



Kenya Building Construction Timber and Furniture Industries Employees Union v Imara Enterprises Limited (Cause 2012 of 2016) [2024] KEELRC 484 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 484 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2012 OF 2016**

JK GAKERI, J

MARCH 6, 2024

BETWEEN

**KENYA BUILDING CONSTRUCTION TIMBER AND FURNITURE
INDUSTRIES EMPLOYEES UNION CLAIMANT**

AND

IMARA ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Memorandum of Claim filed on 29th September, 2016 alleging unlawful dismissal of the grievants.
2. The Claimant states that it had neither a recognition agreement nor a Collective Bargaining Agreement with the Respondent and the grievants were its members and were subject to Legal Notice No. 20 of 2012 Labour Institutions (Building and Construction Industry) (Wages) Order, 2012.
3. That the Claimant union was the rightful union to represent the interests of the unionisable employees of the Respondent.
4. According to the Claimant, a labourer was entitled to Kshs.12,974/= while a driver was entitled to Kshs.30,358/= per month.
5. The Claimant avers that the grievants served diligently but the Respondent terminated their employment without explanation and attempts to resolve the dispute by conciliation were frustrated by the Respondent by failing to attend meetings.
6. The Claimant identifies the grievants as follows;



No.		Date of employment	of termination	Salary (Kshs.)
1.	Stephen Kimere	13/2/2009	13/2/2014	11,000
2.	Elijah Mwaura	21/01/2006	13/2/2014	12,750
3.	Patrick Njuguna	08/02/2010	13/2/2014	10,000
4.	Francis Nganga Chege	1/3/2004	13/2/2014	12,750
5.	Justus Wambua Kilonzo	13/4/2010	13/4/2014	10,000
6.	Julius Kimani Ngugi	24/1/2013	13/4/2014	14,000

7. According to the Claimant, the grievants terminal dues are pay in lieu of notice, pay in lieu of leave, accrued wages, service pay, days worked and compensation for unlawful dismissal.
8. The Claimants prays for;
 - i. A declaration that the dismissal of the grievants was unlawful and unfair.
 - ii. Kshs.1,198,094/= being terminal benefits for all the grievants.
 - iii. Compensation for unlawful termination of the grievants.
 - iv. Costs of the suit.

Respondent's case

9. The Respondent states that it operated a hardware store which sells construction and building materials in Thika and denies that it is bound by Legal Notice No. 20 of 2012.
10. It is the Respondent's case that the grievants were casuals and worked intermittently and were paid daily wages in cash and denies that they were diligent employees and were dismissed when they were found selling building materials from the Respondent's store and the same was reported to the police at Thika Police Station and some of the grievants were detained.
11. The Respondent denies owing the grievants the dues claimed.

Claimant's evidence

12. Mr. Francis Nganga Chege testified that he was a member of the Claimant union but could not recall when he joined and was unaware of the relationship between the union and the Respondent and used to pay membership fees, though his card had no record of payment at all, a fact he admitted. Equally, the receipt on record is dated 16/4/2012 when he paid Kshs.265/= and was aware that the union dealt with building and construction.



13. The witness confirmed that the Respondent operated a hardware shop selling construction equipment (ujenzi) and did not undertake construction.
14. That he had never heard of a recognition agreement or collective agreement (CBA) or list of employees who wished to join the union and the Respondent did not deduct union dues.
15. That he had the NSSF card as evidence of employment but had no copy on record.
16. The witness admitted that he had no written contract of employment with the Respondent or evidence of payment of salary as it was paid in cash.
17. That his work was to load and unload vehicles as a labourer. The witness admitted that there were allegations of theft of goods on 13th February, 2014 and the matter was reported to the police and he was summoned.
18. The witness confirmed that he had no evidence to prove his entitlements and did not apply for payment for leave days and they had not agreed on the rate of service pay payable.
19. Mr. Elijah Mwaura confirmed that he was a labourer whose duty was to load and unload goods and was paying NSSF contributions but had no card or NSSF statement.
20. That the Respondent had a hardware shop and not involved in construction and was unaware of the relationship between the Claimant and the Respondent.
21. That his union membership card showed that he had only paid subscription fees.
22. The witness testified that he was dismissed from employment in 2014 and his salary was Kshs.12,750/= and did not work on Sundays and had no evidence of having applied for leave or had accrued arrears, service pay or wages for days worked.
23. The witness testified that his supervisor was Mr. Nduati who gave him directions to remove his apron (though the witness statement mentions a Mr. Kamata) having given instructions on the same date.
24. He confirmed that he had heard of the alleged theft and had no evidence of payment of union dues and did not work outside the hardware shop.
25. On re-examination, the witness testified that he had a union membership card having paid in 2010 and was dismissed on 13th February, 2014 and his salary was Kshs.12,750/= paid in cash.
26. Finally, Mr. Stephen Kimere confirmed that his work was to load and unload vehicles and was a labourer yet he was a loader.
27. It was his evidence that the Respondent sold cement and other construction materials, was not a contractor and had no CBA with the Claimant union.
28. It is her evidence that he joined the union in 2010, a fact the employer was unaware of, had no evidence of payment of union dues and the union card did not indicate who the employer of the grievant was.
29. He testified that salary was paid in cash and had no evidence of payment.
30. The witness was categorical that he did not know how many leave days were due to him or the 2 months' notice pay, or the arrears of wages and had no evidence of the days allegedly worked.
31. That he was dismissed by the Manager not Mr. Kamata as his witness statement states.
32. That neither Mr. Kamata nor the director intimidated to him not to report to work.



33. The witness testified that after the police were called, they came and arrested the grievants and took them to the police station on 13th February, 2014 but did not record a statement. The written statement makes no mention of the theft or their being taken to the police station.
34. Mr. Stephen Kimere testified that he reported to work on the following day and was not paid for 13 days not 7 as the statement read and left employment on 13th February, 2014 and did not contact the employer to resume duty or write to him.
35. On re-examination, the witness testified that he was not charged for a criminal offence.

Respondent's evidence

36. RWI, Mr. Dominic Kamata confirmed on cross-examination that his company's business was selling building materials and the grievants were casual employees who rendered services intermittently and were paid on a daily basis and he had no record of their engagement as they were old and may have been destroyed.
37. The witness testified the grievants left employment after some steel bars were misplaced and when he returned to the place of work with the police, the Claimants run away. The witness admitted that he had no OB Number of the report and could not recall the date the report was made to the police or whether the grievants were charged or not.
38. That he did not attend any conciliation meeting at the Labour Office and did not owe the grievants any dues.
39. On re-examination, the witness stated that he hired casual employees on a need basis as he had a pool of them but had no record as to who they were and received a notice from the Labour Office.
40. That he paid the grievants minimum wage in cash on a daily basis.

Claimant's submissions

41. The Claimant submitted on whether the union had locus standi to represent the grievants, whether the grievants were employees of the Respondent, whether termination was unfair and the reliefs sought.
42. On the 1st issue, the union cited the provisions Section 54 of the *Labour Relations Act* on recognition of a union by the employer and cited the sentiments of the court in Kenya Hotels & Allied Workers Union V Diani Sea Resort t/a Carlake Nominee Ltd (2015) eKLR where the court underscored the essence of Section 54 of the *Labour Relations Act*, 2007
43. As to whether the grievants were employees, the union relied on Section 37 of the *Employment Act*, 2007 to urge that the grievants had transitioned from casual to term as they served for a long time and the employer did not file employee records as required by Section 10 of the Act and thus failed to discharge the burden of proof.
44. The union submitted that Section 35(1) of the *Employment Act*, 2007 applied to the grievants as held in Chemelil Sugar Company V Ebrahim Ochieng Otuon & 2 others (2015) eKLR to reinforce the submission on the conversion of employment and term contracts.
45. On termination, the union relied on Section 41 of the *Employment Act*, 2007 to urge that the grievants were neither given notices to show cause nor heard and the termination of their employment was unfair
46. The union did not submit on the reliefs sought.



Respondent's submissions

47. Counsel for the Respondent submitted on failure of the grievants to testify, Claimants locus standi, termination of employment and the reliefs sought.
48. On the 1st issue, counsel submitted that failure of a witness to testify renders the pleading mere allegations which remain unproven and cited the decision in North End Trading Co. Ltd V The City Council of Nairobi to urge that the claims by Patrick Njuguna Wangui, Justus Wambua Kilonzo and Julius Kimani Ngugi ought to be dismissed for want of prosecution.
49. On locus standi of the union, counsel submitted that at the hearing, it emerged that the union did not cover the employees in the Respondent's business as it was a seller of construction material not a contractor or builder and cited Section 2(a) – (c) of the Labour Institutions (Building & Construction) (Wages) Order, 2012 (herein after Legal Notice No. 20 of 2012) which prescribes the scope of the order to urge that the Respondent was not in that sector and there was neither a recognition agreement nor CBA between the parties.
50. Counsel urged that the Claimant had no Locus to sue on behalf of the grievants.
51. On termination, counsel submitted that the grievants had not produced evidence in support of their claim of having been full-time employees of the Respondent and Section 10 of the *Employment Act*, 2007 was inapplicable to the Respondent and it had no contract of employment with them and no notice of termination was required.
52. Counsel submitted that the Claimants disappeared when the alleged theft was reported to the police and the police case could not proceed as the Claimants run away.
53. As regards the reliefs sought, counsel submitted that the claim for underpayment was unsustainable, and they were not entitled to pay in lieu of notice as they run away and pay in lieu of leave was statute barred by virtue of Section 90 of the *Employment Act*, 2007 as the suit was filed in 2016 and cited the sentiments of Radido J. in Samuel Ochieng Atinda V Nakuru Express Supplies & Services Ltd (2015) eKLR as are accrued arrears of wages.
54. That the grievants were not entitled to service pay and the suit was for dismissal.

Findings and determination

55. The issues for determination are;
 - i. Whether Legal Notice No. 20 of 2012 applied to the Respondent's employees.
 - ii. Whether the Claimant union has locus standi to sue on behalf of the grievants.
 - iii. Whether the Claimants were employees of the Respondent.
 - iv. Whether termination of the Claimants employment was unfair.
 - v. Whether the grievants are entitled to the reliefs sought.
56. As to whether the Respondent's employees were governed by Legal Notice No. 20 of 2012, parties have adopted opposing positions with the Respondent urging that it did not.
57. The Claimant union did not submit on the applicability of Legal Notice No. 20 of 2012 directly but argued that the union had locus standi to institute the instant suit.
58. Regulation 2 of Legal Notice No. 20 of 2012 provides that;



These Regulations shall apply to all persons other than managerial and executive staff employed in an undertaking which carries on for gain of one or more of the following activities –

- a. . . .
- b. . . .
- c. electrical installation, lift installation, plumbing installation, painting and decorating works and allied “building activities”.

59. Needless to emphasize, Regulation 2(a) and (b) identify activities related to building and construction in fairly broad and specific terms.
60. Regulation 2(c) uses a similar style but adds what in law are described as general words or words of general signification namely “allied building activities” which the Claimant union relied on to urge that Legal Notice No. 20 of 2012 applied to the grievants.
61. Guided by the rules or principles of statutory construction or interpretation, the rule applicable in the foregoing provision is the ejus dem generis which literary means “of the same kind”.
62. In simple legal parlance, the rule postulates that where words of general signification follow words of particular signification in a provision of law or constitution, the general words must be construed as being limited to the class or things identified by the words of particular signification.
63. It means that the phrase “allied building activities” invariably encompasses items or things of the class of activities identified immediately before the phrase.
64. In the court’s considered view, interpreting the phrase “allied building activities” using the ejus dem generis rule would not include stocking and selling of construction material which was the Respondent’s business as admitted on cross-examination by the three witnesses who testified. All agreed that the Respondent was not involved in any construction and had no dealing with timber or furniture.
65. All the witnesses testified that their work was to load and unload cement and other construction material from vehicles, and were thus labourers.
66. From the foregoing, it is the finding of the court that the Respondent’s employees were not governed by Legal Notice No. 20 of 2012 and the salaries cited by the Claimant union as the grievants entitlement are inapplicable to them.
67. It is noteworthy that as the Claimant union had neither a recognition agreement nor CBA with the Respondent, it was relying on Legal Notice No. 20 of 2012 as a basis to urge the grievants case arguing that it was the correct union to represent the grievants yet it did not produce a copy of its constitution to establish the allegation that it was the proper union.
68. Closely related to the foregoing is the issue of locus standi which both sides addressed. While the Respondent relied on Legal Notice No. 20 of 2012 to urge that the Claimant had no standing to represent the grievants, the Claimant relied on Section 54(1) of the *Labour Relations Act*, 2007.
69. In the court’s view, none of the grounds relied upon by the parties confer or deny a trade union locus standi to sue on behalf of its members.
70. Strangely, the Claimant union relied on Section 54(1) of the *Labour Institutions Act*, 2007 yet it had not complied with its provisions and cited the decision in Kenya Hotels & Allied Workers Union V Diani Sea Beach (Supra) where the sentiments of the court do not support its case on account



that it had neither intimated that it had recruited a simple majority of the unionisable employees of the Respondent nor contacted the Respondent for purposes of recognition or a CBA. Indeed, the Respondent was unaware of its existence as the grievants had not disclosed it and it had not intimated that it had recruited members for purposes of deduction of union dues.

71. Section 54(1) is unambiguous that the purpose of recognition is collective bargaining and it does not accord the union a legal right to represent its members in a court of law.
72. Locus standi to sue on behalf of members of a union derives from the fact of membership and is guaranteed by Section 12(2) of the *Employment and Labour Relations Court Act*, 2011 as correctly held by Rika J. in *Kenya Shoe & Leather Workers Union V Falcon Tanners Ltd* (2013) eKLR that;

“There is legal obscurity on the right of representation of the employees by a Trade Union. The law including the Industrial Court Act and the *Labour Relations Act* as correctly argued by Mr. Maina, extends the right of representation of the employees in court, to the Trade Union acting through its authorised officers.”
73. Similarly, in *Modern Soap Factory V Kenya Shoe & Leather Workers Union* (2020) eKLR, the Court of Appeal cited the foregoing sentiments of Rika J. and stated as follows;

“. . . In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court . . . We can see no reason therefore to fault the conclusion by the judge that the Respondent has locus standi to institute claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact.”
74. The Respondent did not contest the allegation that its employees were members of the Claimant union or allege that the documents availed by the grievants lacked credibility, a fact it could have contested if it had honoured the invite to the meetings by the Conciliator.
75. The documents produced by the grievants reveal that they joined the Claimant union at different times and paid subscription fees and testified that they did not disclose their membership to the Respondent.
76. Copies of documents on record show that the grievants had membership cards of the Claimant union which is prima facie evidence of membership.
77. From the documents on record, it is discernible that the Claimant union recruited the grievants for reasons other than collective bargaining.
78. As to whether the grievants were employees of the Respondent, the grievants testified that they were full-time employees while the Respondent maintained that they were casuals hired on need basis from a pool.
79. In their written statement and pleadings, the grievants stated that they worked for the Respondent as follows;
 1. Stephen Kimere 6/4/2009 to 13/2/2014 – 5
 2. Elijah Mwaura 21/01/2006 to 13/2/2014 – 8
 3. Francis Nganga 1/3/2004 to 13/2/2014 – 10



80. Intriguingly, none of the grievants had any record of having dealt with the Respondent. Neither evidence of a contract nor payment was adduced and the same applies to the Respondent who had no record of anything and admitted as much.
81. RWI could not even recall how much he was paying them as casuals and had no record of the pool from which he drew its casuals, a fact RWI admitted.
82. Section 2(1) of the [Employment Act](#), 2007 defines an employee as “a person employed for wages or a salary and includes an apprentice and indentured learner.”
83. Undoubtedly, salary or wage is a fundamental ingredient of the employment relationship.
84. Whereas the grievants testified that they were being paid twice a month and in cash and cited specific sums of money as their salary, the Respondent had no controverting evidence other than stating that they were casuals hired on need basis.
85. RWI adduced no scintilla evidence to controvert the grievants evidence that they joined the company as early as 2004 and 2006.
86. On cross-examination, RWI confirmed that the grievants left employment after some steel bars was lost but did not disclose for how long they had rendered services even as casuals.
87. He confirmed that the records on payments were old and may have been destroyed.
88. Based on the durations the grievants testified as having been in the employment of the Respondent and in the absence controverting evidence from the Respondent, the court is persuaded that although the grievants were initially engaged as casual labourers, their employment transitioned to term contract of service by virtue of the provisions of Section 37 of the [Employment Act](#), 2007.
89. From the foregoing, it is the finding of the court that the grievants have proved that they were employees of the Respondent.
90. As regards termination of the relationship, parties have adopted contrasting positions. While the grievants testified that they were terminated from employment for no reason, the Respondent submitted that the grievants disappeared and the police were unable to proceed with the criminal case.
91. The three grievants testified that their employment was terminated on 13th February, 2014.
92. Mr. Elijah Mwaura testified that one Mr. Nduati, the supervisor directed him to remove his apron and leave, not Mr. Kamata as his written statement states.
93. Mr. Francis Nganga testified that his employment was terminated on 13th February, 2014 and Mr. Stephen Kimere testified that on 13th February, 2014, that after lunch, he was told to remove his apron and leave.
94. In his written statement, RWI, Mr. Dominic Kamata testified that the grievants were dismissed when it was discovered that they had stolen building materials and at the time of termination, they had been paid all their wages.
95. On cross-examination, however, the witness testified that the grievants disappeared from their workplace.
96. Intriguingly, although RWI reported the alleged theft to Thika Police Station, he had no OB Number and was unaware of whether the grievants were arrested or charged or the status of the case stating that he left the matter to the police.



97. It is common ground that some construction material were misplaced at the Respondent's business premises and the matter was reported to the police.
98. However, evidence of what transpired thereafter is unclear and RWI's contradictory evidence does not help yet he was the principal actor. He however acknowledges that the grievants were dismissed from employment on account of loss of construction materials which corroborates the grievants evidence that their employment was terminated on 13th February, 2014.
99. When asked about the conciliation meetings, RWI admitted being invited but retorted that; "There was nothing to discuss about the grievants and I did not attend".
100. Needless to emphasize, the provisions of Section 41 and 45(2) of the *Employment Act*, 2007 are categorical that for a termination of employment to pass muster, the employer is obligated to establish that there was a valid and fair reason for the termination, relating to the conduct, capacity or compatibility of the employee or operational requirements of the employer and the termination was conducted in accordance with a fair procedure.
101. There must have been substantive justification for the termination and procedural fairness as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and affirmed by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*.
102. From the evidence on record, it is discernible that although the Respondent may have had a reason to terminate the grievants employment, it did not follow the prescribed procedure and the termination of the grievants employment was unfair for want of procedural propriety and the court so finds.

Reliefs

103. Before delving into the specific reliefs prayed for, it is essential to dispose the related issue of the salaries paid to the grievants.
 104. The grievants testified that they were being paid specific sums of money in cash and would sign a voucher which the Respondent retained. The Respondent's witness testified that he had no documentary evidence on anything touching on the grievants and did not contest their alleged salaries other than quipping that he paid the minimum wage.
 105. Needless to belabour, the figures computed by the Claimant union appear to be based on a non-existent CBA and since Legal Notice No. 20 of 2012 is inapplicable, the grievants are only entitled to the actual salaries pleaded as follows;

Stephen Kimere Kshs.11,000/=
- Elijah Mwaura Kshs.12,750
- Francis Nganga Kshs.12,750/=

a. Declaration

106. Having found that termination of the grievants employment was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Notice

107. The Respondent adduced no evidence of compliance with the provisions of Section 35 or 36 of the *Employment Act*, 2007.



108. The grievants are awarded one (1) month's salary in lieu of notice.

c. Leave and pro rata leave

109. None of the grievants adduced evidence on the number of untaken leave days and when they accrued. The written statements make no reference to leave.

The prayers lack particulars and are dismissed.

d. Accrued arrears

110. The grievants tendered no iota of evidence on any salary arrears. Indeed, Mr. Elija Mwaura confirmed on cross-examination that he was unaware of the arrears prayed for.

111. Stephen Kimere expressed a similar view when asked about it.

112. In the absence of requisite particulars, the prayer is declined.

e. Wages for days worked

113. None of the grievants led evidence to prove the alleged days worked. While Stephen Kimere claimed 7 days, Elijah Mwaura claimed 22 and Nganga 12.

114. On cross-examination, none of the grievants could testify on the actual number of days worked and when.

115. Relatedly, RWI testified that as at termination, the grievants had been paid all their dues. This prayer lacks particulars and is dismissed.

f. Service pay

116. Mr. Francis Nganga Chege testified that he was a member of the NSSF and had a card but he had not filed it. Stephen Kimere confirmed as much. Mr. Elijah Mwaura confirmed that he was paying NSSF contributions but had neither filed the NSSF card nor the statement.

117. More significantly, the fact that none of the grievants filed his NSSF statement to demonstrate that deductions were not being remitted renders the prayer for service pay unproved and is disallowed on account of the provisions of Section 35(6)(d) of the [Employment Act, 2007](#).

g. Compensation for unlawful termination

118. Having found that termination of the grievants employment was unfair, the grievants are entitled to compensation under the provisions of Section 49(1)(c) of the [Employment Act, 2007](#).

119. The court has taken into consideration the following;

1. The grievants were employees of the Respondent for varied periods as follows;
 - i. Elijah Mwaura 8 years
 - ii. Stephen Kimere about 5 years
 - iii. Francis Nganga about 10 years.

120. Second, the grievants had no recorded evidence of misconduct or indiscipline.

121. Third, the grievants substantially contributed to the termination of employment.



122. Finally, none of the grievants expressed his wish to continue in the employment of the Respondent or appeal the decision.

123. In the circumstances, the court is satisfied that the equivalent of 2 months' salary is fair as follows;

Elijah Mwaura Kshs.25,500.00

Stephen Kimere Kshs.22,000.00

Francis Nganga Kshs.25,500.00

124. In conclusion, judgment is entered in favour of the grievants against the Respondent as follows;

- a. Declaration that termination of employment was unfair.
- b. Sum of Kshs.109,500/= comprising pay in lieu of notice and compensation for unfair termination of employment.
- c. The Claimant union is awarded Kshs.25,000/= as reimbursement of direct expenses.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

