Kenya Engineering Workers Union v Sheer Logics Management Consultants Limited (Cause E085 of 2024) [2025] KEELRC 202 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 202 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E085 OF 2024

M MBARŨ, J

JANUARY 30, 2025

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... CLAIMANT

AND

SHEER LOGICS MANAGEMENT CONSULTANTS LIMITED .... RESPONDENT

JUDGMENT

1. The issue in dispute is the alleged procedural and unlawful termination of fixed contracts of 16 employees.

   The claimant is a trade union under the *Labour Relations Act* (LRA). The respondent is a limited liability company. There is no Recognition Agreement.

   The grievants are members of the claimant union.

   The respondent employed the 16 grievants under a fixed-term contract. The claim is that the respondent has violated the terms and conditions of the fixed-term contracts by forcefully terminating them. The affected employees are;

   1. Eliud Tsuma.
   2. Tsemba Ramathani Saria.
   3. Michael Charo Mboja.
   4. Mohamed Mzonje Chando.
   5. Patrick Katana Katombo.
   6. Emmanuel Mwango Jefa.
   7. Samson Mbani.

8. Abdui Ngala George.

9. Hanza Hassan.

10. Jonathan Ramda.

11. Jason Gideon Kisumuli.

12. Kadilo Dyaya Kavu.

13. Kuliman Salim Sarai.

14. Emmanuel Mangale.

15. Modi tsuma Mwangulo.

16. Manduli Murieve.

2. The claim is that upon the unlawful termination of the grievants' employment, the claimant reported the matter to the Minister and appointed a conciliator. Contrary to the due process, the respondent under the provisions of Section 40(1) (a) of the *Employment Act* verbally terminated the employment of the grievants on account of redundancy without giving them notice. This was done without consultations with the claimant.

   The claim is also that the claimant has achieved the threshold for recognition but the respondent has refused to recognize the union. The claimant has recruited over 50+1 equivalent to 22 unionisable employees. Check-off forms were sent to the respondent but contrary to Section 48 of the LRA, the respondent has not signed a Recognition Agreement.

   The claimant is seeking the following;

   a. The court to direct the respondent to pay the differences of the period of the contract as it was prematurely terminated;

   b. The respondent be compelled to compensate the employees whose fixed-term contracts were verbally terminated prematurely without notice and consultations with the claimant in violation of Article 47 of *the Constitution*.

   c. The court to compel the respondent to pay the grievants one month's salary instead of notice.

   d. The grievants herein be compensated in the meaning of Section 40(1) (c) of the *Employment Act*.

3. In evidence, the claimant called Omari Menza, one of the grievants who testified for and on behalf of the others. His case was that the respondent employed him in January 2017. His work was causal and on a fixed-term contract. It had a fixed term.

   When his employment was terminated, the respondent was paid for the days worked in November 2019. On 30 November 2019, the respondent paid all the grievants. The notice was issued by hand on 16 November 2019 and dated 1 November 2019.

   Menza testified that the respondent would issue the grievants with pay slips stating the following;

   a. Basic wage;

   b. NSSF deductions;

   c. NHIF deductions.

4. The grievants took their annual leave, but no house allowance was paid. They raised the issue of non-payment of house allowance, which led to termination of employment. The claim is unfair termination of employment.

   Upon cross-examination, the grievant testified that the claim relates to 16 grievants but they were 18.

   The list attached to the claim does not include him (Omari Menza) and Bendia Menya.

5. He testified that there was a typing error, and his name was omitted. There is no evidence of unionization, and no record is filed that they are members of the claimant union.

   The contracts issued to the grievants were for a year.

   The contract clause on remuneration provided for Ksh.16, 981 without house allowance is not pleaded.

   Menza testified that before his employment was terminated, he received notice of 30 days. The notices are dated 1 November 2019, but the grievants refused to sign them in acceptance. They demanded payment of terminal dues.

6. In response, the respondent admitted that it employed the 16 grievants as outlined in paragraph 2.2 of the Memorandum of Claim. The grievants were general workers attached to the client Mombasa Apex Steel Yard as fixed-term employees from January 2019 to December 2019. The contracts were subject to an outsourcing contract with the client, Mombasa Apex Steel Yard.

   There was no termination of employment on account of redundancy, as alleged. No redundancy was declared, and no notice of such matter was issued to the Labour officer. The business's nature was to provide labour for different clients. Employees were assigned duties at the outsourcing client. Employment was determined on the terms of the contracts between the respondent and the clients.

7. The respondent received a termination of contract notice from its client on 30 October 2019, taking effect from 1 to 30 November 2019. Immediately, the respondent issued notices to its employees, including the grievants, on 1 November 2019. Employment would terminate on 30 November 2019. The notice is issued under the terms and conditions of the fixed-term contracts. The contracts required 30 days' notice before termination of employment.

   The claims made are without merit and should be dismissed with costs.

   Petman Otieno testified for the respondent as the human resources client relationship manager, stating that he employed the grievants on a fixed-term contract ending in December 2019. Employment was based on the availability of work since the respondent is an outsourcing entity dependent on clients to provide them with labour.

8. Otieno testified that upon notice from the client that they would terminate the outsourcing contract on 30 November 2019, he issued the grievants with notice of 30 days to terminate their employment following the employment contract. This was not a case of redundancy. It was purely based on the termination of the contract by the client, which affected the employment of the grievants. They were paid for days worked.

   At the close of the hearing, both parties filed written submissions.

   Determination

   The pleadings, the evidence and the written submissions analyzed, the issues which emerge for determination are;

Whether the court should direct the respondent to pay the differences of the period of the contract upon premature termination;

Whether the respondent should be compelled to pay for notice and

Whether the grievants should be compensated under Section 40(1) (c) of the *Employment Act*.

Before addressing the issues above, the cause of action arose on 30 November 2019 upon the respondent's termination of the grievant's employment. As noted above, the matter was filed in Nairobi ELRC Cause No.E655 of 2023 in October 2023. Under Section 90 of the *Employment Act* [now Section 89 of the *Employment Act*, 2024], the claimant should have filed the claim within 3 years of employment termination. Such time lapsed on 29 November 2022.

9. A claim filed out of time is incompetent, and the court has no jurisdiction to extend the time set by the law. In the case of Maria Machocho vTotal (K), Industrial Cause No. 2 of 2012, the court held that this court is not imbued with the jurisdiction to extend time. See Kenya Plantation & Agricultural Workers Union v Kensalt Limited & Salt Manufacturers (K) Ltd [2015] KEELRC 936 (KLR), where the court reiterated that the Court has no jurisdiction to extend time or grant leave to commence action outside the prescribed limitation time.

This issue of time limitation should have been resolved instantly. The claim was filed out of time. It should have been dismissed instead of moving from Nairobi to Mombasa.

This lapse noted it would be necessary to address the substantive issues.

10. The claimant has admitted that there is no Recognition Agreement with the respondent.

A Recognition Agreement's main purpose is to allow a trade union, such as the claimant, to proceed and negotiate terms and conditions of employment for its members with an employer, the Collective Bargaining Agreement (CBA). In this case, without any Recognition Agreement, the claimant cannot claim to have achieved the legal threshold for recognition to move to the next stage of negotiating a CBA.

The grievant called in evidence that Omari Menza is not one of the listed grievants under paragraph 2.2 of the Memorandum of Claim. His capacity to attend and support the claim for and on behalf of the grievants was challenged.

Omari Menza is not a proper witness to testify to the facts of the case.

11. On the substantive issues raised by the claimant, the claimant is allowed under the LRA to recruit members in the sector covered without a Recognition Agreement. However, such a matter was not brought to the respondent's attention to create a legitimate expectation that before termination of employment, the claimant was the representative of the union's employees. The witness called, though not a proper witness in this case, admitted that there was no evidence presented in court that they were members of the claimant union.

Without the claimant's knowledge, the respondent cannot be faulted for directly issuing the termination notice to the grievants.

12. In this case, the claim that there was a redundancy and compensation should be issued, is left bare. The notice attached to the Memorandum of Claim and also supported in response states that the respondent had lost its contract with the client, a third party, and hence would terminate the employment of the 16 grievants. Omari Menza admits this. The notice was dated 1 November 2019.

This is not a proper case of redundancy.

Procedural and unlawful employment arises when the employer terminates employment contrary to the law and the written contract. See Akumu v Bidcoro Africa Limited [2023] KEELRC 3305 (KLR); Mathew Latiema v Raiply Woods (K) Limited [2015] KEELRC 99 (KLR); and Mwaniki v Ava Chem Limited [2023] KEELRC 55 (KLR) the courts have held that it was unlawful and unprocedural for the employer to implement the termination before the expiry of one month notice period. This position was reiterated in the case of Kosgei v Nandi County Public Service Board [2023] KEELRC 2604 (KLR).

13. In this case, the employer issued a termination notice in advance. The grievants were paid for time served. The claim that there was a redundancy is not apparent. The grievants served the notice period. The claimant for payment for notice should not arise.

The reasons for termination were outlined in the notice terminating employment. There is no claim that this was not valid, genuine, or justified.

14 The respondent has admitted that its outsourcing contract with a third party was terminated. In return, they applied the contract terms and the law to terminate the 16 grievants' employment effective 30 November 2019. The notice period was served to the end, and payment for days worked was made.

Despite the grievants having fixed-term contracts, the same provided for termination upon notice. The claims made are without merit and without a case in which there was an unfair termination of the fixed-term contracts.

Accordingly, the claim is without merit. There is no evidence that the grievants are members of the claimant. The claimant shall meet the costs due to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŨ

JUDGE