



Kenya Union of Domestic Workers, Hotels, Educational Institutions, Hotels and Allied Workers (KUDHEIHA) v United Kenya Club (Cause 425 of 2019) [2024] KEELRC 761 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 761 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 425 OF 2019
BOM MANANI, J
APRIL 11, 2024**

BETWEEN

KENYA UNION OF DOMESTIC WORKERS, HOTELS, EDUCATIONAL INSTITUTIONS, HOTELS AND ALLIED WORKERS (KUDHEIHA) CLAIMANT

AND

UNITED KENYA CLUB RESPONDENT

JUDGMENT

1. The Claimant is a registered Trade Union within the Republic of Kenya. It represents workers in various sectors including the hospitality sector. On the other hand, the Respondent is a private members' club that offers hospitality services.
2. It would appear that at the time that the cause of action in the suit arose, the Claimant had membership from the Respondent's employees. However, this fact is not obvious from the pleadings filed by the parties.
3. The Grievants were all employees of the Respondent until the relation was severed on diverse dates and for diverse reasons. For the 1st Grievant, Caroline Wanjiku, it is said that she resigned from employment through her letter of 15th September 2016. For the 2nd Grievant, Antony Ndegwa, it is asserted that he was summarily dismissed from employment on 28th May 2018 for alleged gross misconduct. And for the 3rd Grievant, Francis Kioko Wambua, he contends that he resigned from employment on 30th May 2016. However, the Respondent contends that he was summarily dismissed from employment on 30th June 2016 after he absconded duty.



4. The Claimant instituted the instant case on behalf of the Grievants to claim for, inter alia, terminal benefits. The record shows that the Statement of Claim was signed by one Tonge Yoya. He states that he signed the pleadings on behalf of the Claimant but does not indicate in what capacity he did so.
5. It is noteworthy that besides signing the Statement of Claim, Tonge Yoya did not file a witness statement in the cause. Neither did he sign the affidavit that verified the contents of the Statement of Claim.
6. Section 73 of the *Labour Relations Act* entitles an “authorized representative” of an Employer’s Association and a Trade Union to institute legal proceedings on their behalf. With respect to a Trade Union, Section 2 of the Act defines “authorized representative” to mean the Trade Union’s General Secretary or some other person who is duly authorized in writing by the General Secretary of the Trade Union to act on its behalf.
7. Thus, pleadings that institute court proceedings in the name of a Trade Union must be signed by either the Trade Union’s General Secretary or an individual who has been authorized by the General Secretary in writing. Otherwise, the suit runs the risk of being declared invalid.
8. It is therefore imperative that when one signs pleadings on behalf of a Trade Union, he indicates in what capacity he does so. This is critical in order to comply with the aforesaid provisions of statute.
9. If an individual who is not the General Secretary of a Trade Union signs pleadings on its behalf, it is imperative that he provides proof of his authority to do so. As indicated earlier, evidence of such authority must be contained in an instrument that was issued under the hand of the General Secretary of the Trade Union.
10. In the instant case, Tonge Yoya did not indicate the capacity in which he signed the pleadings that instituted the action. He did not assert that in doing so, he was acting as the General Secretary of the Claimant. And neither did he suggest that he was acting under the written authority of the Claimant’s General Secretary. I will consider the implications of this later in this decision.
11. Although the 1st Grievant remains in the suit, she did not file a witness statement for adoption in support of her claim. And neither did she attend court to testify.
12. The 2nd Grievant testified in the cause. He adopted his witness statement as his evidence in chief.
13. According to this Grievant, he was employed by the Respondent as a Chef in July 2007. At the time that his contract was terminated, he had served the Respondent for eleven (11) years.
14. The 2nd Grievant contends that for all this while, his relation with the Respondent had been flawless. According to him, his problems begun when he was serving under one Mr. Magero, the Respondent’s 3rd manager since he (the 2nd Grievant) was hired.
15. This Grievant avers that on 28th April 2018, the Respondent hosted approximately 400 guests. Due to the large number of guests, it was agreed that they be served through buffet service.
16. To facilitate this exercise, the 2nd Grievant avers that the Respondent’s management tasked various Chefs to prepare specific meals. He says that he was asked to prepare goat meat.
17. The 2nd Grievant avers that he executed his task well. When the meal was about to be served, some of his workmates alleged that the goat meat was stale. As such, the Respondent’s manager asked that it (the meat) should not be served to the guests. However, he did not provide an alternative. Yet, the guests were already waiting for the meal.



18. The 2nd Grievant asserts that the chief Chef tasted the meat and confirmed it to be fit for human consumption. As such, it (the meat) was served. The guests allegedly ate the meal without any incident. According to him, they (the guests) were delighted about the food.
19. The 2nd Grievant asserts that owing to the large number of guests on the material day, it became necessary to increase the cooking points. As such, he asked the chief Chef to ask the manager to allow him to use a gas cooker that had been lying unused in the kitchen. However, the permission delayed. Since the permission delayed and there was pressure on him from the guests to have their meals ready, he (the 2nd Grievant) decided to use the gas cooker in question.
20. The 2nd Grievant asserts that the Respondent had no valid reason to terminate his services. He asserts that he was not given the opportunity to be heard in respect of the accusations leveled against him before the decision to terminate his services was made.
21. In respect of the 3rd Grievant, he avers that he validly resigned from employment. However, the Respondent declined to process his terminal payments. As such, he instituted these proceedings to enforce this right.
22. On the other hand, the Respondent's case is that the 1st Grievant was employed by it in September 2007. However, she resigned from employment on 15th September 2016.
23. The Respondent avers that it computed the 1st Grievant's terminal dues but after taking into account the payments that she owed in lieu of notice, it became apparent that she (1st Grievant) was indebted to it (the Respondent) in the sum of Ksh. 100,499.00. As such, she is not entitled to the claims that she has lodged.
24. Further, the Respondent contends that the 1st Grievant was a contributor to the National Social Security Fund (NSSF) and its (the Respondent's) Staff Provident Fund. Thus, she is not entitled to claim gratuity under section 35 of the [Employment Act](#).
25. With regard to the 2nd Grievant, the Respondent avers that it hired his services in September 2007. However, during his term of service he committed a series of work related infractions which led to termination of his services.
26. For instance, the Respondent accuses the 2nd Grievant of having served its guests with stale food on 28th April 2018, a matter that resulted in complaints by many of the customers. It is the Respondent's case that this incident was not an isolated one. According to it (the Respondent), the 2nd Grievant had committed similar infractions in the past despite several warnings.
27. The Respondent also accuses the 2nd Grievant of having used a gas cooker which was not meant to be in use in disobedience of express directions to the contrary. According to the Respondent, the 2nd Grievant was guilty of insubordination, a matter which entitled it (the Respondent) to dismiss him from employment.
28. The Respondent avers that the 2nd Grievant was offered the opportunity to defend himself at a disciplinary hearing before the decision to terminate his services was made. As such, he was accorded due process.
29. With respect to the 3rd Grievant, the Respondent avers that it hired his services in December 2001. The Respondent avers that the 3rd Grievant purported to resign from employment on 30th May 2016 in disregard of the procedure that is provided in the Collective Bargaining Agreement which was in force at the time. Consequently, the resignation was declined and the 3rd Grievant asked to report to



work and hand over. It is the Respondent's case that when the said Grievant failed to resume work, it convened a disciplinary meeting at which he was summarily dismissed from employment on account of having absconded from duty.

30. The Respondent contends that like the 1st Grievant, the 3rd Grievant was enrolled with the NSSF and its Staff Provident Fund. Therefore, he is not eligible to claim gratuity.

Issues for Determination

31. After analyzing the pleadings and evidence on record, I have arrived at the conclusion that the following are the matters that require determination:-
- a. Whether the instant action is properly before this court.
 - b. Whether the 1st Grievant has established her claim.
 - c. Whether the contract of service for the 2nd Grievant was validly terminated.
 - d. Whether the contract of service for the 3rd Grievant was terminated through resignation or summary dismissal from employment.
 - e. Whether the 2nd and 3rd Grievants are entitled to the reliefs that they seek through the Statement of Claim.
 - f. Whether the Respondent is entitled to the reliefs that it seeks.

Analysis

32. This action presents a classic example of the challenge that a court is presented with when parties elect to conflate what are entirely distinct causes of action. The cases by the Grievants are entirely varied. They arose from entirely unrelated sets of events.
33. Yet, for unexplained reasons the Claimant decided to lump the three together. As a result, the court has to deal with the herculean task of patching into one decision what should otherwise be three distinct decisions. This highly undesirable eventuality could easily have been avoided by the Claimant filing separate suits. It is a practice that must be deprecated.
34. The first issue relates to whether the instant suit is properly before this court. Although Tonge Yoya signed the Statement of Claim on behalf of the Claimant, he did not present evidence to demonstrate that at the time of signing the instrument, he was either acting as the Claimant's General Secretary or had been authorized by the General Secretary to act as such. As such, it is doubtful that this suit was properly mounted.
35. It is the duty of the person claiming to have the authority of a Trade Union to file or defend court proceedings on its behalf to demonstrate that he has such authority. In *Banking Insurance and Finance Union (Kenya) v National Health Insurance Fund & another* (Employment and Labour Relations Cause E466 of 2023) [2023] KEELRC 2631 (KLR) (26 October 2023) (Ruling), the court stated that although there is no legal requirement that evidence of such authority be filed together with the pleadings, this fact must nevertheless be established through evidence during the trial. Where this burden is not discharged, the court is not entitled to presume that the suit was validly filed.
36. In the instant action, Tonge Yoya did not provide evidence that he is the General Secretary of the Claimant or that he had the written authority of the General Secretary of the Claimant to sign the Statement of Claim. In the absence of this evidence, the court is not entitled to presume that the said Tonge Yoya validly signed the pleadings.



37. Absent evidence of authority to sign the Statement of Claim by Tonge Yoya, the court arrives at the conclusion that the pleadings are defective for want of execution by an authorized representative of the Claimant. It is so declared.
38. Assuming that I am wrong on the first issue and that this case is validly before me, the next issue to consider would then be whether the 1st Grievant has established her claim. As indicated earlier, the 1st Grievant did not file a witness statement for adoption as her testimony in the cause. Neither did she testify orally in support of her claim.
39. The other two Grievants who testified in the cause did not make reference to her case. Their evidence focused on their respective cases.
40. In the premises, there is no evidence on record to support the case by the 1st Grievant. That being the case, it is apparent that she has failed to establish her case to the standard that is set by law or at all. As such, her case fails for want of proof.
41. The third issue for determination is whether the contract of service for the 2nd Grievant was validly terminated. Although there was a dispute on whether the food that the 2nd Grievant served the Respondent's customers on 28th April 2018 was stale, there is no dispute that he used a gas cooker which members of staff had been asked not to use without the authorization of the Respondent's management.
42. The 2nd Grievant said that he asked the chief Chef to seek the Respondent's manager's permission to use the gas cooker because they had a large number of guests. However, the chief Chef delayed in securing the permission. Because of this delay, he (the 2nd Grievant) decided to go ahead and use the cooker.
43. Undoubtedly, the 2nd Grievant used the gas cooker in question without the Respondent's authorization. This was notwithstanding that the Respondent's management had prohibited its employees from using the cooker since it was not suitable for commercial use.
44. The 2nd Grievant's decision in this respect was in clear disregard of express instructions by his superiors not to use the cooker. As such, his conduct constituted insubordination for which the Respondent was entitled to terminate his services for gross misconduct in accordance with section 44 of the [Employment Act](#).
45. There is evidence that when the 2nd Grievant defied the Respondent's instructions regarding the use of the gas cooker, he was issued with a notice to show cause dated 7th May 2018. Through the letter, the 2nd Grievant was also invited for a disciplinary hearing on 9th May 2018.
46. There is evidence that the Respondent convened the disciplinary session for 9th May 2018. There is evidence that the 2nd Grievant attended the session. It is only after this process that the Respondent took the decision to terminate the 2nd Grievant from employment.
47. This evidence demonstrates that the Respondent observed due process before it terminated the 2nd Grievant's contract of service. Consequently, I find that the Respondent acted procedurally in reaching its impugned decision.
48. The next issue for determination relates to whether the contract of service for the 3rd Grievant was terminated through resignation or summary dismissal from employment. There is evidence that the 3rd Grievant tendered his letter of resignation from employment on 30th May 2016. According to the letter, the resignation was to take effect on 1st June 2016.



49. On 2nd June 2016, the Respondent purported to reject the resignation. This was after it (the resignation) had crystallized on 1st June 2016.
50. The Respondent then purported to summon the 3rd Grievant for a disciplinary hearing. This was followed by a purported decision to terminate the contract of service for the 3rd Grievant through the Respondent's letter of 30th June 2016 purportedly because the 3rd Grievant had absconded from duty.
51. The Respondent's purported rejection of the 3rd Grievant's resignation counted for nothing. Once an employee tenders his resignation, it takes effect on the date it is expressed to take effect. The employer has no power to nullify or delay the decision (*Dharmadhikari v Professional Media Africa Limited* (Cause 622 of 2017) [2023] KEELRC 186 (KLR) (30 January 2023) (Judgment)).
52. The foregoing being the position, the Respondent's purported rejection of the 3rd Grievant's resignation in order to hand him summary dismissal counted for nothing. At the time that the Respondent purported to exercise disciplinary control over the 3rd Grievant and summarily dismiss him from employment, the employment relationship between the two had lapsed through resignation by the 3rd Grievant. Therefore, the Respondent's actions to dismiss him from employment were futile. Consequently, it is declared that the 3rd Grievant's contract of service was terminated through resignation and not summary dismissal.
53. The next issue for determination relates to whether the 2nd and 3rd Grievants are entitled to the reliefs that they seek through the Statement of Claim. With respect to the 2nd Grievant, the court has held that his dismissal from employment was anchored on valid grounds and was effected in accordance with due procedure. As such, he (the 2nd Grievant) is not entitled to the reliefs that he seeks through the Statement of Claim.
54. The 3rd Grievant has prayed for compensation for unfair termination of his contract. He has also prayed for pay in lieu of notice to terminate his contract. Yet, the record shows that he voluntarily resigned from employment.
55. An employee who voluntarily resigns from employment cannot plead unfair termination of his contract. Similarly, he cannot seek for pay in lieu of notice unless he is able to demonstrate that the employer declined to allow him the opportunity to serve his notice period.
56. There was no evidence that was tendered by the 3rd Grievant to suggest that the Respondent prevented him from serving the notice period under section 35 of the *Employment Act*. On the contrary, the 3rd Grievant expressed the intention to quit employment with effect from 1st June 2018. Yet, his notice to resign was issued on 30th May 2018.
57. From the aforesaid notice, it clear that the Grievant failed to satisfy the notice requirements under section 35 of the *Employment Act*. Thus, if there was anybody who was required to pay the other in lieu of notice for failure to provide notice in terms of section 35 of the *Employment Act*, it was the 3rd Grievant. It is therefore no wonder that he asked the Respondent to recover the notice pay from his terminal benefits. As such, the 3rd Grievant's claim for pay in lieu of notice is ill advised and must fail.
58. The 3rd Grievant has also prayed for service pay. Yet, during cross examination, he readily confirmed that during his employment with the Respondent, he was enrolled with the NSSF and the Respondent's Staff Pension Scheme.
59. Under section 35(6) of the *Employment Act*, an employee who is a beneficiary of the NSSF or other pension scheme is not entitled to claim service pay. Thus, the 3rd Grievant is excluded from making this claim.



60. The 3rd Grievant has sought to rely on a clause in the Collective Bargaining Agreement to push for this claim. This would perhaps have been feasible if the Respondent had not paid him his pension funds. However, he (the 3rd Grievant) tendered a letter from the Respondent showing that he received a total of Ksh. 1,329,544.00 as his pension.
61. In my view, the 3rd Grievant having been paid this payment by the Respondent and its insurers, it is not open to him to attempt to pursue further payments under the same head of damages. At best, this will be an attempt at double compensation which the law frowns upon. It is rejected.
62. The final issue for determination is whether the Respondent is entitled to the reliefs that it seeks through its Response to Memorandum of Claim. A perusal of this pleading demonstrates that the Respondent has prayed for the dismissal of the Claimant's with costs.
63. Having regard to the earlier findings in this decision, it is undoubted that the Respondent is the successful party in the action. As such and unless there are compelling reasons to order the contrary, it (the Respondent) is entitled to an order dismissing the Claimant's case and an order for costs of the action. It is so ordered.

Final Orders

64. Having regard to the evidence on record, I arrive at the conclusion that the instant suit is not just defective but also lacks merit.
65. Consequently, the case is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024.

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

