



Amalgamated Union of Kenya Metal Workers v Treadsetters Limited (Cause E383 of 2021) [2024] KEELRC 241 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E383 OF 2021
NZIOKI WA MAKAU, J
FEBRUARY 15, 2024**

**BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
TREADSETTERS LIMITED RESPONDENT**

JUDGMENT

1. The Claimant Union instituted this suit against the Respondent claiming unprocedural and unfair termination of employment of the Grievants Ms. Hellen Gitiri Baiyu, Mr. Msagha Mwakideu Mkilo, Mr. Josephat Njenga Thuo and Mr. Eric Ndegwa Mbuthia. It averred that the Claimant and Respondent have a valid Recognition and Collective Bargaining Agreements. That the Grievants were hired at varied dates on different job titles and wages and served the Respondent without any disciplinary cases and that their problems began when they joined the Claimant Union in November and December 2019.
2. The Claimant's case was that on 1st December 2019, the Grievants were served with letters suspending their services for seven (7) days "to pave way for investigations". That the suspension letters were served to them in a manner suggesting intimidation, harassment, threatening and coercion for them to rethink their union membership. That as the Grievants proceeded for suspension, they were instantly replaced and upon reporting back, were served with Show Cause Letters dated 9th December 2019 directing them to attend a show cause meeting on 16th December 2019. The Claimant contended that from day one of suspension, a management decision had unfortunately been made prematurely to terminate the services of the Grievants and replace them with new employees. It averred that the show cause meeting turned out to be informative as the Grievants were made to listen to the Management and were not to say anything. Moreover, the investigation report used to incriminate the Grievants was never presented to them and neither was the variance in spare parts stock nor any other evidence as alleged. According to the Claimant, the Respondent demonstrated that its actions were witch-hunt as it came



to the venue of the disciplinary hearing with an already written cheque for terminal dues for each of the Grievants. That the Grievants were hesitant to take the cheques but after being threatened with police arrest, some opted to take the cheque. The Claimant further averred that when it had a joint meeting with the Respondent, the Respondent still declined to produce the investigation report among other evidence. That the Union thus reported the matter at the Ministry of Labour for conciliation and the Respondent continued to be reluctant and hesitant during conciliation meeting leading to the Conciliator's Certificate of unresolved dispute. That the Grievants ended up losing their employment on 16th December 2019 for joining the Claimant Union. The Claimant prayed for reliefs as follows:

1. That, the Honourable Court do find actions of the Respondent in terminating the services of the four grievants unprocedural and unfair as it is a contravention of Articles 36, 41, 47 and 50 of the Constitution of Kenya 2010 and sections 41, 43 and 45 of the Employment Act 2007.
 - a. That, the Honourable Court do issue an Order of unconditional reinstatement of the Grievants without loss of their benefits, privileges and status.
 - b. That, only if the Honourable Court decides that reinstatement is not practically possible, then the Honourable Court do consider the alternative prayer and order payment of terminal dues as per the termination clauses of the CBA.
 - c. That, the Honourable Court do consider awarding the Grievants compensation of twelve (12) months wages for unprocedural and unfair loss of employment as stipulated in section 49(1)(c) of the Employment Act 2007.
 - d. That, the Court do order payment of the cost of this suit in favour of the Claimant.
 - e. That, the Court be at liberty to order any other relief it may deem fit.
3. The Respondent filed a Statement of Response averring that there is in fact a dispute between itself and the Claimant on the validity of the Recognition Agreement and CBA that is pending determination at the National Labour Board. It admitted that the Grievants were all employees at its TRM Branch. It further averred that on 9th November 2019, it conducted an internal audit and stock take, which revealed several instances of gross misconduct on the part of the Grievants and unexplained variances of vehicle spare parts at the Branch as follows:
 - a. Failing to use the tyre cage in accordance with safety precautions;
 - b. Failing to open job cards for every vehicle attended to within the service bay;
 - c. Conducting installations of spare parts that have not been purchased from the Respondent contrary to the company policies which the Grievants had been warned about severally by their line manager;
 - d. Failing to keep the work area and the machines clean and well maintained as per company standards;
 - e. Having tyres and/or spare parts fitted on customer vehicles without the requisite invoices and/or approval from the line manager.
4. It was the Respondent's averment that following the gross misconduct, it issued a Memo on 14th November 2019 to all the TRM Branch staff advising them to strictly adhere to the branch policies. That after conducting further investigations into the unexplained variances at the said Branch, it chose to commence disciplinary action against the Grievants on 1st December 2019 and suspended them. The Respondent denied that it had already decided the Grievants' cases as alleged and averred that



it had to seek temporary replacement of the Grievants during their suspension so as to safeguard business continuity and not paralyse operations. While asserting its belief of there being valid grounds to conduct disciplinary proceedings against the Grievants, the Respondent averred that they all attended the disciplinary hearing in the presence of their shop stewards and/or employee of choice. It further averred that the Grievants were accorded a fair hearing at all times as they were informed of the allegations against them in advance and given the opportunity to respond to the same both in writing and through oral hearing. Additionally, that it considered the Grievants' representations before reaching the decision to summarily dismiss them and that they admitted to having breached certain company policies during the disciplinary proceedings.

5. The Respondent further denied that it terminated the Grievants' employment because of them joining the Union. It averred that it has and continues to have many of its employees as members of the Claimant Union, which employees still enjoy a good working relationship with the Respondent. It contended that the Grievants only joined the Claimant Union after realising that the Respondent had discovered discrepancies and instances of gross misconduct at their Branch that would be subject of potential disciplinary action. It noted that the 1st Grievant Hellen Gitiri Baiyu, was in any event a unionisable employee since she formed part of the Respondent's management team in her capacity as Branch Customer Service Manager. That the breach of company policies had led to grave financial losses on the part of the Respondent. The Respondent further averred that it paid the Grievants all their terminal dues upon their dismissal and that any further claim for payment of the same is untenable. It prayed that the Claimant's Memorandum of Claim be dismissed with costs.

Evidence

6. The 1st Grievant, Hellen Gitiri Baiyu, (CW1) testified before Court that when they joined the Claimant Union on 13th November 2019, the Respondent's Assistant HR Manager, Nancy Thairu, called and asked her whether they could denounce the Union but she refused. She asserted that the Branch Manager never showed her the alleged variance when she asked him about it and that he just asked them to go home for seven (7) days for them to prepare an investigative report. She further testified that when she reported back to work on 16th December 2019, they were asked to sign an attendance sheet and was shocked that her title had been changed therein to Customer Relations Manager. CW1 confirmed that she did not take the cheque the Respondent issued to the Grievants and urged the Court to reinstate the Grievants to their jobs because finding a job was proving very difficult. In the alternative, she prayed that the Court awards them the terminal dues as per their calculations before Court.
7. CW1 denied under cross-examination that she had a managerial role and asserted that her title as indicated in her payslip did not imply she was a manager. She stated that she joined the Union four (4) days after the stock-take and refuted that the stock-take had a variance. She reiterated that only the employees who joined the Union on 13th November 2019 were terminated and confirmed that they never remitted union dues. CW1 further confirmed that Msagha Mwakideu Mkilo, Josephat Njenga Thuo and Eric Ndegwa Mbuthia received their terminal dues and that she refused to acknowledge her cheque because leave days were not included. She also stated that she prayed for leave travelling allowance for three years as she was not a member of the Union for three years and that she worked overtime. In re-examination, CW1 asserted that both her and her witness did not sign the Minutes for the disciplinary meeting.
8. The Respondent's witness, Mr. Jenard Nyaga (RW1), stated in cross-examination that they served the Grievants the variance although he could not confirm whether the said document was served to them. He also could not confirm if the Minutes were typed simultaneously and whether the cheques were on the table at the meeting of 16th December 2019.



Claimant's Submissions

9. It was the Claimant's submission that it relies on the provisions of Articles 41, 47 and 50 of the Constitution of Kenya and sections 41, 43, 45, 47 and 49 of the Employment Act. It fronted that if the decision of the Management meeting was to dismiss the services of the Grievants, then other subsequent steps such as tabulation of terminal dues, preparation of cheques and termination letters should have followed after the said meeting and not in advance. It further submitted that section 41(2) of the Employment Act is very clear that an employer shall, before terminating the employment of an employee, hear and consider any representations which the employee may make. That however in the instant case, the alleged disciplinary hearing was just for the sake of it as cheques for terminal dues were ready on the table contrary to procedural dictates under section 45(1) and (2)(c) of the Act. That the Respondent contravened the provisions of Articles 47(1) and 50(2)(a), (b), (j), and (k) of the Constitution and that this Court should consider the procedure the Respondent adopted in reaching the decision to dismiss the Grievants and find the same wanting. The Claimant relied on the case of Barrack Otieno Ombima v Farouk & 2 others [2016] eKLR.

Respondent's Submissions

10. The Respondent submitted that the Grievants made various admissions during the disciplinary hearing as shown in the Minutes of the same. That the Spare Parts Variance Report and the responses by the Grievants during the disciplinary hearing are sufficient proof of reasons for termination as required under section 43 of the Employment Act. It was the Respondent's submission that any reasonable employer would have dismissed its employees if faced with similar circumstances. For this argument the Respondent relied on the decision of the Court of Appeal in the case of Kenya Revenue Authority v Reuvel Waitbaka Gitabi & 2 others [2019] eKLR. The Respondent urged this Court to conclude that the reasons for termination were valid and fair.
11. Regarding the issue of procedural fairness, the Respondent submitted that section 45 of the Employment Act require the employer to prove that the employment was terminated in accordance with fair procedure as under section 41 of the Act. That in this case, the Grievants were given sufficient notice of the hearing and informed of their right to have a witness present and were also given a chance to respond to every issue as can be noted from the Minutes. It was the Respondent's submission that it thus adhered to the procedural safeguards and cannot be faulted. That the Grievants had failed to discharge their statutory burden to prove unfair termination pursuant to section 47(5) of the Employment Act.
12. The Respondent submitted that for discrimination to be proven by an employee, they must show on a prima facie basis, differential treatment between the employee and other employees before the burden shifts to the employer. That however in this case, the Grievants had failed to demonstrate that there were other employees at the Branch who were not terminated and were not members of the Union. That it had on the other hand produced evidence showing there were other employees who were members of the Union and these employees continued to work for the Respondent as at January 2022. The Respondent submitted that it therefore means that the Grievants were not discriminated for being members of a trade union as alleged.
13. As regards the Claimant's prayer for reinstatement of the Grievants, the Respondent submitted that more than three years had passed since the Grievants were dismissed and therefore the prayer cannot be granted. It relied on the holding in the case of Lawrence Onyango Oduori v Kenya Commercial Bank Ltd [2014] eKLR in which the Court held that reinstatement was not a reasonable or practical remedy in the case due to breach of trust and passage of 3 years. The Respondent further submitted



that the prayer for terminal dues is also untenable as the CBA calculations are applicable in an ordinary termination and that the CBA provides that in summary dismissal, the employee would only be entitled to money and benefits due to them as at the date of dismissal. That having shown that the Respondent paid all the dues and no dues are owing to the Grievants, and further having demonstrated that it met both procedural and substantive requirements for fair termination, no award of compensation lies. On the question of costs, the Respondent submitted that since costs follow the event and that Grievants had failed to prove their case, they are not entitled to any costs.

14. The Claimant articulated the matter on behalf of the Grievants who are its members. The Respondent on its part asserts that the Grievants attended the disciplinary hearing in the presence of their chosen representatives who were either shop stewards or an employee of choice. The Respondent further asserts that the Grievants were accorded a fair hearing, were duly informed of the allegations against them in advance and given an opportunity to respond to the same both in writing and at the hearing. The Respondent asserts that it considered the Grievants' representations before reaching the decision to summarily dismiss them. It added that the Grievants admitted to having breached certain company policies during the disciplinary proceedings. The Grievants assert their dismissal was on account of their joining a trade union. The Respondent denies this as it asserts it has union members among its staff.
15. It was not disputed that the Respondent and the Claimant have a pending dispute at the National Labour Board. Seeing that the issue of recognition is before another forum, there will be no further comment by the Court save as to note there was animus to a degree between the Claimant and Respondent.
16. When the audit/stock take was done, there was an allegation there were stock variances. This is the genesis of the disciplinary proceeding which resulted in the termination of the Grievants. The Grievants were accused of inter alia not applying company procedures when handling repairs and that there were unauthorised spares/parts sold to clients. The audit/investigation report would have been quite instructive in demonstrating the delinquency of the staff as alleged. In its absence, there is no evidence of the alleged misconduct of the Grievants. One is left wondering whether indeed it was a disciplinary process prompted by union activities in a new union – the Claimant herein. The Respondent asserts it had no premeditated decision to terminate yet it had new staff on the ready when the Grievants were suspended. On 16th December 2019, the day the Grievants were to be heard, the Respondent had cheques already prepared indicating terminal dues. Only Hellen Baiyu received her payment on 20th December 2019. It was also clear that there was a concerted effort to replace them since all this took place in rapid succession. The results of the audit were not revealed even to the court casting the termination in a bad light. The provisions of section 45 of the *Employment Act* requires the employer to prove that the employment was terminated in accordance with fair procedure as under section 41 of *the Act*. In order to surmount this the Respondent ought to have demonstrated that the allegations against the Grievants were not unfounded. The demonstration of this was critical to ensuring the Respondent's termination of the Grievants was upheld by the Court. In this case, having failed to demonstrate there was justification and failing the procedural fairness test, the termination is found to have been unfair and unlawful. No discrimination was found to have been meted out as there were union deductions and remittances per the payslips issued. The Respondent has not been shown to be anti-union as far as these Grievants were concerned.
17. The remedies the Grievants are entitled to are set out in section 49(1) of the *Employment Act*. One of the remedies the Court would be reluctant to issue is an order for reinstatement as three critical issues mitigate against it. Firstly, the Respondent replaced the Grievants even before it dismissed them (at the time of suspension). Secondly, more than 4 years have passed since the termination in late 2019.



As such, the passage of time militates against the order for reinstatement. Thirdly, there has been a demonstration of animus against the Grievants and the Claimant from the Respondent. It ignored the entreaty to negotiate at the Labour Office leading to the dispute being referred to Court. In the present circumstances, an order of compensation would give the Grievants recompense as opposed to attempting to force the Respondent to accommodate the Grievants. The Grievants were on NSSF and therefore are not entitled to claim service pay. They are successful to a certain degree in their claim. The sum total of the foregoing is that the Claimant is successful on behalf of the 4 Grievants as follows:-

- a. 1st Greivant – Hellen Gitiri Baiyu
 - i. House allowance unpaid for 12 months (Kshs 7,537.50 a month being 15% of Kshs 50,250/-) = Kshs 90,450/-
 - ii. 5 months' salary as compensation – (Kshs 57,787.5*5) = Kshs 288,937.50.
- b. 2nd Grievant - Msagha Mwakideu Mkilo
 - i. House allowance unpaid for 12 months (Kshs 3,450/- a month being 15% of Kshs 23,000/-) = Kshs 41,400/-
 - ii. 5 months' salary as compensation – (Kshs 26,450/-*5) = 132,250/-
- c. 3rd Grievant – Josephat Njenga Thuo
 - i. House allowance unpaid for 12 months (Kshs 4,500/-*12) = Kshs 54,000/-
 - ii. 5 months' salary as compensation – (Kshs 34,500/-*5) = 172,500/-
- d. 4th Grievant – Eric Ndegwa Mbuthia
 - i. House allowance unpaid for 12 months (Kshs 4,500/-*12) = Kshs 54,000/-
 - ii. 5 months' salary as compensation – (Kshs 34,500/-*5) = 172,500/-

18. The Claimant will also have the costs of the suit. The Grievants will have interest at court rates on the sums in para 17(a), (b), (c) and (d) above from the date of this judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

