



**Kenya National Union of Road Contractors & Civil Engineering Workers
v China Rail Way No 5 Engineering Group Company Limited (Cause
E1068 of 2023) [2025] KEELRC 1742 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1068 OF 2023
SC RUTTO, J
JUNE 13, 2025**

BETWEEN

**KENYA NATIONAL UNION OF ROAD CONTRACTORS & CIVIL
ENGINEERING WORKERS CLAIMANT**

AND

**CHINA RAIL WAY NO 5 ENGINEERING GROUP COMPANY
LIMITED RESPONDENT**

JUDGMENT

1. Through a Memorandum of Claim dated 20th December 2023, the Claimant filed a suit on behalf of 101 persons who it avers were formerly employed by the Respondent. According to the Claimant, the said persons were working on the upgrading of Loichangamatak Lodwar road and were declared redundant on 3rd September 2022 on grounds of completion of major work.
2. It is the Claimant's assertion that the Respondent failed to adhere to the provisions of the [Labour Institutions Act](#) 2007 (Building and Construction Order), thereby denying the said persons their terminal dues. To this end, the Claimant has averred that the Respondent's action is unfair, illegal, malicious and unlawful and has sought the sum of Kshs 83,322,631.20 on behalf of the said persons.
3. Putting the Claimant to strict proof, the Respondent has denied all the averments contained in the Memorandum of Claim. The Respondent has further averred without prejudice that in the event the persons listed by the Claimant were its employees, their termination was in accordance with the applicable labour laws and all dues were settled. Consequently, the Respondent has termed the suit an abuse of the court process and has asked the Court to dismiss the same with costs.
4. The matter proceeded for hearing on 4th March 2025, during which both sides called oral evidence.



Claimant's Case

5. The Claimant called oral evidence through Paul Epem Epum and Eliud Denge who testified as CW1 and CW2, respectively. Mr. Epum who was the first to go, sought to adopt his witness statement together with the list and bundle of documents filed alongside the Memorandum of Claim to constitute his evidence in chief.
6. It was the CW1's testimony that he was employed by the Respondent on 20th February 2019 as a chainman. His employment was terminated on 3rd September 2022. At the time, he was earning a salary at the rate of Kshs. 630/= per day.
7. That on the material day, a notice was placed on the company notice board bearing a stamp dated 5th August 2022 informing many employees of the termination of their employment. According to CW1, the notice seemed to have been backdated.
8. When he went to collect his dues, he was only paid Kshs.11,000/= which he was told was for the days worked. He collected the money and reported the matter to his union. The union explained to him that he was entitled to two (2) months' notice leave and service compensation. Later on, the rest of the terminated workers reported the matter to the union as well.
9. Mr. Denge who testified as CW2, equally adopted his witness statement to constitute his evidence in chief. He averred that he was employed by the Respondent on 3rd January 2018 as a steel fixer. He worked at Loichiwangima Tak-Lodwar project until 3rd September 2023, when his employment was terminated. At the time, he was earning Kshs. 993/= per day.
10. CW2 further averred that on 3rd September 2022, a notice was pinned on the notice board to notify some workers, himself included, that the company would no longer require their services. That the notification was to serve as a notice.
11. That although the notice was dated 3rd September 2023, it was however, stamped 5th August 2022.
12. CW2 averred that on the date he went to collect his dues, he was informed that he was entitled to days worked, one (1) year service and 21 days leave, totaling Kshs. 37,000/-.
13. Although he collected the said amount, he felt he was not paid his dues as he had worked for the Respondent for a period of five (5) years.
14. He then informed his union.

Respondent's Case

15. The Respondent called oral evidence through Dennis Korir who testified as RW1. Mr. Korir identified himself as the Respondent's Administration Secretary. Equally, he adopted his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
16. It was RW1's evidence that from the list of the 101 alleged employees provided by the Claimant in this matter, 41 of them are strangers to the Respondent. He challenged the Claimant to produce evidence upon which they are relying to support their assertion that the said persons were employees of the Respondent.
17. RW1 further averred that the remaining 58 persons were the Respondent's employees with various job descriptions. However, they all signed discharge agreements with the Respondent and have no claim against the Respondent.



18. RW1 further stated that two (2) of the 58 employees have their names repeated in the Claimant's list.
19. According to RW1, the Claimant has no claim against the Respondent. To this end, he asked the Court to dismiss the suit with costs to the Respondent.

Submissions

20. On its part, the Claimant submitted that the Respondent failed to comply with the terms of their agreement.
21. It was the Claimant's further submission that the Respondent has not produced employment records pursuant to Section 74 of the *Employment Act*.
22. It was further submitted by the Claimant that the non-dispute agreements do not indicate the details of what the Respondent paid the grievants.
23. On the other hand, the Respondent submitted that from the provisions of the *Evidence Act* and the *Employment Act*, the burden of proof lies with the Claimant herein, who must prove each and every allegation it has made. Still on this issue, the Respondent submitted that the Claimant did not produce a single contract of employment that sets out the terms of the alleged engagement.
24. The Respondent further submitted that no document was filed before this Court to show that the Claimant ever recruited members while they were still under its employment.
25. In the same vein, the Respondent submitted that the Claimant did not prove that the listed persons in the Claim were its members, duly and legally recruited and therefore it lacks the locus to present this case before this Honourable Court. Referencing the case of Workers' Union v Safaricom Limited [2014] KEELRC 1302(KLR), the Respondent posited that the Claimant was on a frolic of its own.
26. The Respondent further argued that the Non-Dispute Agreements were not challenged by the various employees who signed them hence the doctrine of estoppel applies. That even CW1 and CW2 admitted to signing the non-disclaimer agreements and are therefore bound by the same.
27. According to the Respondent, the Claimant is estopped from disregarding the Non-Dispute Agreements where they expressly indicated that they received their dues and have no other claim against the Respondent.

Analysis and Determination

28. Flowing from the record, it is evident that the Court is being called to resolve the following issues: -
 - a. Whether the Claimant has locus standi to bring the suit on behalf of the 101 persons appearing in the Claim;
 - b. Depending on (a), whether there was an employment relationship between the Respondent and confirmed grievants (if any); and
 - c. Depending on (b), whether the reliefs sought in the Statement of Claim are sustainable.

Locus standi?

29. The Claimant has brought the instant suit on behalf of 101 persons whom it has averred were all employees of the Respondent. It is however notable that the Claimant has not indicated nor suggested that the said persons are its members. Indeed, this was a material fact that was not pleaded by the Claimant.



30. It is trite that all necessary and material facts should be pleaded by the party in support of the case set up by him.
31. The closest assertion made by the Claimant in this regard is that it is a registered trade union under the *Labour Relations Act*, representing employees in Road and Civil Engineering Sector. There was no mention of its capacity to represent the 101 persons it has listed in the claim and on whose behalf it purports to bring the claim.
32. Coupled with the foregoing, only two (2) of the said 101 persons signed witness statements and testified in Court during the hearing. There was no evidence or any indication from CW1 and CW2 that they were authorized by the other persons to testify on their behalf. Indeed, the Claimant did not file the requisite authority to prove its capacity to institute the instant proceedings on behalf of the 99 persons who were not present in Court.
33. Whereas Section 22 of the *Employment and Labour Relations Court Act* confers capacity on trade unions to sue, in their names, on behalf of their members who are aggrieved by the actions of their employer, it should be appreciated that the existence of trade union membership is a fundamental requirement for a trade union to institute proceedings on behalf of any person. In a nutshell, there must be a proper grievant on whose behalf a suit is brought.
34. It was therefore incumbent upon the Claimant herein to demonstrate to this Court that it had the capacity and authority to bring the instant suit on behalf of the 101 persons appearing in the Claim.
35. As stated herein, the only grievants who came forward to prosecute the Claim are Paul Epem Epum and Eliud Denge, who testified as CW1 and CW2 respectively. These are the only confirmed grievants.
36. In light of the foregoing, the Court is not satisfied that the Claimant has proved that it has locus standi to institute the suit on behalf of the remaining 99 persons appearing in paragraph 3 of the Memorandum of Claim.
37. The next question that this Court must determine is whether it has been established on a balance of probabilities that there was an employment relationship existing between the confirmed grievants and the Respondent.

Employment relationship?

38. It is worth noting that in his testimony before the Court, RW1 admitted to the existence of an employment relationship between the Respondent and 58 persons appearing in the Memorandum of Claim. To this end, he disowned 41 persons whose names he exhibited before Court and termed them strangers.
39. Notably the names of CW1 and CW2 do not appear in the list of the 41 persons disowned by the Respondent. Based on RW1's evidence, the Court draws an inference that the employment relationship between the Respondent and CW1 and CW2 is not in contest.
40. In any event, the Respondent exhibited a Non-Dispute Agreement, which it has alleged was executed by CW1. How then would he have executed the said Non-Dispute Agreement devoid of any employment relationship?

Whether the confirmed grievants are entitled to the reliefs sought

41. It is the Claimant's case that the Respondent failed to adhere to the provisions of the *Labour Institutions Act* 2007 (Building and Construction Order), thereby denying the said persons their



- terminal dues. In this regard, the Claimant has sought underpayment, notice pay, service pay and leave pay.
42. The Respondent has disputed this claim and contended that it paid all its employees who were declared redundant their terminal dues.
 43. The Respondent further exhibited Non-Dispute Agreements, which it alleges were signed by the said employees. According to the Respondent, CW1 and CW2 admitted to signing Non-Dispute Agreements and are bound by the same. To this end, the Respondent has argued that the doctrine of estoppel applies.
 44. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.
 45. Section 120 of the [Evidence Act](#) provides as follows with respect to estoppel:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”
 46. My understanding of the doctrine of estoppel is that it is not absolute and is subject to certain limitations. Specifically, estoppel cannot override the law.
 47. Evidently, the reliefs sought by the Claimant are statutory in nature being claims for underpayment, notice pay, leave pay and service pay. Therefore, the claims sought by the Respondent are premised on the provisions of the Labour Institutions (Building and Construction Industry) (Wages) Order and the [Employment Act](#).
 48. As such, it is imperative for the Court to determine whether the payments made by the Respondent are in consonance with the provisions of the Labour Institutions (Building and Construction Industry) (Wages) Order and the [Employment Act](#). Needless to say, the doctrine of estoppel will not apply if the payments are found to be below the statutory minimum.
 49. This takes me to the next issue for determination, which is whether the reliefs sought in the Claim are sustainable.

Underpayment

50. With respect to the claim of underpayment, the Claimant has sought the sum of Kshs 159,744.00 and Kshs 46,488/= in favour CW1 and CW2, respectively. It was CW1’s testimony in Court that he was employed as a chainman, while CW2 stated that he was employed as a steel fixer.
51. Pursuant to [Legal Notice 20 of 2013](#), (the Labour Institutions (Building and Construction Industry) (Wages) Order), the basic minimum wage payable to a person employed as steel fixer and stationed in areas outside Nairobi, Mombasa and Kisumu cities is Kshs 492/= while a chainman similarly stationed, is entitled to a basic minimum daily wage of Kshs 459/=.
52. Notably, these rates are exclusive of house allowance. As such, the consolidated daily wage (basic salary and house allowance calculated at the rate of 20% of the basic salary as per Rule 3 of the aforementioned [Legal Notice 20 of 2013](#)) for a steel fixer ought to be Kshs 590.40 while the minimum consolidated salary of a chainman is Kshs 550.80.



53. In this case, CW1 has averred that he was paid the sum of Kshs 630.00 per day while CW2 has averred that he was paid Kshs. 993.00 per day.
54. In light of the consolidated minimum wage payable to a person employed as a chainman and steel fixer, this Court finds that the grievants were not underpaid as claimed. Indeed, their wages were above the minimum prescribed wage for employees in their categories. Therefore, the claim for underpayment collapses.

Redundancy benefits

55. In support of its case under this head, the Claimant has extensively relied on the Regulation of Wages (Building and Construction Industry) Order, 2004, which provides for the benefits payable to an employee upon being declared redundant.
56. It is worth pointing out that the Regulation of Wages (Building and Construction Industry) Order, 2004 ([Legal Notice No. 94 of 2004](#)) has since been revoked and in its place, [Legal Notice No. 20 of 2013](#), published. Therefore, [Legal Notice No. 20 of 2013](#) is the applicable statutory instrument in this regard.
57. It is worth noting that [Legal Notice No. 20 of 2013](#) does not contain similar provisions on payment of redundancy benefits as [Legal Notice No. 94 of 2004](#). This being the case, the applicable provisions with respect to benefits due to an employee following termination on account of redundancy would be Section 40(1) (e) (f) and (g) of the [Employment Act](#), which provides as follows:

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

.....

- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
58. In this case, it is notable that the Respondent merely asserted that the grievants were paid all their dues. Be that as it may, it did not produce any evidence to back up this assertion. Section 74(1) of the [Employment Act](#) stipulates the employment records an employer must maintain for their employees. Therefore, having failed to produce any records to confirm payment of the grievant's dues as per Section 40(1) of the [Employment Act](#), it follows that the Respondent did not controvert the grievants' assertions with respect to the payments made to them after their termination on account of redundancy.

59. In the end, the Court enters Judgment in favour of the grievants and makes the following awards: -

1st grievant (CW1)

- a. One (1) month's salary in lieu of notice being the sum of Kshs 16,380.00.
- b. Unpaid leave (18 months as per Section 28(4) of the [Employment Act](#)) -Kshs 17,199.00.
- c. Severance pay (3 years worked) -Kshs 24,570.00.
- d. Total dues - Kshs 58,149.00.



- e. Less (Kshs 11,000.00) admittedly received by CW1.
 - f. The Final award is Kshs 47,149.00
- 2nd grievant (CW2)
- a. One (1) month's salary in lieu of notice being the sum of Kshs 25,818.00.
 - b. Unpaid leave (18 months as per Section 28(4) of the Employment Act) - Kshs 27,108.90.
 - c. Severance pay (5 years worked) - Kshs 64,545.00.
 - d. Total dues - Kshs 117,471.9.00.
 - e. Less (Kshs 37,000.00) admittedly received by CW2.
 - f. The Final award is Kshs 80,471.90.
60. Interest on the total awards shall apply at court rates from the date of Judgment until payment in full.
61. The Respondent shall also bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2025.

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STELLA RUTTO

JUDGE

In the presence of

For the Claimant Mr. Osicho

For the Respondent Mr. Muriuki instructed by Mr. Opondo

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

