finding that termination was lawful did not rob the court of the right to consider the other remedies. According to counsel the Employment Act permitted one grievant to testify on behalf of others, and it was not necessary to take evidence from each of them.

15 On whether the respondent had a right (*locus standi*) to represent the grievants, the Judge found that the grievants paid union fees to the appellant in the sum of Ksh.200 per month. The record shows that the witness, Rissi Anyango, testified that all the grievants were union members who paid the said sum of money deducted from their wages every month. The witness for the appellant testified that some of the grievants were registered as members of the respondent (union) involuntarily. The respondent's witness testified that there was a Collective Bargaining Agreement which would be read to them (employees) annually by a shop steward. The trial Judge analysed the evidence and found that the grievants were members of the respondent (union). We have gone through the record and find no



reason to disagree with the Judge on that finding. Section 22 of the Employment and Labour Relations Act provides that, in any proceedings before the ELRC or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employer's organization and, if the party is a juristic person, by a director or an employee, specially authorized to do so. In the case of *Modern Soap Factory v Kenya Shoe and Leather Workers Union* (2020) eKLR, the question was whether the union was entitled to represent employees who were members of the union. The court stated:

**"In our Judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.**

**Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2) (d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention. In the same spirit, Section 22 of the Employment and Labour Relations Act provides that:**

**" In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorized for that purpose."**

**Accordingly, we see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question."**

- 16 The appellant complains that the Judge was wrong in entering Judgment for the grievants when only one of them testified.
- 17 The witness called by the respondent – Rissi Anyango – stated that she was testifying on her own behalf and on behalf of her named colleagues whose names we have given in this Judgment. Counsel for the appellant submitted that it was wrong for the Judge to proceed that way, but counsel for the respondent submitted that the law allowed the Judge to rely on the evidence of the one witness on behalf of herself and on behalf of the 6 colleagues.
- 18 Section 20 of the *Employment and Labour Relations Act* donates power to ELRC in any proceedings to act without undue regard to technicalities. *The Employment and Labour Relations Court (Procedure) Rules* 2016 allow a party to opt to file a suit for others and rule 9 thereof allows for a suit to be instituted by one party on behalf of other parties with a similar cause of action. Such suit shall contain the names of the other claimants in the suit and have their description and details of wages due to each of them. Rule 24 of the said rules allows for the court to determine several similar suits through a test suit.
- 19 In the matter before the trial Judge the respondent, as union, filed the claim on behalf of named employees and the particulars of their claims were set out at Table 2 attached to the Memorandum of Claim. We have found that the respondent was entitled to represent the grievants. Necessary particulars



of the grievants were given, and find no merit in this complaint as the witness called was able to testify on the whole claim filed for the grievants. Nothing more would have been gained by calling the other six grievants whose evidence would not have added anything more to what the witness called testified to. The appellant questions the right of the grievants to belong to a union (the respondent) when there was evidence that it was the appellant which deducted union dues from wages of its employees, which it then forwarded to the respondent. Under the Labour Relations Act No. 14 of 2007, every employee has a right to participate in forming a union or federation of trade unions; to join a trade union or to leave such a trade union. That right has constitutional underpinning as Article 36 of the Constitution of Kenya, 2010 on “Freedom of association” gives every person the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

- 20 The last complaint regards to the award of remedies after the court found that termination of employment was lawful.
- 21 The prayers in the Memorandum of Claim included a prayer that the court finds dismissal from employment unlawful; that the court find that redundancy was unlawful; that the court orders reinstatement of the grievants; that the court orders for payment of terminal/redundancy benefits and give any other order that it may deem fit.
- 22 In the end the trial court found that termination was lawful but found that the grievants, being permanent but not casual employees, were entitled to arrears of salary; notice pay; annual leave and gratuity.
- 23 The appellant complains that having found that termination from employment was lawful, the court should have downed tools as it had become *functus officio*. Nothing can be further from the truth. The court was clothed with jurisdiction to determine all the issues framed before it. One of those issues was whether termination of employment of the grievants was lawful. The court examined the evidence and found that the grievants had become unruly after being required to register to be members of NHIF, and that such behavior entitled the appellant to terminate their services. The court examined the other issues in the suit and found that the appellant had breached the law by terming the grievants who were long serving employees as casual employees when the law required that they be permanent employees. Once that position was established, the Judge was right to examine whether employment laws on the right to annual leave, gratuity and salary in lieu of notice had been complied with. The Judge found, and we agree with those findings, that the appellant had not complied with requirements of the Employment Act, but had acted in breach thereof. All the findings of the Judge were sound and there is no merit in the complaints raised by the appellant. This appeal is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**Dr. K.I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

