



**Kenya Engineering Workers Union v Metal Master Engineering Limited (Cause E705 of 2021) [2024] KEELRC 13215 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13215 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E705 OF 2021  
NJ ABUODHA, J  
NOVEMBER 21, 2024**

**BETWEEN**  
**KENYA ENGINEERING WORKERS UNION ..... CLAIMANT**  
**AND**  
**METAL MASTER ENGINEERING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant through its Memorandum of Claim dated 6<sup>th</sup> August, 2021 pleaded inter alia as follows: -
  - a. The Claimant averred that it is a duly registered trade Union within the meaning of the *Labour Relations Act* while the Respondent was a duly registered Limited Company under the *Companies Act* and the parties are yet to sign a recognition agreement and the same is before the court in cause 773 of 2019.
  - b. The Claimant averred that it first recruited the Respondent employees in 2005 but when the dispute for refusal to sign Recognition Agreement and non-remittance of union dues was underway, she terminated all employees.
  - c. The Claimant averred that in 2019, the Claimant again recruited the Respondent employees and moved to Court and obtained an Order restraining the Respondent from victimizing the Claimant members on ground of Trade Union membership by way of termination, redundancy or dismissal.
  - d. The Claimant averred that the grievant Mr. Mourice Juma Odipo joined the Claimant union on 1<sup>st</sup> of July 2019 by signing check off form [Form 'S'] of which the same was forwarded to the Respondent for the purpose of compliance with section 48 of the *Labour Relations Act*, 2007.
  - e. The Claimant averred that the grievant was engaged by the Respondent on 1<sup>st</sup> January 2012 to confirm the same she started deducting the remittance on NSSF contribution.



- f. The Claimant further averred that the grievant employment was implied/verbal as he was only informed verbally that he had been engaged as company works manager.
  - g. The Claimant averred that the grievant had a clean working record and on 30<sup>th</sup> January 2020, the Respondent Managing Director called the grievant to his office and verbally asked him to leave the premises due to lack of work but promised to recall him for short term contracts but the same is yet to happen.
  - h. The Claimant averred that at the time of redundancy the grievant gross salary was Kshs. 60,000/= per month.
  - i. The Claimant averred that it invoked section 62 of the Labour Relations Act by reporting a trade dispute to the Labour Ministry which was accepted under reference No. ML/LD/IR/13/20/2020 and Ms Rahma Gubbo of industrial area was appointed a conciliator and later issued a certificate of unresolved trade dispute on 27<sup>th</sup> November 2020 containing both findings and recommendations after several meetings, written and verbal submissions from parties' representatives.
  - j. The Claimant averred that at paragraph 2 of the findings the grievant termination might have been contributed by his actions joining the union as the 3 employees who withdrew from the union were reinstated back to work.
  - k. The Claimant averred that in good faith to enhance good industrial relations between the parties did accept the report although the conciliator was too lenient on the issue of compensation.
  - l. The Claimant averred that the Respondent declined to pay the grievant in line with the Conciliator's recommendation. That its actions amounted to redundancy and its refusal to issue a letter to the grievant and the ministry of labour was against section 18(5)(b) of the Employment Act. That the same violates Article 39,41 and 47 of the Constitution and section 40 and 41 of the Employment Act.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. That the court be pleased and find the Respondent action of redundancy of the grievant herein Mr. Mourice Juma Odipo to be unfair, unlawful and unprocedural and declare null and void.
  - b. That the court do issue an Order against the Respondent to reinstate the grievant Mr Mourice Juma Odipo unconditionally and without loss of any benefit or in the alternative pay redundancy benefits as follows:
    - c. One month in lieu of notice .....Kshs 60,000/=
    - d. 30 days accrued leave.....Kshs 60,000/=
    - e. Severance pay at 15 days per year for 7 years...Kshs 210,000/=
    - f. 12 Months compensation .....Kshs 720,000/=

TOTAL KSHS 1,050,000/=
  - g. Certificate of Service
  - h. Costs of the suit



3. The Respondent filed its Amended Statement of Defence and Counterclaim dated 2<sup>nd</sup> February, 2023 and averred inter alia:
- a. That the Respondent is a stranger to proceedings in Cause No. 773 of 2019 and that the Respondent has not terminated any employees as alleged.
  - b. The Respondent averred that the grievant joined the Claimant Union after December 2019 and not in July 2019 as alleged.
  - c. The Respondent averred that it had employed the grievant Mr Maurice Juma Odipo and the employment was for periodic short term contracts and was not in continuous employ of the Respondent as he continuously absconded duty without any explanation. That the grievant illegally approached the Clients of the Respondent for work and contracts to perform individually.
  - d. The Respondent averred that the grievant was at all times earning a salary of Kshs 49,420= per month as per NSSF Statements, Employment contracts and salary vouchers.
  - e. The Respondent averred that it was notified about the Trade Dispute and served with Certificate of unresolved Dispute by the Conciliator but the Respondent's submissions and evidence were disregarded and the findings and recommendations were biased.
  - f. The Respondent averred that it wrote a letter to the Conciliator disputing their findings and recommendations and was not obligated to pay since the letter was evident that the conciliator needed to review or refer matter to court.
  - g. The Respondent averred that the Claimant has been on short term contracts since 2012 and was at some point in 2017 he was away from work for 5 months and when he resumed he was contracted for shorter terms between 4 and 6 months as and when need arose and the allegations of redundancy are misplaced, scandalous and meant to tarnish Respondent Company's Reputation.
  - h. The Respondent raised its counterclaim and averred that it employed the Claimant on various term short periodic contracts ranging from 8-12 months depending on the needs of the Respondent. That in 2019, the Respondent was recruited on an 8-month contractual term earning gross salary of Kshs. 49,420/=.
  - i. The Respondent averred that the Claimant during the Respondent's contract in the year 2019 directly engaged the Respondent customers soliciting them for work contrary to contractual terms with the Claimant. That the Claimant used Company's vehicle for personal errands contrary to company policy and Respondent issued various warning letters.
  - j. The Respondent further averred that the Claimant during the said contractual term he was in habit of absconding duty without any explanation whatsoever. That those actions hampered the Respondent's operations and projects hence affecting its business revenue. That the Respondent issued several warning letters to this effect.
  - k. The Respondent averred that the Claimant participated in inciteful acts to rile up and antagonize his fellow employees against the Respondent in a bid to sabotage the Respondent's normal working operations. That due to those actions and omissions it gravely suffered financial loss and prejudice in terms of work and business revenue. That the action amounts to gross misconduct as per section 44 (a) of the [Employment Act](#) that warrants summary dismissal.



4. The Respondent in the upshot prayed for the following against the Claimant:
  - a. a declaration that the Claimant's actions amount to gross misconduct of his contractual terms
  - b. an award of general damages to the Respondent for loss of business revenue
  - c. award of general damages to the Respondent for time theft
  - d. Costs of the suit
5. The court with the consent of the parties directed on 25<sup>th</sup> July, 2024 that the matter be dispensed of by written submissions.

#### **CLAIMANTS' SUBMISSIONS**

6. The Claimant filed written submissions dated 3<sup>rd</sup> August, 2024 and on the issue of whether the grievant was on permanent or fixed contract, submitted that the grievant was on permanent implied contract and not fixed contract in line with his NSSF statement showing the salary was paid continuously apart from one month which was skipped but his bank statements illustrate he was paid continuously and the Respondent did not file attendance list to prove otherwise as per section 74 of the [Employment Act](#).
7. On the issue of whether the grievant's termination was on ground of redundancy and trade union activities/affiliation the Claimant submitted that the grievant was terminated immediately the check-off forms were served on the respondent. He was called and told to leave the premises for lack of work which amounted to unprocedural redundancy which position is captured in the conciliator's report and was against the Act.
8. On the issue of the grievant's salary at the time of leaving employment, it was the Claimant's submission that it was Kshs. 60,000/= gross pay as per the grievant's bank statement and petty cash vouchers in court by Respondent and that double payment was meant to evade tax, the Respondent did not prove otherwise by filing itemized pay statement as per section 20 of the Act as it is the employer who keeps records.
9. On the issue of what remedies were available to the grievant and the Claimant, the Claimant submitted that the grievant was not issued with a month's notice prior to termination hence was entitled to pay in lieu of notice under section 40 of the Act.
10. The Claimant submitted that even if it was summary dismissal, the same would apply under section 49(a) of the [Employment Act](#) and further that he was entitled to severance pay as per section 40(g) of the Act and that if there was desertion the employer should have notified the area labour office as required under section 78 of the Act. That the Respondent did not file any evidence to that effect in court and could not deny verbal termination on account of redundancy and on account of trade union affiliation/activities.
11. The Claimant submitted that the grievant was entitled to 12 months compensation as per section 49 (c) of the Act. That the maximum compensation should be granted since the termination was unfair, unlawful and unprocedural on account of trade union activities/affiliation, the position the conciliator upheld and the Respondent did not adhere to section 40 of the Act more specifically failure to notify the union or labour office.
12. The Claimant submitted that the grievant was entitled to certificate of service as per section 51 of the Act. The Claimant relied on the cases of ELRC Cause No. E90 of 2020 at Nairobi between Kenya Union of commercial and [Allied Workers vs London Distillers \(K\) Limited and Cause E654 of 2020](#)



at Nairobi between the Claimant herein and M/S Insteel (K) Limited and Cause No. 108 of 2010 at Nairobi between Kenya Hotels and Allied Workers Union vs Zanze Investments Limited.

## **RESPONDENTS' WRITTEN SUBMISSIONS**

13. There were no submissions on record by the Respondent.

## **DETERMINATION**

14. This court has reviewed and considered the pleadings and submissions by the Appellant counsel in support of the case. The court has also considered authorities relied on by Counsel and has come up with two main issues;

- i. Aa. aa. Whether the grievant's termination of employment was on the grounds of redundancy or not and if the same was unfair and unlawful
- ii. Whether the parties are entitled to the reliefs sought.

### **Whether the grievant's termination of employment was on the grounds of redundancy or not and if the same was unfair and unlawful**

14. The Respondent alleged that apart from the Claimant performing acts of gross misconduct, the Claimant was on short fixed term contracts and which was renewed and stood terminated by virtue of effluxion of time and voluntarily absconding duty.

15. It was the Claimant's case that the grievant was terminated on grounds of redundancy. That as per the Conciliator's findings, the termination might have because of his action of joining the Claimant union.

16. The Court will first deal with the issue of whether the grievant was on fixed term contract which terminated by effluxion of time. It was the Respondent's case that it engaged the grievant on short term contracts after being away from work for 5 months in 2017. The latest Employment Contract in the Respondent Documents dated 2<sup>nd</sup> January 2019 shows that the Claimant was employed for a period of 6 months effective 2<sup>nd</sup> January 2019 to 29<sup>th</sup> June 2019. The grievant was however terminated on 30<sup>th</sup> January 2020. The Respondent alleged that the grievant failed to sign the subsequent contracts but failed to bring to court the unsigned contracts to show that there was any contract expiring on January 2020.

17. As per the Tax Deduction Card, the grievant was paid salary as late as December 2019. The Court is therefore of the opinion that the grievant's employment did not end on 29<sup>th</sup> June 2019 by effluxion of time. The NSSF statement shows payment of dues on behalf of the grievant from 2012 to 2019 apart from November, 2016 only. Even the months the grievant was said not to be working for the Respondent from January to April 2017 the NSSF deductions were still made to show that the Respondent had engaged the grievant on permanent basis and not fixed term contracts as alleged.

18. The Respondent through its Amended Statement of Defence and Counterclaim alleged that the grievant was not declared redundant and the allegations were a mere speculation. It was the Respondent's case that the grievant failed to report to work. This court has held severally that where an employee absconds duties the employer must make efforts to reach the employee and inform them that they are contemplating disciplinary action on account of absconding of duties. In the case of Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR the court held that;

An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.



19. In this case the Respondent has not proved that the Grievant had absconded duties at the claimed period. The court takes note of the various warning letters given to the grievant but is of the view that the Respondent ought to have taken disciplinary action against the grievant after issuing the said warnings or the worst scenario, if the grievant had committed gross misconduct they could have summarily dismissed the grievant on that account.
20. The courts have stated severally that even in cases of redundancy, the procedure under section 40 of the *Employment Act* ought to be followed and failure to do so shall amount to unfair termination under section 45 of the *Employment Act*.
21. In Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”
22. From the above, it is clear that the reason has to be valid and a fair procedure has to be followed. The reasons given by the Respondent are of termination or dismissal and not redundancy. The Court notes that there was absence from work without notification letter on record dated 15<sup>th</sup> April 2019 by the Respondent. The grievant was asked to report to work by 19<sup>th</sup> April 2019 otherwise he would be assumed to have abandoned employment. The grievant however appears to have reported back to work as his salary was updated as at December 2019.
23. The Respondent’s case was that the grievant’s actions amounted to gross misconduct as per section 44(a) of the *Employment Act* 2007 and warranted summary dismissal but did not proceed to summarily dismiss the grievant.
24. The courts have emphasized that even in summary dismissal the employee must be heard and is guided by the case of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
25. On the issue of process, it is trite law that even in redundancy the procedure under section 41 of the *Employment Act* on the right to be heard has to be followed. The court notes that the Respondent did not follow the right procedure in declaring the Grievant redundant. The Respondent was not given notice of the redundancy.



26. Section 40 of the *Employment Act* is the guiding law on the process of redundancy which provides as follows: -

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy; (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer; (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable The *Employment Act*, 2007 47 upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union; (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

27. From the above provision it is clear that the Respondent did not notify the Claimant union with a month's notice as required. In fact, as pointed by the conciliator the grievant seems to have been terminated due to involvement with the Claimant Union. The grievant who started working with the Respondent in 2012 only seems to have issues in the year 2019 when he joined the Claimant union from around July,2019.

28. Whereas the court notes that the reasons given by the Respondent would be valid reason if it terminated the grievant normally, the same reasons are not valid under redundancy. The procedure followed was unlawful hence unfair termination under section 45 of the *Employment Act*.

#### **Whether the Parties are entitled to reliefs sought.**

29. Having established that the grievant's termination was unfair, the Court must now establish whether the grievant is entitled to any of the reliefs sought. The court has to ascertain the salary payable to the grievant. The last contract of January 2019 the grievant's salary was Kshs 49,420/=. The Tax deduction cards attached by the Respondent showed this. The Grievant did not attach any document to show that his salary was Kshs 60,000/= and the court will work with the Kshs 49,420/=

30. On the prayer for reinstatement, Section 49(3)(a) as read with Section 49(4) (c) provides for reinstatement of an employee. The Claim for reinstatement is not available due to the three-year widow given under section 12(3)(vii) of the *Employment and Labour Relations Court Act*. The grievant could have been entitled reinstatement in 2022.

31. On the prayer for one month in lieu of notice, the court awards the grievant one month's salary in lieu of notice pursuant to section 35 (1) (c) of the Act at the latest salary rate of 49,420/=.

32. On 30 days accrued leave, Section 28 of the *Employment Act* gives every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as and when due.



The Respondent who is the custodian of employment records did not rebut this assertion to show that the grievant took his leave as claimed. The same is allowed as prayed.

33. On the prayer for Severance Pay, this is due as under section 40 of the Act in a case for redundancy. This prayer succeeds since the redundancy was unfair.
34. On the prayer for compensation for unfair termination, the court relies on the provisions of Section 49(4)(b) of the Employment Act while considering the circumstances in which the termination took place, including the extent to which the employee caused or contributed to the termination.
35. The court finds that the grievant may have committed some gross misconduct as per the attached warning letters and even if he was unfairly terminated his behaviour seemed to have contributed to his termination. The grievant served the Respondent from 2012 to 2019 and finds that 4 months' salary is adequate compensation for unfair termination.
36. Respondent shall issue a Certificate of Service to the grievant in terms of section 51 of the Employment Act.
37. The grievant is also awarded costs of this suit.
38. The Respondent's counterclaim was not properly proved and hence fails.
39. In conclusion the Claimant's claim is hereby allowed while dismissing the Respondent's counterclaim with costs as follows;
  - i. One-month salary in lieu of notice .....Kshs 49,420/=
  - ii. 30 days accrued leave.....Kshs 49,420/=
  - iii. Severance pay at 15 days per year for 7 years..Kshs 172,970/=
  - iv. 4 months' compensation..... Kshs 197,680/=
  - v. Certificate of Service
  - vi. Costs of the suit
  - TOTAL .....KSHS 469,490/=
  - vii. Costs and Interests
40. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024**

**DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

