



Kenya Union of Commercial, Food and Allied Workers v U-Fresh Enterprises Limited (Employment and Labour Relations Cause E1033 of 2021) [2024] KEELRC 1705 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1705 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1033 OF 2021
AN MWAURE, J
JUNE 28, 2024**

BETWEEN
KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT
AND
U-FRESH ENTERPRISES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 8th December 2021.

Claimant’s Case

2. The Claimant avers that the parties have an agreement relative to Recognition and Negotiation procedure signed and dated 11/11/2020.
3. The Claimant avers that the parties are engaged in a trade dispute ML/LD/IR/2/119/2021 which involves the failure to record an agreement at the parties’ level in respect to the CBA.
4. The Claimant avers that up until 06/12/2021, the Respondent operated two shifts; the 1st from 7.30am to 6.30pm and the 2nd from 6.30pm to 6.30am.
5. However, vide a cell phone call on 01/12/2021 the Respondent informed the Claimant’s Branch Secretary of its intention to change the shift hours and introduce 3 shifts; the 1st from 5am to 1pm, 2nd from 1pm to 9pm and the 3rd from 9pm to 5am.



6. In opposition, the Claimant vide a letter dated 01/12/2021 expressed its reservation and requested the Respondent to reconsider. The Respondent then requested the Claimant's Branch Secretary for a meeting on 06/12/2021 at 10 am to discuss the changes.
7. On 06/12/2021, the Sub County Labour Officer who was to also attend the meeting called the Claimant's representative who was already at the venue and postponed the meeting to 2pm same day without consultation. The Claimant's schedule could not allow for the meeting to proceed and upon consultation it was rescheduled to 07/12/2021 at 10am.
8. The Claimant avers that the Respondent assembled its employees on 06/12/2021 at 3.30pm and effected the changes effective 07/12/2021. However, without official communication, the workers reporting at 6.30am and 6.30pm reported at the normal time only to be locked out and denied entry
9. The Claimant avers that it availed itself for the meeting on 07/12/2021, only for the Respondent to skip attendance and subsequently issued a letter at close of business sending employees on 4 days unpaid leave and informed them there would be a joint meeting with the Sub County Labour Officer to iron out the issues in dispute.
10. It is the Claimant's case that this matter is linked to the impending conciliation meeting on the CBA, whose import is to frustrate trade union representation and deny the employees their right to collectively bargain with the employer.
11. The Claimant avers that the Respondent has used local police to intimidate and victimize its members.
12. The Claimant avers that under Section 78 of the [Labour Relations Act](#), the dispute has been referred for arbitration by the Respondent and the process has not even started as such it is unlawful to lock out employees.
13. It is the Claimant's case that unpaid leave on the employees is unwarranted and they should be at their working place without the lockout pending the outcome of the intended meeting before the Sub County Labour Officer.
14. The Claimant avers that there is evidence that there is evidence of harassment and victimization involving local police to frustrate employees out of their trade union membership namely Moses Nzau, Joseph Nyamai, Gladys Lusava and Judy Kerubo who were arrested and placed under police custody.

Respondent's Case

15. In opposition to the claim, the Respondent filed a Memorandum of Response dated 30th June 2022.
16. The Respondent avers that the change of working hours was necessitated by the Covid-19 protocol. And it was well within the law to change the shifts to ensure optimal utilization of labour considering employees would unnecessarily take weekly breaks due to the Covid-19 pandemic.
17. The Respondent avers that vide a letter to the Claimant, it proposed that it could provide transport for employees scheduled to work at night shift to ensure their safety and it is still providing transport as it undertook.
18. The Respondent avers that in respect to the meeting scheduled dated 06/12/2021, the Labour Officer was to be involved but she communicated late in the day that she would be unable to attend and called it off.



19. It is the Respondent's case that instead of attending the meeting, the Claimant's Branch Secretary incited its employees to resist the change in shift making the employees rowdy and impossible for the meeting to take place.
20. The Respondent avers that it opted to close down operations temporarily due to the threat posed by the rowdy employees. Further, it issued the Claimant a letter that all employees were on unpaid leave and their full salaries for the month of December was paid.
21. The Respondent avers that the issue of change of shifts which triggered the dispute has no connection with the CBA negotiations. Additionally, it has not in any way curtailed its employees' rights to join and participate in trade union activities.
22. The Respondent avers that the employees (Moses Nzau, Joseph Nyamai, Gladys Lusava and Judy Kerubo) committed criminal activities by blocking and barricading the busy Nairobi-Mombasa road in furtherance of their unlawful and unprotected strike. Further, it has made several attempts to involve the Claimant in matters involving members suspected of stealing from the Respondent but the Claimant has been indifferent.
23. The Respondent avers that it has attended all the conciliation meetings held on its request or that of the Claimant but the Claimant failed to attend.

Evidence in Court

24. The Claimant's witness (CW1), Rebecca Muthoki, stated she is the Branch Secretary of the Claimant union and produced her witness statement and bundle of documents dated 08/12/2021 as her evidence in chief.
25. CW1 testified that from the year 2015 to December 2021, the Respondent's working hours were 2 shifts from 7.30 am to 6.30pm and from 6.30pm to 6.30am. The employees were working 12 hours per shift, 7 days a week.
26. CW1 testified that the workers were subjected to longer working hours and were not paid overtime.
27. CW1 testified that from December 2021, the Respondent introduced the three shifts arrangement but the workers were not agreeable because of transport issues during odd hours. Therefore, the Claimant union asked for safe working shifts and provision of transport and in response to the letter, the Respondent issued the workers 4 days unpaid leave.
28. CW1 testified that prior to the change in shifts the employees were being harassed and victimised and even 12 employees were issued with NTSC and dismissal letters and harassment by the police.
29. During cross examination, CW1 testified that after the events of December 2021, the Respondent's employees resumed work on 12/12/2021 and they are currently working two shifts.
30. CW1 testified that they are claiming unpaid leave days and overtime.
31. CW1 testified that the Respondent issued a notice of unpaid leave during the lockout however the December salary was paid.
32. CW1 testified that the Claimant did not tabulate its claim for overtime therefore it is not supported. There was payment of overtime during the Covid period, however, between 2015 and Covid, the Respondent did not pay overtime and this what is being prayed for.



Respondent

33. The Respondent's witness Simon Maina (RW1) stated he is an administrator of the Respondent and adopted his witness statement dated 30/05/202 and bundle of documents dated 3/06/2022 as his evidence in chief and exhibits.
34. During cross examination, RW1 testified that there was accrued overtime over the years.
35. RW1 testified that when the Respondent introduced the changes in shifts, it informed the employees and the union and transport was provided for
36. RW1 testified that the union requested for provision of transport and flexibility of hours vide a letter dated 01/12/2021. After involving the labour officer and the trade union, the Respondent introduced transport and moved back to two shifts. During the day there was no transport.
37. RW1 testified that the workers were paid Kshs 4,000 overtime whether they worked or not.
38. RW1 testified that the Respondent did not inform the Ministry of Labour or the police of the unlawful strike and barricaded road.
39. RW1 testified that there are no documents on overtime as it was not an issue, the only issue was the 4 days when the workers were on lock out.

Claimant's Submissions

40. The Claimant submitted that the Respondent locked out her employees on 07/12/2021 without issuing a 7-day written notice to the Cabinet Secretary of the Ministry of Labour. This action was unlawful and contravened Section 76 of the [Labour Relations Act](#).
41. It is the Claimant's submission that there was no reason the send all employees away as their only mistake was to approach the Respondent to involve them when rescheduling shift hours.
42. The Claimant submitted that any working hours above 45 hours per week are overtime hours and under the law, overtime and the formula for payment of overtime is clearly set out.
43. The Claimant submitted that the Respondent only availed in court evidence of payment of overtime for May, June, July, August, October and December 2021. However, no evidence was availed to confirm payment from January 2015 to April 2021 and September and November 2021.
44. The Claimant submitted that the Respondent subjected its employees to extra working hours but has no intention of settling the accrued overtime claim.

Respondent's Submissions

45. The Respondent submitted that what the Claimant calls a lock out was a strike and it was resolved by the parties. The employees went back to work and were paid their dues, the unlawful strike notwithstanding.
46. It is the Respondent's submission that the facts do not support a case for lock out as the issue in dispute is related to shifts. Under Section 27(1) of the [Employment Act](#), an employer is obligated to regulate working hours of employees to meet the needs of its enterprise.
47. The Respondent submitted that a lock out and unpaid leave are distinct and different. The letter dated 07/12/2021 discloses that employees were sent on unpaid leave and not locked out. Further, both witnesses indicated that the employees resumed work on 11/12/2021 and were paid their salaries for



December 2021. The employees though engaged in a strike did not lose their salaries as provided under Section 79(6) of the *Labour Relations Act*.

48. It is the Respondent's submission that the order sought by the Claimant to compel the Respondent to work an alleged suitable shift arrangement flies on the face of the law as this is solely the employer's duty and the impugned shift arrangement is overtaken by time.
49. The Respondent submitted that the Claimant did not produce any evidence to demonstrate the alleged use of the police to further trade disputes or resolve labour disputes. The order sought is not merited as the Claimant has not demonstrated the Respondent's wrongdoing.
50. The Respondent submitted that it produced salary payment for the month of December 2021 and CW1 conceded that the claim for unpaid leave did not have a basis as it is overtaken by events since all employees were paid their full salaries.
51. The Respondent submitted that it demonstrated that its employees engaged in unlawful strike whereupon they were sent on unpaid leave to preserve loss of lives and property. It further demonstrated the employees did not lose anything since they were paid full salaries and emoluments for December 2021.
52. It is the Respondent's submission that the Claimant did not plead or seek relief for overtime. Further, it did not state the dates the employees worked beyond normal working hours or the hours thereof.

Analysis and Determination

53. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the Respondent's action of sending the employees on unpaid leave amounted to a lock out.
 - b. Whether the employees are entitled to payment of the 4 days unpaid leave days.
 - c. Whether the employees are entitled to payment of overtime.

Whether the Respondent's action of sending the employees on unpaid leave amounted to a lock out.

54. Section 2 of the *Employment Act* and *Labour Relations Act* defines what a lock-out is as follows;

“lock-out” means the closing of a place of employment or the suspension of work or refusal by an employer to employ any employees—

 - (a) for the purpose of compelling the employees of the employer to accept any demand in request of a trade dispute; and
 - (b) not for the purpose of finally terminating employment;”
55. Further, part 10 (X) of the *Labour Relations Act* and Section 76 of the Act allow for protected lock-out and provides as follows;

“76. Protected strikes and lock-outs

A person may participate in a strike or lock-out if—



- a. the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
- b. the trade dispute is unresolved after conciliation—
 - i. under this Act; or
 - ii. as specified in a registered collective agreement that provides for the private conciliation of disputes; and ...”

56. Lock-outs was discussed in depth in as follows:

“The context of the definition of a lock-out under section 2 of the Act is thus lost where the same is given a literal meaning. That the respondent closed its gates and refused its employees entry. There must be in issue the terms and conditions of employment or the recognition of a trade union and or there must be a trade dispute that remains unresolved despite conciliation and or there is a collective agreement which provides for conciliation of disputes and or there is a notice issued by the employer for a lock-out.

The provisions of part 10 of the *Labour Relations Act*, 2007 with regard to a lock-out by an employer must be read together with *the Constitution*, 2010 where there is a given right to Strike but no corresponding right to a lock-out. Article 41 (1) and (2) provides that;

41.

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.

On the one part, every person has the right to fair labour practices but only the employee has the right to go on strike. however, these constitutional rights should not be read in isolation as article 162(3) allow parliament to pass legislation and to determine the jurisdiction of the court. such mandate to address protected or unprotected lock-outs is set out under the *Labour Relations Act*, 2007.”

57. In view of the foregoing, the Respondent’s action did not amount to a lock-out as its letter dated 07/12/2021 was clear that due to misunderstanding with the employees it sent its employees on a 4-day unpaid leave. However, the employees were fully paid their salary for December 2021 hence they were not prejudiced in any manner, this was confirmed by the Claimant’s witness testimony.

Whether the employees are entitled to payment of the 4 days unpaid leave days.

58. As evidenced above, the Respondent evidenced that its employees were fully paid their December 2021 salaries. This was reiterated by the Claimant’s witness during her statement.



59. Therefore, the employees are not entitled to unpaid leave days as they were duly compensated their December 2021 salaries and further they resumed their duties on 12/12/2021.

Whether the employees are entitled to payment of overtime

60. The Respondent submitted that the Claimant is barred from seeking overtime payment as it did not plead or seek relief for the same and further failed to provide the tabulation of the same.

61. The Court of Appeal in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR held:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

62. The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in *Gandy V Caspar Air Charters LTD* [1956] 23 EACA, 139:

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given”

Later in *Galaxy Paints Co Ltd V Falcon Guards LTD* [2000] 2 EA 385, this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.”

63. From the reading of the Memorandum of Claim, it is clear that the Claimant did not raise in any manner the issue of overtime payment on the claim. Therefore, the Court cannot delve on the same. The court cannot also delve into issues of overtime before 2021 since they are time barred and in any event the said overtime claim as already observed is not pleaded.

64. The other prayers raised on the clam (i) (ii) (iii) (iv) (v) & (vi) are overtaken by events because the respondents put the workers back to the two shifts even as admitted by the claimant in his evidence. The issues of intimidation and harassment are also not proved.



65. The court has considered the pleadings and the exhibits and rival submission and hold that the claimant has not established a valid case against the respondent vide their memorandum of claim dated 8th December 2021. The suit is not proved and is dismissed accordingly.

66. Each party will meet their respective costs of the sit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JUNE, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

