



Mwanyika v Rai Plywoods (K) Limited (Employment and Labour Relations Cause E591 of 2023) [2025] KEELRC 2180 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E591 OF 2023**

DKN MARETE, J

JULY 23, 2025

BETWEEN

OCTAVIAN MANDI MWANYIKA CLAIMANT

AND

RAI PLYWOODS (K) LIMITED RESPONDENT

JUDGMENT

1. This matter arose out of a Memorandum of Claim filed on 24th August 2022. The issue in dispute is therein cited as;

Failure to pay terminal dues owed to the claimant by the Respondent.
2. The Respondent in a Statement of Response dated 27th October, 2023 denies the claim and prays that the same be dismissed with costs to herself.
3. The claimant's case is that she was employed by the Respondent as a Invoice Clerk from October, 1994 to 31st January, 2022 when she voluntarily retired on giving the Respondent the requisite notice. She was also a member of the Kenya Building, Construction, Timber and Furniture Industries Employees union who had a CBA with the Respondent.
4. The claimant's further case is that he was supposed to be paid service for the years he had served with the Respondent in accordance with the CBA to wit, 26 years x 21 days x 3231 = Kshs.1,764,126.00.
5. He avers that he has issued demand for payment of these dues but this has fallen on deaf ears.
6. He prays as follows;
 - a. Kshs.1,764,126.00
 - b. Further or other incidental as this Honourable Court may deem just.



- c. Costs of this cause.
7. The Respondent denied the Claimant's assertions. It content that the Claimant was employed as a Sales Officer with effect from 1st February 2013 and not October 1994 as alleged. The Respondent asserted that the Claimant held a managerial position and was therefore excluded from the CBA. It filed a Statement of Response dated 27th October, 2023 supported by various documents and evidence.
 7. The Respondent produced pay slips showing the Claimant's designation as "Officer" and her status as "Non-Unionisable." It also relied on a medical insurance policy which it stated was exclusively available to managerial staff to demonstrate her status. The Human Resource Manager, a Mr. Henry Okola swore a witness statement in which he stated that the Claimant had never served as an invoice clerk and that she had been paid all her terminal dues upon retirement.
 8. In further support of its position, the Respondent relied on Section 35(6) of the *Employment Act, 2007* which exempts employees who are members of pension or NSSF schemes from service pay. It also cited the Industrial Relations Charter and its Appendix C which excludes management staff from unionisation. The Respondent also referred to case law, including *Kenya Chemical and Allied Workers Union v Bamburi Cement Limited* [2017] eKLR and *Teachers Service Commission v KNUT* [2019] eKLR, where the courts affirmed that managerial employees cannot be union members.
 9. The issues in dispute therefore are;
 1. Whether the claimant was employed from October, 1994 or February, 2013.
 2. Whether the claimant was a unionisable or management employee.
 3. Whether the claimant is entitled to the relief sought.
 4. Who bears the costs of this cause?
 10. The premier issues for determination are the date of employment and whether the claimant was a unionisable or management employee. In her written submissions, the Claimant reiterated her employment history and union membership. She emphasized that the Respondent had failed to controvert her evidence and maintained that her retirement letter ("OMM1") supported her claim. She relied on authority of *Mary Mmbone Mbayi v Chandubhai Patel* where the Court held that oral evidence could suffice in the absence of documentary proof.
 11. Conversely, the Respondent submitted that the Claimant bore the burden of proof under Section 107 of the *Evidence Act*, Chapter 80, Laws of Kenya and had failed to demonstrate employment from 1994.
 12. It relied on the authority of *Kabucho v Kamuthi Housing Co-operative Society Ltd* [2021] eKLR to argue that her NSSF membership disqualified her from receiving service pay under Section 35(6) of the *Employment Act, 2007*.
 13. The issues arising for determination are in all threefold, whether the Claimant was employed from October 1994 or from February 2013; whether she was a unionisable employee covered under the CBA and lastly, whether she was entitled to the terminal dues claimed.
 14. On the question of the employment period, the Claimant's retirement letter ("OMM1") suggested that she had been employed since 1994. However, the Respondent's pay slips and the testimony of its HR Manager pointed to a start date of 1st February, 2013. The Claimant did not provide appointment letters or any documentation to prove employment for the disputed period between 1994 and 2013. The Respondent's case is more credible and persuasive of the two.



15. On the issue of Union membership, the Court noted that the Claimant's designation in her pay slips was that of "Officer" and that she enjoyed benefits under a medical scheme reserved for managerial staff. These indicators aligned with her exclusion from the bargaining unit under the Industrial Relations Charter. The Union's demand letter ("OMM3") alone was insufficient to override this classification. Again, the claimant loses on this score.
16. As regards the claim for terminal dues the Court finds that the Claimant, being in management, was excluded from the CBA and thus not entitled to benefits arising therefrom. Moreover, her membership of the NSSF scheme placed her outside the scope of Section 35(5) of the *Employment Act*, 2007. This court seeks to rely on the holding in *Monica Wanza Mbavu v Roofspec & Allied Works Co Ltd* [2021] eKLR, where similar circumstances led to a denial of service pay.
17. This matter does not come out in favour of the claimant on all fronts. Her case is overwhelmed by that of the Respondent on the basis of the evidence adduced and the law.
18. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 23RD DAY OF JULY 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Kitheka instructed by Kitheka & Company Advocates for the Claimant.
2. Ms Chitala instructed by O & M Law LLP Advocates for the Respondent.

