



**Kenya Petroleum Oil Workers Union v Ng’amu Limited t/a National Oil Chania
(Cause 1537 of 2018) [2024] KEELRC 115 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1537 OF 2018
NZIOKI WA MAKAU, J
FEBRUARY 2, 2024**

BETWEEN
KENYA PETROLEUM OIL WORKERS UNION CLAIMANT
AND
NG’AMU LIMITED T/A NATIONAL OIL CHANIA RESPONDENT

JUDGMENT

1. The Claimant Union instituted this claim against the Respondents, through a Memorandum of Claim dated 16th November 2018, for wrongfully and unfairly terminating the employment of Francis Gathuita Mburu and David Kioko Titus (hereinafter “the 1st and 2nd Grievants” respectively). The Union averred that the 1st Grievant was employed as a Pump Attendant by the Respondents in January 2010, earning a monthly basic salary of Kshs 14,000/- exclusive of house allowance. That in 2015, his salary was then increased to Kshs 16,168/- per month, which salary he earned up to the time he left employment on 19th February 2018 when the Respondents terminated his services. On the other hand, the 2nd Grievant was employed on 3rd May 2011 earning a monthly basic salary of Kshs 6,000/- exclusive of house allowance, which was similarly increased to Kshs 10,000/- per month in 2015 instead of Kshs 10,559/- per month. Moreover, that the Respondents unprocedurally terminated the services of the 2nd Grievant on 13th March 2018. It was the Claimant’s averment that it reported the dispute to the Ministry of Labour on 16th March 2018 and a Mr. P. Kamau of Thika Labour Office was appointed on 23rd April 2018 to conciliate the parties. That consequently, meetings of 11th June 2018 and 9th July 2018 were convened and the dispute later closed as expressly informed by the appointed Conciliator in his letter of 30th July 2018. However, the Respondents wrote to the Conciliator on 9th August 2018 seeking for more time to present their memorandum and requested for a meeting of 17th August 2018. The Respondents also wrote to the Claimant through their advocates on 14th August 2018, citing unfounded allegations they could not substantiate as they had failed to attend all meetings convened



- by the Conciliator. The Claimant Union asserted that it was at that point that it sought to file the matter before this Honourable Court.
2. The Claimant further averred that the Grievants delivered their services to the Respondents without any warning on record and that they had payable pending leave days as they never went for leave. Further, having served for 8 and 6 years respectively without any lawful rest days, the Grievants demanded for compensation for the same and for public holidays. That the Respondents terminated the Grievants' services without according them a fair hearing and either giving them one month's notice or payment in lieu of such notice. The Claimant Union thus prayed that the Respondents be compelled to reinstate the Grievants back to their respective positions unconditionally or in the alternative, each of the Grievants be paid as enumerated in the Memorandum of Claim. It further prayed for any other relief/award beneficial to the Grievants, for the Respondents to issue the Grievants with certificates of service, and for costs of the suit to be borne by the Respondents.
 3. In reply, the Respondents averred in their Memorandum Response dated 11th July 2019 that the 2nd Respondent is a distinct legal personality from the 1st Respondent. That since there is no existing employer-employee relationship between the Claimant and the 1st Respondent, the present suit is as such not sustainable as against the 2nd Respondent who has been wrongfully sued. That this Court therefore has no jurisdiction to entertain any claims as against the 2nd Respondent in the absence of an employer-employee relationship. The 1st Respondent averred that it subsequently indeed employed the 1st Grievant vide a Contract of Employment dated 1st March 2011. That the 1st Grievant was earning a salary of Kshs 11,840/- and a House Allowance of Kshs 1,750/- totalling to Kshs 13,590/- per month. It admitted that the 1st Grievant's gross salary was adjusted to Kshs 16,168/- per month, which he earned until he exited the 1st Respondent's employment. It however asserted that the 1st Grievant had been issued with a warning letter for misconducting himself at work and that the second warning specifically on or about 11th January 2018 was for irreconcilable and missing cash collections to which he admitted liability and offered to pay the money or it be deducted from his earnings. It further averred that on 19th February 2018, the 1st Grievant had also been found culpable of overcharging a customer at one of the filling pumps at the station and after openly admitting to the same, was summarily dismissed from duty vide a letter dated 19th February 2018. The 1st Respondent averred that the 1st Grievant was accorded adequate opportunity to explain the loss in writing and through a reconciliation process conducted in his presence before the summary dismissal.
 4. As regards the 2nd Grievant, the 1st Respondent averred that he was paid on daily rates as a casual employee since his services as a Service Man were provided on need basis by the 1st Respondent's clients and as an additional service. That the 1st Respondent reconciled the company's stock book and records maintained by the 2nd Grievant and discovered that fuel filters worth Kshs 487,200/- remained outstanding from customers whose vehicles had been fitted with the said filters. That vide a letter dated 13th March 2018, the 2nd Grievant was then instructed to collect the said funds from the respective customers or alternatively clear the sums but he instead rushed to the Claimant Union's offices alleging that his services had been terminated. The 1st Respondent's stance was that it never terminated the services of the 2nd Grievant as evidenced from the foregoing facts and asserted that the 2nd Grievant in fact absconded his duties as he never returned to its premises or tendered an explanation to that effect.
 5. The 1st Respondent denied ever receiving any correspondences from the Labour Office as alleged and averred that immediately it became aware of the dispute as the Labour Office, it requested for more time to consult its legal representatives and respond to the Claimant's memorandum. That it was however disappointed to later establish that a certificate on the same had been issued on 30th July 2018, which letter had neither been served upon the 1st Respondent nor its contents disclosed to it by the



Conciliator. It contended that through its advocates on record, it wrote to the Claimant protesting the manner in which the Conciliator had handled the dispute.

6. The 1st Respondent further denied the claims for rest days and public holidays, asserting that it religiously observed the Grievants' rest days and that since the Claimant had not provided particulars of the alleged public holidays when the Grievants worked, it could not sufficiently respond thereto. It averred that neither notice pay nor compensation are payable to the 1st Grievant as termination of his employment by way of summary dismissal was lawful and that the 2nd Grievant is also not entitled to the same having absconded duty without notice. That there is no basis for payment of leave days as leave entitlements in respect of the 1st Grievant was taken as and when the same became due. That the claim for House Allowance is baseless as the 1st Grievant's contract of employment clearly provided for the same whereas the 2nd Grievant was subjected to a daily rate. It also rejected the claim for underpayment in wages for having no standing in law. It was the 1st Respondent's averment that if at all any of the claimed dues are justified, the 1st Respondent's liability cannot be extended beyond the three (3) year limitation period. It prayed that the suit be dismissed with costs.
7. In rejoinder, the Claimant filed its Reply to Statement of Defence dated 14th September 2021 wherein it denied the averments made in respect of the 1st Grievant and averred that the Respondent had failed to provide sufficient evidence to substantiate the allegations of irreconcilable and missing cash collections. In respect of the averments made on the 2nd Grievant, the Claimant admitted that he was engaged on casual terms as a Service Man but denied the allegation on the fuel filters asserting that the Respondent had not provided any evidence in proof of the same. The Claimant stated that it was due to the Respondent's own shortcomings that the dispute was not resolved by the Conciliator. It averred that the Claim was instituted within the time limits provided for in law and that therefore if the Claimant becomes successful in its claim, the Respondent would still be liable to make good on the claim. In the end, the Claimant prayed for the Statement of Defence to be struck out and judgment entered in favour of the Claimant as prayed in the Memorandum of Claim.
8. At the hearing, the 2nd Grievant, David Kioko Titus (CW1), testified that it was not true that he sold filters and did not account for the sale. He asserted that he was neither given a letter of termination nor a show cause and that no disciplinary hearing was held. The 1st Grievant, Francis Mburu (CW2), denied that he overcharged a client and similarly testified that he was neither asked to show cause or to appear for disciplinary hearing. The Respondents were absent at the hearing and the Court therefore closed the defence case with no oral testimony being adduced on their behalf.

Claimant's Submissions

9. The Claimant submitted that the issues for determination are:
 - a. Whether the Claimant is rightfully placed to represent the Grievants;
 - b. Whether the 2nd Respondent was right fully sued;
 - c. Whether or not the Grievants were unfairly and unlawfully terminated;
 - d. Whether the Grievants are entitled to the claims and orders sought for; and
 - e. Whether Costs should be awarded to the Claimant.
10. It was the Claimant's submission that it has capacity to institute suits on behalf of the Grievants who joined the Union pursuant to Article 41 of *the Constitution* of Kenya on labour rights and that the Respondents never contested the Grievants' membership in the Union. In short, it therefore had the locus to represent the Grievants in the suit. As regards the 2nd Respondent's capacity to be sued, the



- Claimant submitted that Order 1, rules 5 and 7 of the [Civil Procedure Rules](#) provide that it is not necessary for every defendant to be interested in all relief claimed and that where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants for the question on which defendant is liable to be determined by all parties. The Claimant noted that the 2nd Respondent signed several documents and was the 1st Respondent's Director and immediate boss of the Grievants. It argued that there was no prejudice the 2nd Respondent shall suffer since he is one of the top management officers within the 1st Respondent company and shall be the one to implement the Court Orders in case the suit succeeds.
11. The Claimant submitted that contrary to their assertions, the Respondent were aware that the dispute was before the Labour Office but chose not to participate. It cited the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR in which the Court found that an employer must prove both substantive justification and procedural fairness for a termination to pass the fairness test. It argued that in the instant case, the Grievants were not issued with show cause letters and neither were they taken through any form of disciplinary hearing before their unlawful dismissals. That since the Respondents had no reason to dismiss the 1st Grievant, they hence did not meet the requirements of sections 43 and 47(5) of the [Employment Act](#) and his dismissal was unfair and unlawful. That similarly, the Respondents' failure to adduce evidence in support of the allegations raised against the 2nd Grievant means that the reasons fall short of the requirements of the aforesaid statutory provisions. That an employer who pleads desertion as a ground for dismissal has to prove to court the necessary steps it took to reach out to the employee before the dismissal as aptly put by the Court in the case of [Kenya Petroleum Oil Workers Union v Bach Enworld Holdings Limited](#) (Cause E017 of 2020) [2023] KEELRC 563 (KLR) while citing with approval the cases of [Atieno Owuor v Sameer Agriculture and Livestock Limited](#) [2020] eKLR and [Gituma v RAA Limited](#) [2020] eKLR. It was the Claimant's submission that this Court should find that the Grievants' termination was not only procedurally defective but substantively devoid of merit for want of reasons from the employer. In respect of the orders sought, the Claimant submitted that section 28 of the [Employment Act](#) provides for annual leave entitlement which the Grievants were never granted and that since the Respondents never rebutted this claim as the custodian of employment records, the same should be allowed as prayed. It submitted that whereas section 27 of the Act provides for at least one rest day in every period of seven days, the Respondent similarly never proved that the Grievants utilised their rest days for the period they were in employment. The Claimant asserted that subject to the provisions of section 49(1)(c) of the Act, this Court should consider the circumstances that led to their termination without any fair procedure and award each of them maximum compensation. It relied on the decision in the case of [John Musavi Okanga v Hesbon Wasike](#) [2018] eKLR in which the Court considered section 49 of the [Employment Act](#) in awarding an employee who had worked for 10 years, maximum compensation.
 12. It was the Claimant's further submission that there were no payslips provided to prove that the salary of the 1st Grievant was inclusive of house allowance whereas the 2nd Grievant had no written contract and was never paid house allowance despite serving for six (6) years and ten (10) months. In addition, that the applicable regulation during the periods the 2nd Grievant was underpaid was the Regulation of Wages (General) (Amendment) Orders for 2013, 2015 and 2017 for a vehicle service worker (petrol and service stations) in a municipality and town council. The Claimant also submitted that since the Grievants were not issued with certificates of service, the employer was in breach of section 51 of the [Employment Act](#) and should be ordered to issue the same to the Grievants forthwith. Lastly, that since costs follow the event, the Respondents should be compelled to pay the costs for litigation in the suit, which it prayed be assessed at a higher scale.
 13. The Respondent did not file any submissions in the suit.



14. The Claimant union did demonstrate the 2 Grievants were employed by the Respondent. It is trite law that limitation applies to any live claims that are not actioned by way of a suit or reference to conciliation when these occur. The Union was aware from its members about underpayment and made no effort to have the issue resolved timeously. As such, any claim on underpayment and house allowance that was not raised within 1 year of the same being due is not covered in terms of section 90 of the *Employment Act*. Section 90, in case it escaped the attention of the Union, requires the filing of claims within 3 years but where the injury is a continuing one, within the next 12 months following or after the cessation thereof. Having not taken action in prior years, the Grievants and the Union cannot now expect the claims to have any remedy since they chose to forego the same. It is true, the Respondents failed to pay certain allowances from the narration and evidence before court. These ranged from some underpayment of wages, leave earned but not taken or paid for, as well as the failure to adhere to requirements of section 41 of the *Employment Act*. The Grievants are therefore entitled to recover underpayment, leave dues and notice pay. The 1st Grievant Mr. Francis Gathuita Mburu was entitled to leave for one month since he declined to seek payment in years prior to 2018. His salary was 16,168/- a month which was within the sum due for an employee of his calibre in the Municipality of Thika. The sum was inclusive of house allowance. The 2nd Grievant was underpaid by a sum of Kshs 559/- per month and is entitled to Kshs 7,188/- for the underpayment spanning the last year of his service in terms of section 90 of the *Employment Act* as his previous claims had abated. He would also be entitled to leave pay of Kshs 10,559/-. The Respondents did not sever their relationship with the Grievants as would be expected and for the abrupt termination without a hearing would be liable to pay 3 months salary for each of the Grievants. The Respondents will also bear costs of the suit. In the final analysis, I enter judgment for the Claimant against the Respondent as follows:

1. 1st Grievant – Francis Mburu
 - a. Leave earned and not taken – Kshs 16,168/-
 - b. Notice pay – Kshs 16,168/-
 - c. Compensation – 3 months Kshs 48,504/-

1st Grievant - Total Kshs 80,840/-

2. 2nd Grievant – David Kioko
 - a. Leave earned and not taken – Kshs 10,599/-
 - b. Notice pay – Kshs 10,599/-
 - c. Underpayment (10,599-10,000/- = 599x12) – Kshs 7,188/-
 - d. Compensation 3 months – Kshs 31,797.

2nd Grievant - Total Kshs 60,183/-

15. The Claimant shall have costs of the suit and there shall be interest on the sums in para 14(1) and (2) at court rates from date of judgment till payment in full.

16 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

