



**Kenya Petroleum Oil Workers Union v Oryx Service Station & Pebo Filling Station
(Cause E072 of 2021) [2024] KEELRC 757 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E072 OF 2021**

**CN BAARI, J
APRIL 11, 2024**

**BETWEEN
KENYA PETROLEUM OIL WORKERS UNION CLAIMANT
AND
ORYX SERVICE STATION & PEBO FILLING STATION RESPONDENT**

JUDGMENT

Introduction

1. The Claimant filed this suit on behalf of two of its members, namely Mr. Wycliff Omambia (1st grievant) and Mr. Robert Monyancha (2nd grievant) alleging unfair and unlawful termination and unlawful labour practices. It seeks the following remedies: -
 - i. An order that the grievants were unfairly, unlawfully and illegally terminated from employment.
 - ii. An order compelling the Respondents to pay the grievants terminal dues in the sum of Kshs 547,924.60/= for the 1st grievant and Kshs 392,393.85/= for the 2nd grievant.
 - iii. That the Respondents issue the grievants with certificates of service
 - iv. Costs of the suit and interest thereon.
2. The Respondents entered appearance on 26th July, 2022, and subsequently filed a response to the claim dated 24th October, 2022, and filed on 28th October, 2022.
3. The Claimant's case was first heard on 21st June, 2023, with the 2nd grievant (CW1) testifying in support of the Claimant's case, and concluded on 2nd October, 2023, with the evidence of the Labour officer. The Respondents' case was heard on 9th October, 2023 when one Ms. Hellen Kwamboka testified in defence of the Respondents.



4. Submissions were filed for both parties.

The Claimant's Case

5. The Claimant's case is that it is a registered trade union representing the interests of workers within the petroleum, oil and gas industry. It states further that the grievants were its members and equally employees of the Respondents.
6. It is the Claimant's further case that the 1st grievant was employed by PEBO (K) Company Limited in the year 2008 as a pump attendant at a basic salary of Kshs 4,500/=, while the 2nd grievant was employed in the same capacity on 1st May, 2017 at a salary of Kshs 10,500/=.
7. The Claimant contends that the Respondents terminated the services of the 1st grievant without notice and without salary in lieu of notice in October, 2020. It further states that the 2nd grievant was subjected to similar treatment in May, 2020. The terminations, the Claimant avers necessitated a report to the union given that the grievants were its unionisable members.
8. It is the Claimant's further case that pursuant to the terminations, it sent the calculations of the grievants terminal dues to the Respondents which elicited no response, forcing it to report the matter to the ministry of labour on 4th January, 2021. It states that the ministry appointed the Kisii labour officer to conciliate the dispute on 9th January, 2021.
9. It is the Claimant's assertion that per the Conciliator's report, the Respondent terminated the grievants without notice or pay in lieu of notice contrary to Section 35 of the *Employment Act*.
10. The Claimant further avers that the Conciliator concluded that the Respondent underpaid the grievants, and did not pay them for leave days not taken and public holidays worked.
11. In his evidence in chief, CW2 told court that he was employed by the Respondents as a pump attendant in May, 2017, on a monthly salary of Kshs. 10,500. It is his further evidence that the 1st grievant was employed in 2008 on a salary of Kshs. 20,000.
12. The 2nd grievant further told court that he was employed and that the employer was the one supposed to have issued him with a contract which it did not. He further states that at no time was he told that he was working on probation.
13. CW1 the 2nd Grievant, refutes stealing any money from the Respondents. He further states that he was not taken through any disciplinary process.
14. It is CW1's further testimony that he was a member of the Claimant's union, and that he personally paid his monthly union dues to the Claimant.
15. CW2 the Labour Officer on his part, acknowledges having conciliated the matter. He states that he found that the grievants were underpaid and recommended payment of their salary arrears and issuance of certificates of service.

The Respondents' Case

16. The Respondents' case is that the 1st grievant resigned of his own volition via text message, while the 2nd grievant lost money under his custody while on probation resulting in his employment not being confirmed.
17. The Respondents further avers that there was no Collective Bargaining Agreement (CBA) between them and the Claimant, hence the grievants were not the Claimant's unionisable members.



18. It is the Respondents' case that they was never served with any of the grievants' calculations of terminal dues, and neither were they involved in the alleged Conciliation process. It contends that it is a stranger to the conciliation report branding it a fabrication.
19. The Respondents affirms that the 1st grievant voluntarily left work after receiving information that he was being transferred to Migori.
20. In her testimony, the Respondent's witness (RW1) stated that the 1st grievant who was working at Oryx service station within Sondu, was transferred to Migori, but instead of taking up his new posting opted out of employment through a text message.
21. RW1 further contends that the Claimant lacks capacity to file this suit as there is no agreement between itself and the Claimant on deduction of union dues from the grievants' salary for being its unionisable members.
22. In her oral testimony, RW1 told court that the grievants were employed by PEBO (K) Limited, the 2nd Respondent herein, and further confirmed that the 1st Respondent is a fuel supplier of the 2nd Respondent and which has no workers.
23. It is RW1's evidence that the 2nd grievant was employed on contract as a reliever when their employees went on leave, and was therefore not their permanent employee.
24. It is her testimony that some time in 2020, the 2nd grievant lost money collected while on duty, and denied knowing who took the money. She states that the Respondent send the 2nd grievant to bring the lost money, and that he left and never returned to work.
25. The witness further told court that the 1st grievant declined a transfer to Migori, and chose instead to leave work on his own accord. It is her evidence that she was not invited/served and did not thus participate in the conciliation process.
26. On cross-examination, RW1 told court that she did no produce employment records in evidence and was not told about salary underpayment and only contended that she paid the grievants well.
27. It is her testimony that she transferred the 1st grievant through a text message sent to his mobile number. She confirmed on cross-exam that she did not lead any evidence to show that the 2nd grievant was employed on probationary terms.
28. It is her evidence that though there was no disciplinary hearing conducted, she did not terminate the grievants.
29. The Respondents pray that the Claimants claim be dismissed with costs.

The Claimant's submissions

30. It is submitted for the Claimant that the dictates of procedural and substantive fairness were not met in the grievants' dismissal. Reliance was had in *Walter Ogal Anuro vs Teachers Service Commission* [2013] eKLR for the holding that for a termination to be fair, there must be substantive justification and procedural fairness.
31. The Claimant further submits that Section 41 of the *Employment Act* on the need for procedural fairness is couched in mandatory terms. It sought to rely in the case of *National Bank vs Nguru Mutonya* [2019] eKLR where the Court cited with approval the case of *Jane Nyandiko vs Kenya Commercial Bank* [2017] eKLR and held that Section 41 enjoins the employer in mandatory terms



- before termination for misconduct to explain to the employee in an understandable language why termination is being considered, and in the presence of a fellow employee or shop floor steward.
32. In further support of its case the Claimant submits that the grievants' dismissal was devoid of merit as the allegations of desertion and stealing of money were not proven. It avers further, that attendance records were not produced to prove desertion.
 33. It is its submission that the Respondent had a duty to reach out to an alleged deserter so as to ascertain the reasons for desertion. It relies on the case of Simon Mbithi Mbane vs Inter Security Ltd [2018] eKLR, where Aboudha J held that an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts made to contact such an employee without success.
 34. The Claimant contends that no evidence of any sort was produced to show that money was stolen from the Respondent, and urged the court to consider Section 43(1) of the Employment Act on the employer's duty to prove the reasons for termination.
 35. The Claimant submits that the Respondent had no valid and fair reasons to dismiss the grievants.
 36. It is the Claimant's submission that membership to a trade union is a Constitutional right, hence not filing a CBA or a recognition agreement or non-remittance of union dues by the employer was not prejudicial in any way. It avers that Article 41 (2)(c) of the Constitution guarantees every worker's rights to form or join a trade union.
 37. It submits further that the Respondent had not disproved the grievants' union membership, and that private union membership is recognised under Section 52 of the Labour Relations Act. The Claimant submits that it is not mandatory for union dues to be remitted by the employer.
 38. Regarding locus, this court is urged to consider the case of Kenya National Private Security Workers Union vs Lavington Security Ltd [2013]eKLR where the court held that the Labour Relations Act and the Employment and Labour Relations Court (Procedure) Rules confer jurisdiction on trade unions in litigation where a trade union may sue in its own name on behalf of a member(s).
 39. On whether the grievants' are entitlement to the orders sought, the Claimant submits that Kisii county falls under former municipalities hence under the Regulation of Wages (General) (Amendment) Order 2020, the grievants are entitled to one month notice of Kshs 18,892.55/= each.
 40. On public holidays not paid, the Claimant states that the grievants are entitled to Kshs 21,798.60/= each. It contends that the Respondent did not adduce records showing that the grievants were compensated for the public holidays.
 41. Concerning the claim for leave days not taken of Kshs 39,806.55/- and Kshs 18,323.65/- for the 1st and 2nd Grievant respectively, the Claimant contends that leave is an entitlement under Section 28 of the Employment Act. It states that there is no evidence adduced by the Respondent as prove that the grievants took their leave.

The Respondents' submissions

42. In its submissions dated 12th February, 2024, the 2nd Respondent reiterates that 1st grievant rejected his posting to Migori on a routine reshuffle by texting that he was unwilling to go to Migori, and that the Respondent should find someone else. It equally reiterates that the 2nd grievant was not confirmed on account of loss of company funds.
43. The Respondent submits that there was no correspondence relating to signing of a recognition agreement and neither was the recognition agreement produced in court. It submits further that the



Claimant did not provide details of the grievants' membership either in its pleadings or at the hearing. At the very least the Respondent avers that there ought to have been discussions between itself and the Claimant or even a letter forwarding checkoff forms and recognition agreement.

44. On its legal capacity to be sued, the Respondent affirms that PEBO filing station and Oryx Service station were separate and distinct entities. It states that Oryx Service Station and PEBO Filing Station is not a proper party with capacity to be sued. To buttress this point reliance is placed on the case of Apex Finance International Ltd & anor vs Kenya Anti-Corruption Commission [2012] eKLR which cites the Supreme Court of Nigeria case of Goodwill & trust Investment vs Witt and Bush Ltd Nigerian SC 266/2005 where it is stated that:

“To be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”

45. On whether the grievants have a valid claim, the Respondent submits that the 1st grievant did not file a statement nor testify in court, hence his assertions remain unsupported. It contends that the 2nd grievant's case was not applicable to the 1st grievant. Reliance is placed on the cases of CMC Aviation Ltd vs Cruisair Ltd 1978 KLR, Interchemie E.A Ltd vs Nakuru Veterinary Center Limited Nairobi HCC No. 165B of 2000 and Motrex Knitwear Ltd vs Gopites Mills Ltd Nairobi HCCC NO. 834 of 2007. Where the common thread was that pleadings in the absence of evidence meant a party had not proven their case to the sufficient standard.
46. The Respondent therefore submits that the Claimant's assertions against the 1st grievant remain uncontroverted.
47. It is the Respondent's submission that the 2nd grievant resigned as evidenced by the oral testimony and the text message extract. and that he was only meant to step in as cover for other employees in cases of leave and sickness.

Analysis and Determination

48. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The following issues coalesce for determination are:
- i. Whether the grievants were members of the Claimant
 - ii. Whether the grievants' termination was fair
 - iii. Whether the Claimant is entitled to the remedies sought

Whether the grievants were members of the Claimant Union.

49. The issue of the grievants' membership in the Claimant union was raised by the Respondent severally in its pleadings. It contended that there was no evidence of their membership, hence the Claimant lacked locus to file suit on their behalf.
50. The Respondents again argue that there was no correspondence relating to signing of a recognition agreement between them and the Claimant, and neither was the recognition agreement produced in



court. It is their assertion that at the very least, there ought to have been discussions between itself and the Claimant or a letter forwarding checkoff forms and a recognition agreement.

51. The right of employees to join a trade union is a basic right protected under *the Constitution*, the *Labour Relations Act* and the core instruments of the ILO on freedom of association. This right cannot be curtailed unless by constitutional means.
52. The Claimant produced check off forms bearing the names of the grievants and indicating that they were forwarded to the employer for purposes of union dues deductions. The grievants evidence however, is that they individually paid union dues from personal sources and not directly deducted from their wages.
53. Although there was no prove of a recognition agreement between the Claimant and the Respondents as correctly submitted by the Respondents, it has now been settled that recognition of a trade union is for purposes only of collective bargaining, while membership to a union goes to representation.
54. Further, once a trade union recruits members, it is by law granted organization rights which obligates it to protect her members rights. (See Seth Panyako v. Kenya Union of Domestic, Hotels, Educational Institutions and allied Workers Cause No. 1292 of 2011)
55. In light of the foregoing, I find and hold that absence of recognition does not curtail the grievants' right to be represented by their union. I thus return that the Claimant had the requisite locus to file this suit on behalf of the grievants.

Whether the grievants' termination was fair

56. The Claimant submits that the grievants' termination failed both the procedural and reasonable tests. In respect of procedural fairness, the Claimant avers that the grievants were not subjected to the requisite disciplinary procedure stipulated under Section 41 of the *Employment Act*.
57. The Respondents on their part, contend that the 1st grievant declined a transfer to their station in Migori and left work never to return, while the 2nd grievant failed to surrender money collected in the sale of the Respondent's petroleum products, and that upon being asked to surrender the money, he likewise left and did not return.
58. It is for circumstances herein outlined that the Respondent denies terminating both grievants herein.
59. It is not in dispute that declining a lawful transfer and failure to surrender monies collected on behalf of the employer, are acts of misconduct on the part of the employees, and which warranted disciplinary action.
60. There is no indication on the part of the Respondents that any sort of disciplinary action was attempted upon losing the monies and the employee declining a transfer. Their contention through the testimony of RW1, was simply that they did not terminate the grievants.
61. The question of compliance with the mandatory requirements of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007, therefore, does not arise premised on the Respondent's admission that it did not attempt any form of disciplinary action.
62. It then follows that the Respondents assertion is that their separation with the grievants was by their desertion of duty. In *William Gituma v RAA Limited* [2020] eKLR the court cited with approval the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, for the holding that it is not enough for an employer to say that an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts.



63. Justice Nzioki Wa Makau in *Boniface Francis Mwangi v B.O.M Iyego Secondary School* [2019] eKLR held thus:

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

64. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is therefore not enough for the Respondents to simply state that the grievants deserted duty, and showing no effort made to properly and lawfully separate with the grievants.

65. In the end, I find and hold that the termination of both grievants is unlawful and unfair.

Whether the Claimant is entitled to the remedies sought

Salary in lieu of notice

66. The grievants did not deny deserting duty for various reasons cited in the foregone paragraphs, and their termination is found unfair only to the extent that the employer did not make a follow-up on their whereabouts so as to lawfully bring the employment relationship to an end.

67. In the circumstances, it is my considered view, that they are not entitled to notice pay.

Leave days and public holidays

68. The Respondents are by law the custodians of employee records. They did not lead any evidence to show that the grievants utilized their leave, paid on account of leave not taken or that they were compensated for public holidays worked.

69. The claims for leave pay and public holidays worked therefore succeeds, and are awarded per the amended claim.

Underpayments

70. The Claimant avers that the 1st grievant was entitled to underpayment arrears of Kshs 219,883.8/=, while the 2nd grievant was entitled to Kshs 106,704/=.

71. It avers that the underpayments were for the duration of their employment. In the pleadings filed herein, the 1st grievant is said to have been earning Kshs. 4,500 while the 2nd grievant Kshs. 10,500. In the report by the labour officer and produced in evidence, the 1st grievants salary is provided in the sum of Kshs. 12,000 while the 2nd grievant is said to have been earning Kshs. 11,500.

72. The Claimant's witness, CW1, who is also the 2nd grievant, told court that his salary at termination was Kshs. 10,500 while his counterpart the 1st grievant earned Kshs. 20,000/-.

73. I note that the Respondents did not at all show how much they paid the grievants and no pay slips were produced in evidence. I will thus proceed to calculate the underpayment based on the report by the Labour officer and limited to three years premised on Section 90 of the Employment on time limitation.

74. The Claimant's statement of claim was filed on 23 October, 2021. It then follows that the valid claims in relation to the under payment is that between October, 2018 to May, 2020. The rest of the claim is statute barred.



75. The claim thus partly succeeds in terms of paragraph 74, and is hereby awarded.

Compensation for unfair termination

76. The termination of the grievants has been found to be unfair. This holding entitles the Claimant to the remedies under Section 49 of the Employment Act (See Benjamin Langwen v National Environment Management Authority (2016) eKLR.)

77. In Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under Section 49 (4) of the Employment Act.

78. It is not disputed that though the grievants were unfairly terminated, they largely contributed to their own termination. In the circumstances, I deem an award of 3 months' salary as compensation for unfair termination.

Certificate of service

79. This being a statutory requirement the Respondents are accordingly ordered to provide the same.

Conclusion and Disposition

80. The Court accordingly makes the following orders as against both Respondents herein, jointly and severally:

a. In respect of the 1st Grievant

- i. Leave days Kshs 39,806.55/=
 - ii. Public Holidays Kshs 21,798.60/=
 - iii. 3 months compensation Kshs 54,970.95/=
 - iv. Underpayment arrears Kshs 107,491/=
- Total: Kshs 224,067

b. In respect of the 2nd Grievant

- a. Leave days Kshs 18,323/=
 - b. Public Holidays (30) Kshs 21,796/=
 - c. Underpayments Kshs 115,991/=
 - d. 3 months compensation for unfair compensation Kshs 56,670/=
- Total: Kshs 212,780/=

81. The Respondents shall bear the costs of the suit.

82. Judgment of the Court.

DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11TH DAY OF APRIL, 2024.

C. N. BAARI

JUDGE



Appearance:

Ms. Achieng h/b for Mr. Onyony for the Claimant

Ms. Nyaenya present for the Respondents

Mr. Erwin Ongor - Court Assistant

