Ashton Mombasa Apparel (EPZ) Limited v Tailors and Textile Workers Union (Cause E014 of 2024) [2025] KEELRC 444 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 444 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E014 OF 2024

M MBARŨ, J

FEBRUARY 20, 2025

BETWEEN

ASHTON MOMBASA APPAREL (EPZ) LIMITED .... CLAIMANT

AND

TAILORS AND TEXTILE WORKERS UNION .... RESPONDENT

JUDGMENT

1. Issues in dispute are the imminent threat to an unprotected or illegal industrial action by the respondent and the recognition of the union by the claimant.

2. The claimant is seeking the following orders;

   a. A declaration that in any event, the respondent union, whether by itself, its officers, agents and/or employees cannot call for a strike, a lockout or any other form of industrial action by its members without first subjecting any trade dispute they may have with the claimant to resolution by way of conciliation under the provisions of PART VIII of the *Labour Relations Act*.

   b. A declaration that any strike, lockout or any other form of industrial action called for or caused by the respondent union whether by itself, by its officers, agents and/or employees without first subjecting any trade dispute they may have with the claimant to resolution by way of conciliation under the provisions of the *Labour Relations Act* and in particular PART VIII thereof be unprotected, outside the law, and therefore illegal.

   c. A conservatory order be and is hereby issued prohibiting or restraining the respondent by itself, officials, its agents and/or members from proceedings with, taking part in, calling, instigating or inciting the claimant's employees to take part in any unprotected and therefore illegal strike, lockout or in any other form of unprotected and illegal industrial action for any other reasons whatsoever.

d. An injunction to permanently restrain the union and all of its officials and/or members, from calling for, causing, instigating, participating in and/or proceedings with any strike, a lockout, and/or any other form of industrial action without full and prior compliance with the provisions of the *Labour Relations Act*, including the provisions of Part VIII thereof.

e. Any other or further reliefs that this court may deem just and expedient to grant in the circumstances of this case.

f. Costs of this claim be borne by the union.

Claim

3. The claimant is a limited liability company that manufactures garments for export within the country under the Export Processing Zone (EPZ) programme. The respondent is a trade union representing workers in the tailoring and textiles industry in Kenya.

4. The claim is that on 2 January 2024, the claimant commenced operations in the EPZ programme following a significant financial investment. Due to a lack of space to centralize operations, the claimant operates 3 production lines: Unit 1 in Jomvu, Unit 2 in Changamwe in Mombasa County, and Unit 3 in Mtwapa, Kilifi County.

5. Since 2 January 2024, the respondent union has been recruiting eligible members of the claimant's employees without any impediments or obstruction. Upon receipt and validation of check-off forms from the respondent, the claimant has withheld the prescribed union dues from all unionized employees and made remittances to the respondent.

6. The respondent has yet to recruit a simple majority of unionisable employees. The claimant cannot be forced to recognize the respondent or negotiate a collective agreement (CBA). Despite the union not being eligible for recognition by the claimant, it has threatened and instigated employees to engage in industrial unrest at the 3 production lines at Jomvu, Changamwe, and Mtwapa. On 29 to 31 January 2024, for 3 days, the respondent caused its members to slow down all production activities and eventually ceased working.

7. On 29 January 2024, the respondent's union officials and other members deliberately breached the peace at the Jomvu and Changamwe production lines. They caused violent disruption and beat up and assaulted the claimant's line manager and other employees who were peacefully at work. The claimant was compelled to cease production by shutting down and locking up its premises in the two production lines. On 1 and 2 February 2024, for two days, the two production lines remained closed.

8. In letters dated 1 February 2024, the claimant summarily dismissed the various employees who had engaged in violent attacks and assaults on their colleagues. The claimant followed clause 6 of the employment contract and section 44 of the *Employment Act* and wrote to the Office of the Regional Commissioner about the incidents of violence at the two production lines at Jomvu and Changamwe. The claimant requested enhanced security.

9. The employees who had been assaulted made formal complaints to the investigating agencies.

10. The respondent did not take well the decision to summarily dismiss the employees who had been involved in the unrest and assaulting their colleagues. In an apparent retaliation, it instigated continuing illegal industrial action protesting the summary dismissals. To amicably resolve the matter, on 2 February 2024, the claimant engaged the respondent in a meeting under the joint leadership of the Deputy Commissioner and the Mombasa County Labour Officer to deliberate on a return-to-work formula (RTF). Among the resolutions, the parties agreed that;

a. The employee on strike who has a valid contract would resume duties unconditionally and there would be no victimization;

b. The management would fast-track the signing of the Recognition Agreement presented to them within the legal provisions, and

c. All the parties would desist from using abusive and derogatory language and they would follow the laid down company and legal procedures in place in solving any disagreement irrespective of the position held in the company.

11. Despite the RTF, Respondent officials, together with local politicians, insisted on addressing the claimant's employees on 3 February 2024, thus ensuring that there was no production. Production resumed on 5 February 2024. The RTF was not respected, as the respondent members went on a go-slow until recognition was achieved. This resulted in production losses before, during, and after the lockout.

12. In a letter dated 12 February 2021, the respondent wrote to the claimant, raising additional complaints concerning item (a) of the RTF over the alleged victimization of employees. There was an allegation that the claimant had forced the assaulted employee to record statements with the police on 29 January 2024 in Jomvu and Changamwe. This demonstrates that the respondent is focused on disruption and shutdown of operations unless recognized by the claimant. Through a letter dated 15 February 2024, the respondent wrote to the claimant and insisted that it would call its members to engage in an illegal strike unless its demands were met. The claimant engaged the respondent for an amicable solution without success.

13. The claimant has received reports that the respondent silently incites employees to engage in unprotected industrial action to force recognition. The claimant cannot ignore these threats, given the previous conduct of the respondent, leading to the closure of production lines and huge losses. Unless the orders sought are issued, the claimant shall suffer severe irreparable damage arising from consequential loss of production, inability to meet and continue meetings, exiting contractual engagements with her overseas buyers, possible loss of production materials and destruction of property, loss of revenue and reputation all putting the existence of the claimant as a viable going concern at risk.

14. The claim is that under Article 41 of *the Constitution*, every employee has the right to strike, but this is not absolute and must be exercised within the confines of the law. All trade disputes should be resolved under the *Labour Relations Act* (LRA) provisions. Before an employee can go on strike, a trade dispute should be subjected to conciliation under the LRA. Attempts by an employee or trade union to call for a strike without compliance with the LRA are unlawful and unprotected.

15. In this case, the claimant has not recognized the respondent because the recognition threshold has not been achieved. Unless the orders sought are issued, the claimant will suffer irreparable loss and damage that cannot be compensated in damages.

16. In evidence, the claimant called Abizer Lokhandwala, the general manager of administration. He testified that the claimant was incorporated on 9 November 2023 and licenced to operate as an EPZ enterprise on 20 December 2023. It commenced operations on 2 January 2024, and due to a lack of sufficient space, it operates 3 production lines in Jomvu, Changamwe, and Mtwapa.

17. Abizer testified that on 29 January 2024, its employees at Jomvu and Changamwe units were attacked and assaulted by union officials and other employees who were members of the respondent union. The union officials who engaged in the brutal attacks were employed on fixed-term employment contracts.

18. Since the claimant commenced operations on 2 January 2024, the respondent has been recruiting members without hindrance. Upon receipt of the check-off forms, the claimant verified and remitted union dues. By 2 February 2024, the respondent had recruited 5873 members. By March 2024, the respondent had not secured a simple majority to allow for recognition. The respondent opted to commence threats and call for an illegal strike to be recognized by the claimant.

19. Abizer testified that from 29 to 31 January 2024, for 3 days, the respondent and its members went on a go-slow and ceased working. On 29 January 2024, the union officials and other employees breached the peace at the production lines in Jomvu and Changamwe units. To secure the employees, the 2 production lines were closed. Arising from the threats and violence, the claimant was forced to issue notices dated 1 February 2024 dismissing 12 employees who engaged in brutal attacks on other employees and senior managers. Such actions were contrary to the employment contracts and Section 44 of the *Employment Act* and hence justified. The dismissed employees were paid their full wages.

20. The claimant also wrote to the County Commissioner about the incidents of violence. The assaulted employees made reports to the investigating agencies, but the respondent did not take the termination of its officials well, and in retaliation, it started instigating illegal industrial action by the employees.

21. Abizer testified that efforts to amicably restore peaceful industrial relations, the claimant engaged the Deputy County Commissioner, Labour Officer, to deliberate on 2 February 2024, and the RTF was reached. Parties agreed that all employees on strike who had valid employment contracts would resume duty and would not be victimized. Upon attaining the legal threshold, the claimant agreed to recognize the respondent and that parties should not use abusive language.

22. Despite having the RTF, on 3 February 2024, the respondent and local politicians insisted on addressing the employees disrupting production. Work resumed on 5 February 2024, leading to huge losses and order cancellations.

23. On 12 and 15 February 2024, the respondent wrote claiming its members were being victimized, which was false. Those dismissed had assaulted other employees, leading to summary dismissal.

24. On 30 May 2024, the union officials violently assaulted one employee outside the workplace.

25. The respondent's actions are meant to force the claimant to recognize it without following the provisions of the LRA. The threats of illegal industrial action have led to go-slow and low productivity, leading to losses.

26. On the counterclaim that the claimant unlawfully terminated 2228 employees who are members and including 8 officials, the claimant's business model is in manufacturing and based on pre-contractual orders from overseas buyers. From the business model, the claimant has a policy to employ fixed-term contracts wholly dependent on the existing contracts. In this case, the employees were engaged for 3-month period. Unless a formal notice is issued for renewal, each contract ends on its terms. The dismissed employees had fixed-term contracts ending on 25 March 2024 and were paid in full.

27. Arising from constant production disruption triggered by the respondent and its officials in January and February 2024, the claimant's ability to meet contractual orders from overseas buyers went down. Overseas buyers wrote complaints and some cancelled orders. It was not viable for the claimant to renew most employment contracts. 1968 contracts were not renewed after 25 March 2024. Of the 1968 employees, 998 were not respondent members.

28. The claimant also called Bernard Okwiri Ndori as a witness. He testified that the claimant employs him as a machine operator. On 30 May 2024, while at work, he went for lunch at Mlo Hotel near the claimant's premises accompanied by Nicholas Wephukulu, Mutua Musyimi and Edwin Shibia.

He was accosted by Said Kombe and Clement Omwayo Mukoshi, who beat him up while alleging that many employees had ceased being union members. The two were former claimant employees and respondent officials. Following the beatings, he suffered injuries, and he made a report to the claimant and Jomvu police station and was later treated at Coast General Hospital.

Response

29. In response, the respondent filed a response and counterclaim.

30. The respondent has denied all the claims. There are no particulars.

Counterclaim.

31. In the counterclaim, the respondent's case is that they seek the following from the claimant;

    a. Execution of the Recognition Agreement.

    b. Deduction and remittance of union dues for the 1473 newly recruited members and any other recruit.

    c. Withdrawal of the unlawful dismissal of the 12 unionisable members of the union and their reinstatement without loss of any benefits.

    d. Compliance with the terms of the Return to work formula signed and dated 2 February 2024.

    e. An order restraining the claimant from harassing, threatening and intimidating the respondents and its members.

32. The response is also that, the respondent having recruited 5873 unionisable employees from the claimant's establishment entitles them to have dues deducted and remitted to them without any hindrance or conditions and to be granted recognition. The claimant should stop interfering with the union operations touching on the recruitment of members and stop intimidation and harassment of unionisable employees.

33. The respondent in the counterclaim is seeking the following orders;

    a. A finding and declaration that the claimant has violated the respondent's rights to receive full union dues and recognition.

    b. An order by way of permanent injunction restraining the claimant from treating the unionisable employees unfairly.

    c. An order directed to the claimant to abide by the return to work formula executed by the parties on 2 February 2024.

    d. The claimant be ordered to unconditionally withdraw the dismissal letters issued to the respondent's members and to reinstate them forthwith.

    e. The claimant be ordered to pay the costs of this suit.

34. In evidence, the respondent called Cosmas Musau, the branch secretary in Mombasa, since 2021. He testified that the respondent recruited members and the claimant has been remitting union dues. On 29 January 2024, there was a strike in the factory; the claimant called the branch secretary to go to the company, where he met workers' representatives for a briefing. The employees complained that they were fed up with their supervisors, who were sexually harassing them and using abusive language, and

refused to extend their employment contracts. Upon negotiations, a stakeholder meeting was held, and an RTF was reached on 2 February 2024. On 3 March 2024, political leaders addressed the employees.

35. Musau testified that under the RTF, parties agreed that work would resume without victimization. The claimant went ahead and victimized union officials and refused to recognize the respondent. The claimant went ahead and removed all members of the respondents from its employees. The claimant refused to address the complaints of sexual harassment or conduct any investigations and further continued in the use of abusive language. To date, no Recognition Agreement has been executed by the claimant. There are 6000 members per the checklists shared with the claimant. The claimant's allegations that the checklists are incomplete are incorrect because of the deliberate reduction of union members.

36. Musau testified that the claimant has alleged that 12 employees and members of the respondent assaulted other employees, which is not correct. No evidence was submitted in this case. There was no disciplinary hearing before the summary dismissal, and the counterclaim should be allowed.

37. The respondent, Collins Otieno Odhiambo, testified to the claimant's allegations that there was violence at the company on 29 January 2024, which are incorrect. The claimant officers wanted the employees to resign from the union. The claimant called the employees to tell them about the changes in the company and that a new company had come in. The employees looked at the work targets and found them unrealistic and abnormal. They tried to ask how the targets were set, but the claimant said it would remove all union members. This was followed by the dismissal of 12 union members who were shop stewards.

38. Odhiambo testified that at the time, the employees were frustrated due to sexual harassment, tribalism and the use of abusive language. They went on a go-slow on 29 January 2024. He was one of the union officials and one of the 12 dismissed from his employment by the claimant.

39. On 2 February 2024, while the RTF was negotiated, it was agreed that nobody would be victimized due to the go-slow. The claimant went ahead and victimized all the union officials. The notice was issued through the phone without a hearing or due process being followed. He had worked for the company for 10 years. Upon the summary dismissal, he was paid his terminal dues for 2 January to 25 March 2024. He was dismissed before the fixed-term contract ended.

40. The respondent called Colleta Masula Wakheya, who testified that the claimant harassed and intimidated respondent members and locked them out of the workplace. The claimant harassed the employees because it did not want the union on the premises. The claimant refused to receive the employees' grievances.

41. Colleta testified that the claimant refused to receive her grievances and instead got victimized. Upon the RTF, she was elected a shop steward with the mandate to go to human resources to give grievances brought to her attention by fellow employees. Instead, the claimant told her to leave the union or her employment contract would not be renewed. She was moved from one department to another to change her performance, leading to dismissal; this was done to reduce the number of union members and deny the respondent the simple majority threshold. In total, 2228 members of the respondent were dismissed through a notice that their contracts would not be renewed. No reasons were given. She had worked for the entity of the claimant for 15 years, but when they sought the claimant for reasons, they were removed from the premises.

42. Rev. Joel Kandie Chebii, the general secretary, testified that the claimant is a merger of Ashton Apparel EPZ Limited and Mombasa Apparels EPZ Limited, which have been in operation since 2000 under the AGOA Protocols. The merger led to the incorporation of the claimant.

43. Rev. Kandie testified that there was no brutal assault of any employees by the union officials, as alleged by the claimant. On 29 January 2024, the union was not active in the claimant company, nor was any election conducted to elect union officials as alleged. The claimant has not mentioned the officials who were alleged to have assaulted and brutalized other employees.

44. On 29 January 2024, the respondent was aware that the employees had representatives whom the claimant's management had elected and not the union, unlike the case where, under the law, the employees should be allowed to elect their representatives.

45. The employees were aggrieved by the claimant's infringing on their right to association in joining the union of choice. The claimant has engaged in unfair labour practices such as sexual assault/harassment, bribery, discrimination, underpayment, non-payment of overtime and the use of abusive language by management to employees. This results from the lack of a union to represent employee interests. The elected union representatives and shop stewards were done after the signing of the RTF on 2 February 2024. It was mutually agreed that no employee would be victimized. However, the claimant continues to violate employee rights, coercing them to resign from the union, which amounts to unfair labour practices.

46. Rev. Chebii testified that despite the respondent recruiting more than 5873 employees by 2 January 2024, the claimant refused to deduct and remit union dues until 9 February 2024. This was done upon the order of the County Labour Officer, Mombasa and the County Commissioner EPZ representative after the RTF on 2 February 2024. Despite recruiting over 5873 members, the claimant only deducted union dues for 3048 employees. This was intended to deny the union recognition and negotiate for a CBA.

47. Rev. Chebii testified that the respondent is aware that some employees were removed from the check-off forms and forced to resign from the union by the claimant. The claimant has terminated the employment of 2228 union members in 3 months and replaced them with new employees who have been instructed not to join or participate in union activities. Among the 2228 unlawfully terminated employees included all union representatives and shop stewards newly elected after the RTF was signed on 2 February 2024. This was an act in bad faith calculated to deny union members representation.

48. In May 2024, the respondent recruited over 6,000 members, but the claimant refused to deduct and remit union dues. This is not justifiable and amounts to unfair labour practices. The union members have not gone on strike or engaged in any go-slow or lockout, as alleged by the claimant. The reliance on video footage captured before 2 February 2024 was before the union commenced any activities in the claimant company.

49. On 3 February 2024, the claimant's management and labour officials, including politicians, summoned the employees for an address. The respondent was not invited, and the claim that it stopped production activities is unjustified.

50. Rev. Chebii testified that there has never been a stoppage of production in all other companies, including a neighbour to the claimant, Simba Apparels EPZ, which has over 3000 union members. Upon the RTF, production within the claimant company increased from 40% to 74% without any losses as alleged. There was no go-slow, and the claimant cannot assert that orders were cancelled. Where there was low productivity, the same resulted from recruiting new employees without experience after the unlawful termination of 2228 union members. The removal of 8 shop stewards from Jomvu and Changamwe and all line representatives was victimization due to union activities. The letters dated 15 February 2024 by the respondent to the claimant addressed the victimization of union members and

elected shop stewards who were forced to sign statements with the DCI. The respondent has never issued any threats for industrial action as alleged.

51. The police are currently deployed at the claimant company to intimidate workers into not joining the union or participating in union activities. The assault case involving Okwiri is not relevant to this case as it is related to a personal altercation from personal differences over a football match. The matter was reported to the police and has been used to mislead the court and defeat the ends of justice. His witness statements have significant discrepancies. He states that he was taken to Coast Guard Hospital on 22 May 2024, but the treatment notes indicate that he was treated at Mwananchi Medical Centre.

52. In reply to the counterclaim, the claimant denied the allegations made and said that the recognition of a trade union is on condition that such a union represents the simple majority of the unionisable employees. The respondent has not achieved this legal threshold to allow the claimant to accord recognition. The respondent's complaints seeking recognition are premature, and such claims should be dismissed with costs.

53. The claimant, in response, asserts that the summary dismissal of the union officials and other employees was due to these employees' deliberate breach of the peace at the production lines at Jomvu and Changamwe.

54. Termination of employment was done under Section 44 of the *Employment Act*. Following termination of employment, the claimant on ex gratia elected to settle their contractual dues up to and including the end date of the fixed-term employment contracts.

55. The response is that each fixed-term contract for the dismissed employees will automatically be terminated by effluxion of time on 25 March 2024. The claim that there should be reinstatement is without merit.

56. The claimant complied with the terms of the RTF dated 2 February 2024. No employee was victimized as alleged. The respondent has acted contrary to the RTF and continued to disrupt peace through violence by its officials.

57. The respondent has not recruited 5873 employees as alleged. It has not achieved the threshold for recognition under the LRA, and when union dues are payable, they have been remitted to the respondent when due. The counterclaim is without merit and should be dismissed with costs.

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

59. The claimant submitted that the respondent engaged in an illegal industrial action contrary to Article 41 of *the Constitution*. The right to strike is not absolute and is regulated under Section 76 of the LRA. Notice must be issued and conciliation undertaken. Without notice, the respondent called for a strike with a work stoppage from 29 to 31 January 2024. Musau, for the respondent, admitted that the refusal to recognize the respondent agitated the employees, leading to industrial action that was resolved in the RTF. Rev. Chebii and Colleta echoed the exact words, saying that refusing to recognize the respondent led to industrial action.

60. Without achieving the legal threshold for recognition, the claimant cannot be forced to recognize the respondent. The risk of the respondent instigating its members for industrial action caused the claimant loss and damage. Such adverse effects were witnessed when several overseas buyers, including the Global Sourcing Director, expressed discontent with the claimant’s ability to meet production and delivery under its contract. The initial work allocated was pushed to other vendors. The production disruptions resulted in the non-renewal of fixed-term contracts for 1969 employees on 25 March 2024.

61. Under Section 54 of the LRA, the respondent has not complied. The allegations that it had 5873 employees on 2 January 2024 are incorrect, as this was the first day of operations. No evidence was produced to confirm the recruitment of such numbers of employees. In the case of Kenya Shoe and Leather Workers Union v Crown Industries Limited & another [2017] eKLR, the court held that a trade union pursuing recognition must lay before the court documentary evidence that it has recruited a simple majority of unionisable employees. In the case of Kenya Chemical & Allied Workers Union v Strategic Industries Limited [2016] eKLR, the court held that recognition is a matter of verifiable numbers.

62. In this case, the respondent has failed to discharge its burden of producing evidence that it has recruited a simple majority to justify the demand for recognition. In the case of Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR, the court held that a simple majority must be attained to be recognized as the representative trade union of a given entity.

63. The claimant submitted that all employees were on fixed-term contracts, and upon lapse, unless renewed, each terminated on its terms. The employees who engaged in threats and violence committed gross misconduct subject to summary dismissal but were paid for the entire contract term. The claimant had the right to renew or allow fixed-term contracts to lapse as held in National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza Civil Appeal No.178 of 2014. The 1968 employees whose contracts were not renewed lapsed on the terms. No notice was due as held in Stephen Kitheka v Kevita International Limited [2018] eKLR.

64. The claim should be allowed with costs and the counterclaim dismissed.

65. The respondent submitted that the claimant's legal entity came into being upon the merger of two companies that were parties to Mombasa ELRC No.119 of 2023. Consent Orders were recorded and implemented. To frustrate the respondent's recruitment drive and the recognition process, the claimant wound up its operations and remained a separate company that employed the same employees. The claimant was previously Ashton Apparels EPZ Limited and Mombasa Apparels EPZ Ltd, which laid off its employees due to redundancy.

66. On 2 January 2024, the claimant took up some of the former employees of the wound-up company but earned union members for termination of their employment. Despite the RTF, unionized employees had their contracts terminated. Those who got victimized were shop stewards representing employees.

67. The respondent submitted that the claimant had violated the respondent’s rights to receive full union dues and recognition. Upon recruitment of 5878 members from the claimant employees, the respondent is entitled to recognition.

68. The RTF, dated 2 February 2024, was not secured by the claimant, who proceeded to victimize the employees and members of the respondent. This was meant to deny the respondent the numbers towards recognition amounting to unfair labour practices. The court should direct the claimant to recognize the respondent to allow for CBA negotiations. The counterclaim should be allowed with costs and orders directing the claimant to remit union dues for 1473 employees, and the summary dismissals should be withdrawn with reinstatements by the RTF plus the costs of the suit.

69. The respondent relied on the following case, KUDHEIHA Workers v Mombasa Golf Club Cause No.54 of 2019, where the court held that the union should be recognised upon a simple majority membership. In the case of Zephania O. Nyambene & another v Nakuru Water and Sanitation Services Company Limited Cause No.13 of 2013, the court held that an employee terminated for participating in union activities should be reinstated. Where the union cannot access the workplace due to reduced

members by sacking, the employer should be ordered to remit union dues as held in KUCFAW v The Gravity Trading Co. Ltd Cause No.1134 of 2018.

Determination

70. From the pleadings, evidence and written submissions, the issues for determination can be summarized as follows;

    Whether the parties have engaged in unfair labour practices;

    Whether the threshold for recognition has been achieved;

    Whether the claim should be allowed;

    Whether the counterclaim should be allowed;

    Who should pay the costs?

71. The concept of unfair labour practices is not defined under Article 41 of *the Constitution* or the *Employment Act*. It is however part of the Bill of Rights and subject to be secured by everyone. In this context, an employer who subjects the employee to unfair labour practices as protected in Article 41 (1) of *the Constitution* if the employer, by omission or action, fails to uphold the statutory provisions that protect the employee or secure industrial peace at the shop floor. It is where the working environment is not conducive.

72. The Supreme Court of Kenya in the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) defined the right to "fair labour practices" as encompassing the constitutional and statutory provisions and the established workplace conventions or usages that give effect to the elaborations set out in article 41 of *the constitution* or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.

73. The court held that;

    > From the above definition unfair labour practice encompasses all conduct prior to, in the course of employment, during and after termination of employment. The provisions of Article 41 therefore encompass the full spectrum of labour practices. The provisions of Article 41 are borne from the realization that employment and/or the right to work is a human right. The right is also linked to other rights in the Bill of Rights more so the protection of life and the dignity of a person. The right is therefore a principle with legal obligations

74. Hence, the absence of fair labour relations results in unfair labour practices. The shop floor has no peace. The employees remain agitated and the employer does not benefit from the labour of the employees. Fair labour practices then call for concerted efforts by all the actors on the shop floor to foster peace and enhance productivity. This calls for fairness at work. Provision of basic fair treatment of employees by the employer. Adherence to the law and set rules and policies of the employer. Fundamentally, the adoption of procedures for collective representation at work. These are the rights secured under Article 41 of *the Constitution*.

75. This raises the question of recognition of the respondent by the claimant.

76. The respondent contests that the claimant is a merger of Ashton Apparel EPZ Limited and Mombasa Apparels EPZ Limited. However, the claimant is a limited liability company with its registration separate and distinct from any other third party.

77. There is no merger but a legal entity that can sue and be sued.

78. The recognition that the respondent enjoyed with Mombasa Apparels EPZ Limited cannot be transferred to the claimant. Recognition by the claimant must be secured under the provisions of Section 54 of the LRA, which requires an Employer to grant Recognition to a Trade Union, once a Trade Union has recruited a simple majority of the Employer's Unionisable Employees as held in Kenya Hotels and Allied Workers Union v Diani Sea Resort T/A Carslake Nominee Limited [2015] KEELRC 528 (KLR).

79. In his evidence, Rev. Chebii confirmed that as of 29 January 2024, the respondent union had no elected officials within the claimant company, and the claimant had not formally recognized it. The union officials alleged to have assaulted other employees are not named. They did not exist.

80. The claimant has sued the respondent, the trade union. There is no recognition between the parties. The employees who are alleged to have instigated violence leading to the closure of production are not enjoined in these proceedings. Despite the claimant stating that these persons are known and reports were made to the police, they are not respondents herein.

81. The respondent trade union has the right to represent its members on the shop floor and in court. Be it individual members or a collective. This is a fundamental right and freedom under Articles 41 and 36 of *the Constitution*. However, recognition of the trade union is pure arithmetic. The trade union must achieve the legal threshold under Section 54 of the LRA as held in Krystalline Salt Limited v Kenya Chemical Workers Union [2024] KECA 573 (KLR). Pending recognition, the employees of the claimant who have joined the respondent as the trade union of their choice are eligible for a deduction of trade union dues and remittance to the respondent. With the payment of wages by the claimant, there is a legal duty to deduct and remit the trade union dues to the respondent. Until recognition is achieved, the claimant has the legal duty to deduct and remit trade union dues to the respondent for the unionized employees.

82. Sections 48 (1) and 54 of the LRA spell out how an employee becomes a member of a trade union and also how a recognition of a Trade union happens respectively. Due to the nature of the employment contracts issued to the claimant employees based on fixed-term contracts, the numbers of unionized employees and members of the respondent have been oscillating each month denying the respondent a threshold for recognition. Based on the records kept by the claimant as the employer as required under Section 74 and Section 10(6) of the *Employment Act*, the numbers are that;

    a. In January 2024, the total number of unionisable employees was 11305 and the respondent members were 4391 a 38.8 per cent;

    b. In March 2024, the total number of employees was 12627 and the respondent members were 5026 at 39.8 per cent; and

    c. In May 2024, the total number of employees was 10006 and the respondent members were 3046 at 30.4 per cent.

83. The respondent has maintained that it has a membership of 5873 within the unionisable employees of the respondent. That it has achieved the threshold for recognition.

84. However, with the fluidity of the shop floor, numbers keep changing. Due to the nature of fixed-term contracts in place, the number of employees and members of the respondent is not constant. These changes are bound to have an impact on the legal threshold for recognition of the respondent by the claimant.

85. The numbers presented before the court, the respondent membership within the claimant entity is below the simple majority required for recognition.

86. The question of a simple majority is regulated under section 54(6) of the LRA. It requires any dispute regarding the right of a trade union to be recognised for collective bargaining to be referred for conciliation. It is only when the conciliation fails that the dispute can be referred to the Court as held in the case of Civicon Limited v Amalgamated Union of Kenya Metal Workers [2016] KECA 164 (KLR).

87. In this case, the crucial step and conciliation under Section 54 of the LRA and report to the Minister before filing suit was missed. The step for conciliation would have allowed parties to ventilate their issues with a resolution. The constant change of numbers due to the nature of contracts taken into account. The threshold for recognition will keep changing with the numbers.

88. The RTF process though commendable resolved the immediate concerns but was not regularized through the legal mechanism under the LRA.

89. However, the RTF in itself is an acknowledgement that there was withdrawal of labour preceding the agreement. It is an admission that there was an industrial action, in this case, a go-slow that affected production leading to the closure of two units at Jomvu and Changamwe. As observed by the Court in Mohammed Yakub Athman & 18 others v Kenya Ports Authority [2017] KECA 606 (KLR) it is unlikely that there would be an RTF without a preceding industrial action.

90. In this case, the claimant has moved the court following agitation from its employees to take industrial action on what the claimant asserts to be efforts towards arm-twisting it to unlawfully recognize the respondent. Indeed, there was a stoppage of work from 31 January to 2 February 2024 and on 3 February 2024, local politicians addressed the employees.

91. Of interest in this case was the meeting of minds on 2 February 2024 chaired by the County Commissioner and the Labour Officer and a RTF was achieved. However, there is no report to the Minister on the matter to allow for conciliation as contemplated under Section 54 of the LRA.

92. This is crucial because although the RTF was achieved on 2 February 2024, industrial peace remains evasive. Whereas parties to the RTF agreed that the employees on strike who has a valid contract would resume duties unconditionally and there would be no victimization; through notices dated 1 February 2024 the claimant terminated the employment of 12 employees through summary dismissal. The affected employees were largely union officials serving as Shop Stewards in both units in Jomvu and Changamwe.

93. Giving effect to the RTF terms, the contracts of the 12 dismissed employees had lapsed on 1 February 2024 hence not valid.

94. Where these employees caused violence in the company as alleged, the sanction issued was summary dismissal. This brought to an end the employer-employee relationship.

96. Whereas the claimant has not recognized the respondent, the employees who engaged in the industrial action from 31 January to 2 February 2024 resulting in the RTF are not parties in these proceedings. The claimant sued the respondent instead.

97. The agreement to resume work by the employees was secured through the involvement of the union. The understanding and agreement was that the employee on strike who has a valid contract would resume duties unconditionally and there would be no victimization. The RTF further agreed that;

(2) The following employees elected as shop stewards be recognized by the management;

Unit 1;

Rodgers Wanyama – Chief Shop Steward;

Lilian Bosibori – Deputy Shop Steward;

Luca Malau – Assistant Shop Steward;

Colleta Masulia – Assistant Shop Steward;

Unit 2;

Joshua Kilambosi – Chief Shop Steward;

Teresia Kathanga – Deputy Shop Steward;

Agnes Kisisu – Assistant Shop Steward;

Baraka Chombo – Assistant Shop Steward;

(8) Management to desist from blacklisting the employees who have exited the company;

(9) The management to fast-track the signing of the Recognition Agreement presented to them within the legal provisions.

98. The employees whose employment was terminated on 1 February 2024 included;

1. Hassan Juma Odhiambo;
2. Petro Simotwa;
3. Sebastian Kiio Mwila;
4. Godwin Wafula Sifuna;
5. Onesmus Musyoka Kiasyo;
6. Paulo Wanzala Nalianya;
7. Amos Wafula Khaemba;
8. Hezron Odhiambo Ochieng;
9. Clement Ombayo Mukoshi;
10. Collins Otieno Odhiambo;
11. Evans Ofukhu Okochi;
12. Kombe Said Athuman.

99. Whereas the threshold for employer recognition of a trade union is secured in law, the RTF identified shop stewards for each unit. Shop stewards ordinarily represent a trade union on the shop floor in the context of Section 41 of the *Employment Act*. In the case of Unilever Tea (K) Limited v Kenya Plantation & Agricultural Workers Union [2024] KECA 540 (KLR) the court recognized that the

presence of the union representative and shop stewards at a disciplinary hearing creates the balance contemplated under Article 41(1) of *the Constitution* and Section 41 of the *Employment Act*. The employee(s) can agitate their case in the presence of the union representative. The court held that;

> As regards the presence of shops steward during the hearing and its legal effect, the requirement of the law in section 55(2) (a) of the *Labour Relations Act* is that shop stewards they are required to represent an employee during disciplinary proceedings and therefore safeguard and promote the employee's interests. ...

100. Without limiting the matters that may be dealt with in a recognition agreement, trade union members in a workplace are allowed to elect from among themselves trade union representatives following *the constitution* of their trade union. Where the employer picks the appointed union representatives and shop stewards for summary dismissal, such is a direct violation of article 41(1) of *the Constitution* and a negation of the LRA and the *Employment Act*. The lawful activities of a trade union are protected under Article 41 of *the Constitution* and Section 46 of the *Employment Act* which provides occurrences that do not constitute fair reasons for dismissal or the imposition of a disciplinary penalty. These include;

    a. an employee's membership in a trade union,

    b. the participation of an employee in the activities of a trade union,

    c. the employee's seeking office in a trade union, or his refusal to join or withdraw from a trade union,

101. Mr. Abizer for the claimant testified at length that on 29 January 2024, there was an industrial action by employees. Some assaulted senior staff and fellow employees on the shop floor. They did so to agitate the claimant to recognize the respondent. For two days, operations were paralyzed, leading to closure. Despite the RTF, on 2 February 2024, operations did not resume immediately because on 3 February 2024, local politicians decided to address the employee and continued to agitate for the recognition of the respondent without achieving the legal threshold.

102. The witness produced a CCTV recording in court.

103. The court has taken time to go through the CCTV footage. It has no audio.

104. What emerges from the clip is a large number of employees getting out of a room/warehouse. Their procession is towards one direction. There is no assault or any employee holding, touching or in any manner battering any other.

105. The evidence that there were 12 employees and members of the respondent union assaulting and battering senior managers and other colleagues is not evident from the CCTV footage. If this occurred before the mass movement, as evidenced by the CCTV footage or after this fact, it is not apparent to the court. The lack of audio in the CCTV footage cannot assist the court in appreciating the tempo under which the mass movement of people is viewed. Even where such was provided, there is no violence, battering, assault or criminal behaviour/conduct apparent.

106. There is no marker or indicator that this was within the claimant's premises, and the persons seen moving out are the affected employees.

107. Although the claimant filed P3 forms and statements for the employees alleged to have been assaulted, the linkage to the CCTV footage submitted in court is lost.

108. The termination of employment of the 12 employees including 8 union officials arose from unionization and participation in lawful activities of a trade union. This is acknowledged in the RTF, and these persons are appointed to represent fellow employees as shop stewards or union representatives of their choice.

109. The union representatives were specifically targeted and victimized for unionization.

110. This amounted to unfair labour practices and a violation of Article 41 of *the Constitution* and Section 46 of the *Employment Act*. With termination of employment, despite payment for the full term of their fixed-term contracts, these employees were denied a fair chance to earn an honest living.

111. The RTF acknowledged that no employee would be victimized and further that the claimant would desist from blacklisting the employees who exited the company. This was not to be.

112. The 12 employees who have served in their capacities with similarly situated entities, including the predecessor to the claimant, Mombasa Apparel EPZ Limited, for a period ranging from 10 to 15 years, were denied a fair chance to offer their labours in their industry and earn a living.

Unfair labour practices impede industrial peace.

113. This has had a direct impact on production, and the claimant has made huge losses. This cannot be blamed on the respondent. The claimant has yet to recognize the respondent. The lapse in engaging in fair labour relations to allow elected union officials to play their role and the summary dismissal of employees, including union officials, sent a clear message to the other employees. Once you join the union, any agitation for union activities would result in the non-renewal of the contract. The spirit of the RTF was lost in terms of not blacklisting former employees whose contracts had lapsed, and none were renewed.

114. Of interest was the claimant's case, which, on 3 February 2024, local politicians addressed the employee, leading to the stoppage of production. This cannot be blamed on the respondent. These meetings were secured upon the intervention of these actors for industrial peace. Soon thereafter, from these meetings, production resumed but upon the summary dismissal of 12 employees including union officials.

115. Another case was that of Okwiri, who testified that he was assaulted while outside the workplace by former employees. Indeed, his evidence was at variance with his statement as submitted by the respondent. Whereas he alleged to have been treated at Coast General Hospital, he produced medical records for another facility. The case of assault, if at all, took place outside the workplace. Not all disagreements that happen outside the shop floor relate to the shop floor. His evidence was farfetched.

116. For the unfair labour practices, the court in Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) confirmed the award of Ksh.800, 000. In the case of Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2013] eKLR, the court held that there were violations of the right to fair labour practices, and each employee was awarded 6 months of gross pay. In the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR), the court awarded the employee who was found to have been unfairly treated by the employer Ksh.7, 500,000 in damages.

117. In this case, the court takes into account that upon the summary dismissal of the 12 employees who included union officials, the claimant paid them upfront for the entire fixed term contract ending on 25 March 2024. In this regard, an award of 3 months gross pay to each of the 12 employees is considered just and appropriate. The dues shall be tabulated and paid to each of the 12 without discriminating against them on the basis of whether they were unionized or not.

3 months gross pay in general damages for unfair labour practices.

118. On the counterclaim, indeed, as submitted by the claimant, fixed-term contracts are lawful and valid. This is allowed under Section 10(3) of the *Employment Act*. This mode of employment allows parties to the fixed-term contract to allocate a start and end date. No notice is necessary before the end date, as held in Wambugi v Board of Management Afya Yetu Initiative [2024] KECA 1557 (KLR), that the employee was under a fixed-term contract with a definite commencement date and termination date. The contract terminated automatically when the termination date arrived. In the case of Article 19; Global Campaign for Free Expression v Waswa [2024] KECA 139 (KLR), the court held that fixed term contract lapses by effluxion of time and, therefore, the employer has no legal duty to give reasons or issue notice. This position is reaffirmed in the case of Kenya Power and Lighting Company v Osiro [2024] KECA 854 (KLR);

> The general principle, as we understand it, is that a fixed-term contract will terminate on the sunset date unless it is extended to terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract, giving ordinary meaning to its terms in determining any issue that may arise.

119. In this case, the claimant issued fixed-term contracts to all employees. However, on 1 February 2024, 12 employees, including members of the respondent, were issued with notices terminating their employment through summary dismissal. The notices were to take effect immediately. The reasons given were due to workplace disruption and assault. The claimant noted that on 29 January 2024, a group of workers, including the listed 12 employees, caused significant disruption to the factory operations and engaged in physical altercations with senior staff members.

120. Termination of employment through summary dismissal under Section 44 of the *Employment Act* is allowed. Even where the employee holds a fixed term contract with a provision for termination, it is subject to assessment as to the lawfulness and validity of the stated reasons under Section 35(4) of the *Employment Act*.

121. Whether to terminate a fixed-term contract or summary dismissal is issued, the employer must abide by the mandatory provisions of Section 41(2) of the *Employment Act*. The employee must be invited to attend and address the matter; however, short notice is required. The right under Section 41 is mandatory unless the employer can demonstrate that it was practically difficult or impossible to issue the employee with notice to attend and address and make his representations as held in Population Services Kenya v Wetende & 2 others [2024] KECA 450 (KLR) that section 41(2) of the *Employment Act* requires that before an employer terminates the services of an employee, the employee must be allowed to be heard. The section provides that the employer must;

> ...hear and consider any representation which the employee may have on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

122. In this case, the allegations are that on 29 January 2024, union officials and some employees violently attacked senior managers and other employees. There were reports to the police, and due to gross misconduct, the subject employees were issued a notice of summary dismissal. Collins Otieno Odhaimbo testified that he was served with his notice of summary dismissal over the phone. He was then denied access to the claimant's premises. There were no hearings or notices requiring him to attend and make any representation.

123. The rights secured under Section 44 of the *Employment Act* which allows the employer the sanction of summary dismissal are not absolute.

124. These provisions must be read together with Section 41(2) of the *Employment Act*;

> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

125. In the case of Kenya Plantation & Agricultural Workers Union v Sotik Tea Highlands Estate [2016] KEELRC 378 (KLR) and Ibrahim Ali Kongani v Mayfair Holdings Limited [2021] [2021] KEELRC 1336 (KLR) the courts have held that in cases of summary dismissal, section 41(2) of the *Employment Act* makes it mandatory that an oral hearing be conducted in the presence of a colleague of the employee.

126. In cases of a fixed-term contract, where the employer intends to terminate employment before the due date, even where there is the payment of the entire contract sum, the due process of the law is mandatory. It is not the payment that absolves the employer from the law; due process and reasons leading to termination of employment before the end date is necessary. In the case of Monica Munira Kibuchi & 6 others v Mount Kenya University, Attorney General [Interested Party] [2021] eKLR, the court emphasized that even where the employer is allowed to apply the terms of a probationary contract, the rights secured under Section 41 of the *Employment Act* are mandatory. Engaging in unfair labour practices cannot be sanitized through payment of a full-term contract.

127. In the case of Praying Mantis t/a The Scottish Tartan Hotel & Hotel Octopus (K) Ltd v Andayi [2023] KEELRC 1134 (KLR), the court, in addressing the motions of Section 41 of the *Employment Act*, held that it sets out the mandatory procedure to be applied in cases of misconduct, including gross misconduct. The purpose of this provision is to allow an employee facing disciplinary action to test the veracity of the accusations made against them and to offer their defence.

128. Abizer, for the claimant, testified that following the violence at the premises, various stakeholders held a meeting on 2 February 2024, and an RTF was executed. On 3 February 2024, various politicians attended and addressed the employees. The difficulty in conducting hearings of the 12 summarily dismissed employees was not explained. The fact that the RTF discusses that no employee would be victimized given the context and that the claimant failed to accord these employees the rights under Sections 35 and 41 of the *Employment Act* is unjustified.

129. Without evidence that the claimant complied with section 41(2) of the *Employment Act*, the Court finds that dismissing the 12 employees, including respondent members, was procedurally and substantively unfair.

130. For due process, notice pay is due to each of the 12 employees at one month's notice pay.

131. For lapse in substantive justification, the counterclaim seeking an order of reinstatement, taking note of the ongoing matters between the parties, would be to return these employees to a hostile environment already found that unfair labour practices exist. This would subject them to these conditions and not foster justice. Considering all employees of the claimant are on fixed-term contracts, what would happen is the RTF on the agreement not to blacklist former employees. Each should be re-employed without being subjected to discriminatory treatment.

132. The claimant will continue to employ various cadres of employees, including unionisable employees, keeping the respondent trade union engaged.

133. On the findings above, the orders issued on the claim and counterclaim are;

a. On 2 January 2024 and by 25 March 2024, The respondent had not attained the threshold for recognition by the claimant;

b. The claimant engaged in unfair labour practices leading to the termination of 12 employees, listed below;

c. General damages for unfair labour practices awarded at 3 months gross pay to each of the 12 employees;

d. Compensation for unfair termination of employment awarded for 3 months gross pay to each of the 12 employees;

e. Notice pay awarded for one month to each of the 12 employees;

f. On (c), (d) and (e) above, parties to tabulate the dues and file for adoption on 20 March 2025;

g. On (a) and (b) above, parties to engage in negotiations under the RTF dated 2 February 2024 to assess the parameters upon which the respondent shall recruit members in the employment of the claimant to achieve the recognition threshold;

h. For continued industrial peace, each party has to bear its costs.

The 12 employees referred under (c), (d) and (e) are;

1) Hassan Juma Odhiambo;

2) Petro Simotwa;

3) Sebastian Kiio Mwila;

4) Godwin Wafula Sifuna;

5) Onesmus Musyoka Kiasyo;

6) Paulo Wanzala Nalianya;

7) Amos Wafula Khaemba;

8) Hezron Odhiambo Ochieng;

9) Clement Ombayo Mukoshi;

10) Collins Otieno Odhiambo;

11) Evans Ofukhu Okochi;

12) Kombe Said Athuman.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF FEBRUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

.... and ....