Njoroge (On Her Behalf and on Behalf of 93 others) & another v Zena Roses Limited (Cause 230 of 2018) [2025] KEELRC 2105 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2105 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE 230 OF 2018

MA ONYANGO, J

JULY 11, 2025

BETWEEN

RUTH WANJIRU NJOROGE (ON HER BEHALF AND ON BEHALF OF 93 OTHERS) ..... 1ST CLAIMANT

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .... 2ND CLAIMANT

AND

ZENA ROSES LIMITED ..... RESPONDENT

JUDGMENT

Introduction.

1. The 1st Claimant in a former employee of the Respondent herein. She filed this suit on her own behalf and on behalf of 93 former employees of the Respondent.

2. The 2nd Claimant is trade union mandated to represent all unionisable employees in the larger Plantation and Agricultural sector in Kenya.

3. The Respondent is a registered company under the laws of Kenya growing flowers for commercial purposes.

4. The Respondent is a member of the Agricultural Employers Association with a Recognition Agreement and a subsisting Collective Bargaining Agreement with the 2nd Claimant in respect of its employees.

The Claimants case

5. In the Further Amended Memorandum of Claim filed in court on 26th September 2023, the Claimants contended that the Collective Bargaining Agreement between the 2nd Claimant and Respondent provides in clause 34 that salaries shall be paid at the end of each month.

6. The Claimants alleged that the Respondent has been habitually declining to pay workers their end month salaries at the end of each month thereby pushing the workers to extreme financial constraints. This according to the Claimants, is despite several meetings held over the issue by the 1st Claimants, the 2nd

Claimant and the Respondent.

7. It is the Claimants case that the Respondent declined to pay the employees their end of May 2018 salary on 31st May 2018 thereby causing a grand stand-off between the Respondent and its workers as the employees were unable to meet their monthly financial obligations.

8. The Claimants assert that as a result of the stand-off, the Respondent deposited the outstanding May 2018 salaries into the account of the workers and requested the workers vide an internal memo dated 23rd June 2018 to proceed on a three [3] days rest. It is averred that the Respondent also asked the 1st Claimants to convene on 26th June 2018 at 2.00 pm at the farm for a meeting to chart the way forward.

9. It is the Claimants case that on 26th June 2018, the Respondent vide a letter dated 26th June 2018 addressed to the 2nd Claimant Branch Secretary-Thika , forwarded a list comprising of ninety two [92] workers suspended for allegedly participating in unprotected strike on 18th June 2018.

10. The Claimants contend that on 27th June 2018, the Respondent wrote to the Claimants Branch Secretary in Thika purporting to have issued hearing notices inviting the Grievants for a hearing meeting on the 27th June 2018.

11. The Claimants further state that on 12th July 2018 when this matter came before the Honourable Court for hearing of the Claimants' application dated 28th June 2018, Counsel for the Respondent informed the 2nd Claimant that the 1st Claimants had already been dismissed from employment.

12. The Claimants assert that after making inquiries with the statutory bodies, they established that the Respondent, despite deducting the statutory dues for NHIF and NSSF in the year 2018, the deductions were not remitted to the said authorities.

13. According to the Claimants, the suspension of the 1st Claimants was illegal, unjustified and improper as clause 17 of the Collective Bargaining Agreement between the 2nd Claimant and the Respondent provides that an employee can only be suspended on suspicion of having committed an offence and for not more than one month on half pay pending investigations. Additionally, the Claimants stated that the provisions of Section 80 [1], [b] of the *Labour Relations Act* only provides that the Respondent is not obliged to pay the workers during the period the employees participated in an unprotected strike.

14. The Claimants maintained that termination of employment on the grounds that the employees participated in a strike is a breach of their Constitutional right to go on strike protected in Article 41 of *the Constitution* of Kenya. It is also averred that the 1st Claimants were not issued with a show cause letters and neither were they invited to a disciplinary hearing prior to their dismissal from employment.

15. It is therefore the Claimants contention that the dismissal of the 1st Claimants was unfair for failure to comply with substantive and procedural fairness within the meaning of Section 45[2], [a], [c] 4[b] of the *Employment Act*.

16. In addition, the Claimants stated that for the period of 1st August 2017 and 30th June 2018 , Clause 35 [i] of the binding Collective Bargaining Agreement 2017- 2019, provided that all semi- skilled and skilled employees would be given a salary increment of 11.5% in the first year of operation of the CBA, but this provision was never implemented by the Respondent.

17. The Claimants therefore sought for the following orders:-

    i. A declaration be and is hereby issued that the suspension of the ninety four [94] employees for demanding to be paid unpaid salaries was unlawful, unjustified and unfair.

    ii. An order be and is hereby issued that the summary dismissal of Ruth Wanjiru Nioroge and ninety three [93] other employees was unlawful, unjustified, unfair therefore wrongful for want of substantive and procedural fairness

    iii. Compensation for unlawful termination of employment equivalent to twelve months' salary equivalent to Kshs. 16,550, 196.72/= .

    iv. Payment for outstanding a salary increment of l5% in the first year of operation of the CBA that was not implemented by the Respondent, for the period of 1st August, 2017 and 30th June, 2018 [11 months] in the amount of Kshs. 1,744,666.57/- as per the attached schedule.

    v. Payment of all NSSF arrears in the sum of Kshs. 993,011.80/= or in the alternative service pay for every year worked as per the attached schedule.

    vi. Refund of the deducted NHIF payments that were not remitted in the sum of Kshs. 279,000/- as per the attached schedule.

    vii. One month's salary in lieu of Notice in the amount of Kshs. 1,379,183.06 as per the attached schedule.

    viii. Remittance of the unpaid Union Fees for the 94 terminated employees to the 2nd Claimant.

    ix. Certificates of Service to be issued to the 94 terminated employees

    x. That cost of this claim be provided for.

The Respondent's case

18. The Respondent filed a Memorandum of Defence dated 21st September 2018 and averred that the Respondent's Association and the 2nd Claimant in their Recognition Agreement agreed on how to resolve disputes within the membership and more particularly, set conditions that must be met before the 2nd Claimant can call on its members to participate in a strike.

19. In its defence, the Respondent asserted that it had been going through cash flow challenges necessitating delay on payment of salaries. However, it stated that it had always engaged the Claimants in looking for an amicable solution noting the sensitivity of flower growing business and the potential for having loss that would arise from disruption of operations.

20. The Respondent contended that despite the meeting held on 13th June 2018,where it committed that from June 2018, salaries would be paid in good time, the 1st Claimants without reference to the law, Recognition Agreement and the CBA withdrew their labour on 18th June 2018. According to the

Respondent, clause 3 of the Recognition Agreement provides mandatory conditions to be met before the 2nd Claimant call for strike action to wit:-that the union must refer a trade dispute to the ministry of labour before a strike and also, that the union must refer a dispute to the highest level of the association [AEA] and can only call for a strike if a deadlock has been recorded in such a meeting and a requisite strike notice has been issued and lapsed.

21. It is the Respondent's case that 2nd Claimant did not report a trade dispute; did not refer the dispute to the association as provided by the Recognition Agreement, and did not issue any strike notice to facilitate bipartite dialogue so as avert huge losses suffered by the Respondent.

22. The Respondent maintained that on 23rd June 2018, it resolved to suspend all the striking employees for three days and thereafter, on 26th June 2018, it issued the 1st Claimants with a notice to show cause to explain why they were participating in unprotected strike. The Respondent further averred that the notice to show cause invited the 1st Claimants to appear before disciplinary panel on 27th June 2018 but the 1st Claimants declined the invitation and none of them showed up for the hearing.

23. According to the Respondent, the notices were delivered to the union and copied to the Labour offices at Muranga. The Respondent averred that due to the uncooperative attitude of the Claimants, noting the sensitivity of its business, it resolved to dismiss all the striking employees with effect from 27th June 2018.

24. The Respondent's view is that section 80 of the *Labour Relations Act* is explicit that an employer may take disciplinary action against any employee participating in an unprotected strike.

25. The court was thus urged to dismiss the Claimants suit with costs.

The Evidence

26. The suit proceeded on 13th March 2024 where the 1st Claimant testified as CW1 in furtherance of the Claimants' case. CW1 adopted her witness statement filed in court as her evidence in chief. She also relied on the documents filed in court in support of the Claimants' case.

27. In her testimony, the CW1 stated the 1st Claimants were employees of the Respondent from the year 1996 to 2018. She told the court that as from the year 2015, the Respondent started delaying their salaries which issue was discussed among the parties herein and it was agreed that salaries would not be paid later than the 2nd day of each month. She told the court that the Respondent delayed their May 2018 salaries and on 13th June 2018, a meeting was held between the employees and the management and it was agreed that salaries they would be paid their May salaries and that the same would not be delayed again. It was her testimony that they stopped working on 18th June 2018 after the Respondent failed to pay them their salaries as agreed. CW1 further stated that on 23rd June 2018,they were paid their salaries and told to go home and report to work on 26th June 2018. She testified that they were not issued with suspension letters and also, that they were not paid the increment of 11.5% as stipulated in the CBA.CW1 therefore urged the court to grant the reliefs sought in the Claim.

28. The 2nd Claimant called David Wanyonyi, its Branch secretary who testified as CW2. He adopted his witness statement recorded on 1st August 2023 as his evidence in chief and stated that the Respondent suspended the 94 Claimants orally without any justification. CW2 stated that since 2017, the Respondent despite deducting the union dues from the 1st Claimants, did not remit the dues to the 2nd Claimant. CW2 urged the court to make a finding that the verbal dismissal of the 1st Claimants was unfair and unlawful and order for payment of their terminal dues. He also sought for an order that the Respondent pays the 2nd Claimant the unremitted union dues.

29. The Respondent's case was closed as they chose not to participate in the proceedings.

30. At the close of the Respondent's case, the court directed parties to file written submissions. The 1st Claimants and the Respondent's submissions are on record.

The 1st Claimants' submissions

31. The 1st Claimant in their 20th May 2024 identified the issues for determination to be;

    i. Whether the Claimants' employment was unfairly terminated

    ii. Calculation of the dues owing to the Claimants

32. On the issue whether the Claimants employment were unfairly terminated, it is the 1st Claimants submissions that they were dismissed without a valid reason for participating in a strike on 18th June 2018. According to the 1st Claimants, they were justified in participating in the strike in a bid to demand payment of their salaries after the Respondent habitually failed to pay them their salaries on time in contravention to clause 34 of the Collective Bargaining Agreement which required that they be paid at the end of each month. The 1st Claimants contended that as a result of the Respondent's actions, they were pushed to extreme financial constraints.

33. On this basis, the 1st Claimants submitted that the failure by the Respondent to pay the Claimants' their salary without any excuse is a fundamental breach of an integral part of employment contract and therefore on that ground alone the Respondent did not have the right to terminate their employment due to a strike related to unpaid salaries.

34. The 1st Claimants have also submitted that the termination of their employment was unfair because they were not taken through the due procedure as required under Section 41 of the *Employment Act*. The 1st Claimants maintained that they were not issued with a Show Cause Letters and neither were they given any explanations on the grounds upon which the Respondent was considering terminating them from employment.

35. It is the 1st Claimants submission that Clause 16 of the Collective Bargaining Agreement provides that an employee who commits misconduct other than gross misconduct shall be given warnings before being subjected to termination of their employment. According to the 1st Claimants, the Respondent blatantly ignored the terms of the agreement it had prescribed to, as the Claimants were not given any first, second or third warnings before being held liable for termination of employment by the Respondent.

36. The 1st Claimants therefore submitted that their termination from employment was both substantively and procedurally unfair within the meaning of Section 45 [2] [a], 2[b], [2] [c] and [4] [b] of the *Employment Act*.

37. On the second issue, the 1st Claimants submitted that they are entitled to the reliefs sought in its Further Amended Memorandum of Claim. On the claim for salary in lieu of notice, the 1st Claimants submitted that they are entitled to the same having proved that their dismissal was unfair. It is submitted that clause 18 of the Collective Bargaining Agreement, provided for the payment of salary in lieu of notice based on period an employee was engaged with the Respondent. However, the 1st Claimants submitted that in its claim, they applied and sought for equal payments of all employees, that is 30 days pay in lieu of notice totaling to Kshs 1,379,183.06 for all the 94 claimants.

38. On the claim for compensation for unfair termination, the 1st Claimants submitted that since they have proved that the termination of their employment was both substantively and procedurally unfair,

they are entitled to compensation for unlawful termination equivalent to twelve [12] months' salary amounting to Kshs. 16,550,196.72/=

39. On the claim for NSSF and NHIF arrears, the 1st Claimants sought for Kshs 993,011.80 and Kshs 279,000 respectively from the Respondent on grounds that they had established that the Respondent despite deducting the same failed to remit the deductions to the statutory bodies.

40. On the claim for outstanding dues by way of payment for outstanding salary increment as provided in the CBA, it is submitted that as per Clause 35 of the Collective Bargaining Agreement, the Claimants are entitled to payment for outstanding salary increment of l1.5% in the first year of the Collective Bargaining Agreement coming into force and a further salary increment of 11.5% in the second year which payments were never made. They thus sought for the outstanding salary increment of 11.5% for the period between 1st August th June 2018 totaling to Kshs. 1,744,666.57/-. 2017 and 30

41. On the claim for union fees, the 1st Claimants submitted that 2nd Claimant is entitled to remittance of the unpaid Union fees for all the 94 terminated employees.

42. Lastly, with regard to the certificate of service, it is submitted that CWI testified that they were not issued with any Certificate of Service. The court was urged to compel the Respondent to grant all the 94 terminated employees their Certificate of service.

The Respondent's submissions

43. On its part, the Respondent in its undated submissions framed the issues for determination to be;

    i. Whether the Claimant's employment was unfairly terminated?

    ii. Whether the Claimants are entitled to the reliefs prayed for?

44. On the first issue, the Respondent submits that the 1st Claimant have failed to furnish any evidence proving that their termination was unfair, unprocedural and unlawful. It is the Respondent's case that just like any other running business entity, it was going through some cash flow challenges, causing delays in payments to the 1st Claimant matters well within the knowledge of the Claimants. The Respondent avers that the 1st Claimant in total disregard to the applicable Law, Recognition Agreement and Collective Bargaining Agreement absented themselves from work on 18th June 2018 and participated in an unlawful strike and as such they were liable to disciplinary action as provided under Section 80[1] [a] of the Labor Relations Act .

45. It is further submitted that in compliance to applicable law, the Recognition Agreement as read together with the Collective Bargaining Agreement, the 1st Claimants were issued with Show Cause Letters offering them an opportunity to be heard and to defend themselves which but they declined the invitation.

46. The Respondent maintained that 1st Claimants actions of participating in an unprotected strike amounted to a gross misconduct warranting summary dismissal. In support of this position, the Respondent cited the case of Red Lands Roses Limited v Kenya Plantations and Agricultural Workers Union [2020] eKLR.

47. It is therefore the Respondent's submission that it has discharged its burden on proving its reason for dismissal of the 1st Claimants as per Section 45 of the *Employment Act*. In this regard, the Respondent asserted that the dismissal of the 1st Claimants was fair, procedural, just and lawful.

48. On the second issue as to whether the Claimants are entitled to the reliefs sought, the Respondent has maintained that it discharged this burden by proving that the 1st Claimant participated in an

unprotected strike, absented themselves from work without permission and ignored an invitation to dialogue and defend themselves. While citing the case of Evans Sagwa Rumura v Insignia Kenya Limited [2022] eKLR, the Respondent asserted that it dismissed the 1st Claimant procedurally as it issued a Notice to Show Cause to all striking employees on 26th June 2018 which they failed to honor and thereafter on 27th June 2018, it resolved to dismiss them with immediate effect.

49. The Respondent thus submitted that the 1st Claimant has not made a case for the reliefs sought in the Further Amended Memorandum of Claim. It is the Respondent's further submission that it suffered loss due to the actions of the 1st Claimant and that it should not be put in a position to compensate the 1st Claimant.

50. In the Respondent's view, the 1st Claimant was liable for disciplinary action including summary dismissal and on this basis, the court was urged to dismiss the claim.

Determination

51. From the pleadings on record, the oral testimony adduced in court as well as the submissions of the rival parties, the issues that fall for this Court's determination are;-

    i. Whether the strike of 18th June 2018 was protected

    ii. Whether the Respondent had valid reason to dismiss the Grievants and particularly those on permanent terms of employment.

    iii. What orders should issue

52. From the record and as appears from the evidence presented by CW1, the dispute herein arose after the 1st Claimants participated in a strike on 18th June 2018 after the payment of their salaries was delayed.

53. Section 2 of the *Labour Relations Act*, 2007 defines strike as–

> "strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employers' organisation of which their employer is a member to accede to any demand in respect of a trade dispute;

54. Although Article 41[2][d] of *the Constitution* provides that "Every worker has the right to go on strike" the right to go on strike must be executed in accordance with the law.

55. Section 46 of the *Employment Act*, guarantees the rights to go on strike and that participating in a lawful strike does not constitute a fair reason for dismissal.

56. Further, section 76 of the *Labour Relations Act* allows a person to participate in a strike if the dispute that forms the subject matter of the strike concerns the terms and conditions of service. It provides:-

    76. Protected strikes and lock-outs

    A person may participate in a strike or lock-out if—

    a. the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

    b. the trade dispute is unresolved after conciliation—

        i. under this Act; or

ii. as specified in a registered collective agreement that provides for the private conciliation of disputes; and

c. seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of—

i. the trade union, in the case of a strike;

ii. the employer, group of employers of employers' organisation, in the case of lock-out.

57. In the case of Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 Others [2016] KECA 759 [KLR], the Court of Appeal observed as follows:-

> "As can be appreciated the above requirements [Section 76] are in three sequential stages, with the first being to ensure that the trade dispute concerns the terms and conditions of employment or recognition of a trade union [as the case may be]. In this case, it is common ground that the root of the dispute was the respondents' working hours and remuneration. Thus it qualifies as a dispute concerning terms and conditions of employment. Having satisfied the first requirement, the second hurdle is whether there was a failed conciliation process. On the evidence on record, the parties never got past this stage as no conciliator was appointed whether under Section 65 of the *Labour Relations Act* or the collective bargaining agreement [if any]. The last stage is the issuance of a strike notice in writing to the employer and or adverse party."

58. As mentioned, the 1st Claimants in their pleadings averred that they went on strike after the Respondent delayed in paying them their salaries contrary to Clause 34 of the CBA. Clause 34 of the CBA between the 2nd Claimant and the Respondent provides that wages shall be paid at the end of each month. This is a term and condition of employment and it follows that the 1st Claimants were justified in participating in the strike.

59. The second requirement that must be met is that the dispute was referred to a conciliation process which failed. There is no evidence on record showing that the dispute was referred to conciliation as required. I therefore find that second requirement was not met.

60. The third requirement is the issuance of a strike notice in writing to the employer and or adverse party. The Respondent in its Memorandum of defence stated that the 94 employees, the 1st Claimants herein, withdrew their labour on 18th June 2018 without notice. I have perused the record and did not find evidence that a written strike notice was issued to the Respondent, seven days prior to the cessation of work by the 1st Claimants on 18th June 2018. The requirement for issuance of a strike notice to the Respondent was therefore not met.

61. The three requirements must co-exist for an employee to plead that a strike is protected. It is therefore my considered view that the strike of 18th June 2018 did not meet the threshold to qualify as a protected strike.

62. Section 80 of the *Labour Relations Act* provides sanctions against employees who engage in such unprotected strike such as the one the 1st Claimants herein engaged in. It provides:-

80 [1] An employee who takes part in, call, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and-

a. is liable for disciplinary action; and

b. is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the strike.

63. It therefore follows that the Respondent was justified in terminating the services of the employees who participated in the unprotected strike. However, it is trite that even where an employer contemplated to dismiss an employee for participating in an illegal strike, the employer must adhere to procedural fairness as espoused in section 41 of the *Employment Act*.

64. In Mohammed Yakub Athman & 18 others v Kenya Ports Authority [2017] KECA 606 [KLR], the Court of Appeal upheld the decision of the Trial Court on summary dismissal of the applicants who had participated in an illegal strike. The Court agreed with the Trial Court that the provisions of Section 41 of the *Employment Act* were applicable in cases of summary dismissal and had to be complied with.

65. In its Memorandum of defence, the Respondent in its defence averred that it issued the 1st Claimants with notices to show cause dated 26th June 2018 over their participation in the strike of 18th June 2018 but the 1st Claimants declined to appear before the disciplinary hearing scheduled for 27th June 2018. In support of this averment, the Respondent annexed the show cause letters and the delivery notes which the court has analysed and found that indeed the 1st Claimants were given an opportunity to defend themselves but they declined to appear before the disciplinary hearing panel.

66. Consequently, it is my finding that the Respondent adhered to the provisions of section 41 of the *employment act* and as such, the claim that the 1st Claimants were unfairly and unlawfully terminated from their employment cannot hold. The claim for compensation for unfair and unlawful termination is therefore dismissed.

67. On their prayer for the unpaid 11.5% increment, the Respondent did not adduce any evidence to rebut the Claimant's assertion that they were entitled to the same. I therefore enter judgment for the 1st Claimants in respect of the same. The Respondent is directed to tabulate the amount due and submit to court within 60 days for entry of final judgement in respect of the amount.

68. On the claim for unremitted NSSF and NHIF dues, this court has held in several decisions that the court cannot grant reliefs under these heads as NSSF and NHIF are statutory bodies with powers to recover unremitted monies from the employer. These prayers are therefore is declined.

69. The 2nd Claimant's case with regard to payment of union dues which was deducted from the 1st Claimants and not remitted was uncontroverted and I order that the Respondent pays the said dues within 60 days of this judgment failing which the 2nd Claimant may seek further orders from the court in respect thereof.

70. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 11TH DAY OF JULY, 2025.

MAUREEN ONYANGO

JUDGE.