



**Kenya Tertiary and Schools Workers Union (KETASWU) v Nile Road Special School
(Cause E895 of 2022) [2024] KEELRC 931 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E895 OF 2022**

**B ONGAYA, J
APRIL 17, 2024**

BETWEEN

**KENYA TERTIARY AND SCHOOLS WORKERS UNION
(KETASWU) CLAIMANT**

AND

NILE ROAD SPECIAL SCHOOL RESPONDENT

JUDGMENT

1. The claimant union filed the suit on 05.07.2017 through Japath A. Agura, the Secretary General. The claimant union alleged unfair termination of its members Virginia Njoki Mwangi; Jackline Maghanga Mombo; and, Hannah Kaluki Mwikya (the grievants).
2. The claimant alleged as follows:
 - a. The respondent employed the grievants as grounds ladies (cleaners). The grievants are members of the claimant union. They were employed on diverse dates namely 18.03.2011; 18.03.2012; and, 01.01.2013 respectively. Their employment amounted to civil service. The minimum wage orders applied. During the service, each was underpaid.
 - b. Each was unfairly terminated in breach of sections, 35(5), 37, 41 and 43 of the *Employment Act*.
 - c. The grievants are potential members of the claimant per Articles 36 and 41 of *the Constitution*; section 4 of the *Labour Relations Act*, 2007; and ILO Convention 87.
 - d. The claimant reported a labour dispute per section 62 (1) of the *Labour Relations Act*, 2007. The respondent failed to attend conciliation meetings fixed for 8th and 27th June, 2016 an certificate of unresolved dispute issued.
 - e. The claims are made for each grievant upon the headings of unpaid salary for May 2015; salary underpayments per cited wage orders; pay in lieu of annual leave per all period served; one-



month pay in lieu of termination notice; severance pay at 21 days per year served; 12-months' maximum compensation; and, general damages and emoluments or contingencies at 15% of the total amounts. They claimed sums of money as follows: 1st grievant Kshs. 1, 952, 501.70; 2nd grievant Kshs. 1, 742, 999.70; and, 3rd grievant Kshs. 1, 685, 856.65.

3. The claimant prayed for judgment against the respondent for:
 - a. The verbal termination of the grievants on 06.05.2015 was in breach of sections 41 and 43 of the Employment Act, unfair, unlawful, wrongful and null and void.
 - b. Reinstate the grievants to their positions without loss of seniority, continuity, benefits and privileges.
 - c. Each be paid accumulated back salaries and allowances from 06.05.2015 to the date of judgment.In alternative:
 - d. 1st grievant Kshs. 1, 952, 501.70; 2nd grievant Kshs. 1, 742, 999.70; and, 3rd grievant Kshs. 1, 685, 856.65.
 - e. Interest.
 - f. Costs.
 - g. Issue certificate of service.
4. The claimant appointed Chwero & Company Advocates to act in the suit and the respondent appointed Onyango Oyieko & Associates.
5. The respondent had filed the response to the memorandum of claim on 24.08.2017 through kivuva Omuga & Company Advocates. The respondent pleaded as follows:
 - a. The respondent denied employing the grievants as cleaners or at all and that the grievants were members of the claimant trade union.
 - b. There was no recognition agreement between the respondent and the claimant.
 - c. In any event, if employees of the respondent, each grievant served upon a fixed term contract.
 - d. The respondent denied breach of the Employment Act as alleged for the claimant. The employment was properly and lawfully determined per agreements between the parties. The respondent communicated whatever was in the written contracts.
 - e. The respondent prayed the suit be dismissed with costs.
6. The 1st grievant testified to support the claimant's case. The respondent did not call a witness.
7. The Court has considered the material on record and final submissions filed for parties and returns as follows:
 - a. As submitted for the respondent the claimant has not shown that the named respondent is a person in law capable of suing and being sued.
 - b. The Claimant by checkoff forms on record has shown that the grievants were its members.
 - c. The 1st grievant testified that the termination was on a date she did not recall and sometimes in May 2015. The suit was filed on 05.07.2017. Section 90 of the Employment Act, 2007 provides that for a continuing injury, the time of limitation is 12 months from the date of



cessation thereof. The Court finds that the 12 months lapsed in May 2016 with respect to the claimed underpayments and overtime. The cause of action was time barred with respect to those continuing injuries. In any event, the 2nd and 3rd grievants offered no evidence on the claims and the 1st claimant's testimony was not sufficient to justify the award as claimed. In particular, the particulars of the overtime were not proved at all and no grievance had been reported while in service – making the claims mere afterthoughts. The notice of the dispute to the Ministry of Labour dated 08.07.2015 confirms that the dispute was only about unfair termination of the grievants.

- d. The claimant failed to show that the grievants were indeed terminated. The 1st grievant who testified stated that she did not recall the date of the termination. The Court finds that with such testimony, on a balance of probability, the termination has not been established. The issue of the fairness or legitimacy of the termination does not then start to arise. The appointment letters on record show the claimants were serving on a fixed term of three months, which appears to have lapsed.
- e. The claimants are entitled to a certificate of service and in that consideration each party to bear own costs. The other remedies prayed for will fail.

In conclusion the suit is determined with orders each party to bear own costs and the respondent to deliver the certificates of service by 01.05.2024.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

