



Kenya Union of Commercial, Food and Allied Workers v Swastika Aluminum & Joinery Limited (Cause 103 of 2020) [2024] KEELRC 13486 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13486 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 103 OF 2020
B ONGAYA, J
DECEMBER 19, 2024**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
SWASTIKA ALUMINUM & JOINERY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of Claim dated 19.02.2020 through Kenya Union of Commercial, Food and Allied Workers. The claimant prayed for judgment against the respondent for orders as follows:
 - A.
 - (i) Order the respondent to withdraw their individual redundancy notices dated 28.01.2020 to allow employees to continue working uninterrupted.
 - (ii) Declare that upon concluding recognition agreement unionisable employees do have a lawful right to elect their shop floor representative and the Honourable Court so orders.
 - (iii) Costs of the claim be awarded to the Claimant.
 - B. In the alternative and where the Honourable Court allows the redundancy, the claimant prays that the Court orders the Respondent to pay each of the targeted employees as follows:
 - a. Pro-rata leave.
 - b. One month's pay in lieu of notice.
 - c. 15 days severance pay for each year of service totalling to Kshs. (not stated).



- d. Days worked.
- e. 12 months gross wages to each of the 8 targeted employees as compensation for unlawful and wrongful redundancy worked out in Exh. 8.

C. Any other relief the court finds fit and proper to grant to meet the ends of justice.

2. The respondent filed the statement of response dated 19.06.2020 through Kabugu & Company Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that the respondent's employees are members of the claimant union and the parties have a valid agreement relative to recognition and negotiating procedure, signed, and dated 30.11.2019.
4. That the parties are yet to begin the process of collective bargaining to realize a set of terms and conditions of service governing unionisable employees.
5. Pursuant to the said recognition agreement, the claimant states that it addressed the respondent through a letter dated 28.11.2019 seeking a meeting with all unionisable employees on 05.12.2019 for purposes of election of shop stewards.
6. In reply to the claimant's aforesaid letter, the respondent reverted by email indicating that they would not allow such an exercise to take place within their premises.
7. The claimant maintains that the respondent's email is a clear reflection of its resolve to stifle trade union representation and to refuse to allow workers to participate in trade union activities.
8. Subsequently, the respondent on 28.01.2020 served eight employees with individual redundancy notices. The claimant on 29.01.2020 sought a meeting with the respondent on 30.01.2020, but unfortunately, the meeting was declined.
9. The claimant states that whereas redundancy is lawful under section 40 of the *Employment Act*, 2007, no employee should be disadvantaged only because of his or her union membership and participating in trade union activities.
10. It is the claimant's contention that upon signing a recognition agreement per section 55(1) of the *Labour Relations Act*, 2007 the workers have a lawful right to elect their shop floor trade union representatives and the same should be carried out without any hindrance.
11. Whereas individual redundancy notices were served upon the eight employees, the claimant maintains that the Act alone does not satisfy the requirements of section 40 of the *Employment Act*, 2007. Further, that the employees should not be targeted because of their union membership.
12. On the part of the respondents, it was pleaded that the claimant entered into an agreement relative to recognition and negotiating procedure signed and dated 30.11.2019 without the knowledge of the director of the respondent.
13. That Hitesh Kerai who holds the position of an administrative supervisor signed the agreement. He was not a director and was incompetent to execute the agreement on behalf of the respondent. Thus, the agreement was void.
14. The respondent states that the eight employees were declared redundant due to lack of work and the redundancy notices were served upon them as required in law.



15. The respondent maintains that the eight employees were duly paid their dues and there is no outstanding amount owed to them.
16. The Ministry of Labour and Social Protection served the respondent with a letter inviting it for a conciliation meeting regarding the deduction of union dues.
17. The respondent insists that it does not owe any union dues to the said employees and the matter before the Honourable Court about union dues but rather it is regarding redundancy of the eight employees.
18. The respondent maintained that it declared the eight employees redundant in accordance with the law and therefore prayed that the Court dismisses the claimant's claim with costs.
19. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows:
 - a. The evidence is that the parties concluded a recognition agreement effective 30.11.2019. The respondent alleges that Hitesh Kerai who signed the agreement lacked authority to do so. He signed as the Administrator for the respondent and the respondent has provided no evidence to show that the said Hitesh Kerai lacked authority. In any event, if the respondent desired to challenge the recognition agreement then the respondent ought to have reported a trade dispute under Part VIII and per section 54(6) of the Labour Relations Act, 2007. In the circumstances, the Court finds that there is a valid recognition agreement as urged for the claimant. While making that finding the Court has noted that the email of 28.11.2019 by Hitesh Kerai confirms that parties had signed the agreement but the union could not be allowed to select its representatives from the respondent's workshop he the union could not be allowed to enter and carry out the exercise.
 - b. Section 55 of the Act entitled the union to have shop floor workers representatives and in the instant case, the once recognition agreement was signed, the respondent was obligated to allow the election of the shop floor representatives of the unionisable workers. The section provides as follows:

“ 55.

 - (1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for trade union members in a workplace to elect from among themselves trade union representatives in accordance with the constitution of the trade union.
 - (2) A trade union representative elected under subsection (1) is entitled to–
 - (a) represent members in grievance and disciplinary hearings at the workplace; and,
 - (b) perform any other functions specified in the recognition agreement or constitution of the trade union.”
 - c. Clause 2 (h) of the recognition agreement states, “Normal rights of access to members and potential members shall be accorded to accredited union representatives for the purpose of



union business in accordance with I.L.O Convention No.135 and the Labour Relations Act, 2007.”

- d. The Court finds that the respondent was bound per the statutory provision and per the recognition union to permit entry and for the election of shop floor representatives as the claimant had requested. The request to elect the union officials was on 28.11.2019 and the signing of the agreement was on 30.11.2019. Even if the request was prior to the signing, thereafter the respondent did not allow the elections.
- a. The union by documents exhibited and testimony of the witness confirm that the respondent did not undertake fair procedure in declaring and terminating the affected employees by redundancy. While the respondent knew the union had recruited the employees and therefore entitled to represent them, the respondent did not serve the union the prescribed one-month notice on the nature and extent of the redundancy per section 40 of the Employment Act. The exhibits show (like the one to Eric dated 27.01.2020 was taking effect on 08.02.2024) that the individual notices were less than the prescribed 30 days. There appears no 30 days statutory notice was served upon the area labour officer per section 40 of the Act. The union was equally not involved in the selection process and the respondent has not shown that it complied with section 40 of the Employment Act with respect to the prescribed criteria.
- b. The respondent alleged there was lack of work and for some grievants no reason for redundancy was stated. The Court finds that the respondent has failed to show that there existed a valid reason for the redundancy as per section 43 of the Act and no witness testified for the respondent. The Court returns that there was no fair reason and procedure as envisaged in section 43 of the Act and the claimant’s submission in that regards is upheld.
- c. The Court has considered the factors in section 49 of the Act on grant of compensation for unfair termination. The respondent did not prepare the grievants for the redundancy. The respondent breached all the prescriptions on redundancy under section 40 of the Act. The respondent did not pay the terminal dues at all including the severance package. There existed no established reasons for the sudden termination. It appears the termination was actuated with the emergency of trade unionism at the respondent’s workplace. The Court finds such to be aggravating factors for grant of the payment per exhibit 8 including maximum compensation at 12 months. The Court Awards accordingly and observes that parties had no disputes on the computation as set out in exhibit 8 of the claim bundle.
- d. In the instant case the three months limitation period attached to award of reinstatement under section 12 of the Employment and Labour Relations Court Act, 2007 have since lapsed. The prayer for reinstatement is disallowed as time barred. The costs follow event and in the circumstances of the case, the respondent to pay the costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that upon concluding recognition agreement unionisable employees do have a lawful right to elect their shop floor representative and the Honourable Court so orders.
2. The respondent to pay the grievants final dues and compensation for unfair termination per exhibit 8 on the claim bundle and the computation be incorporated in the decree accordingly.



3. The respondent to pay the amounts in (2) above by 01.03.2025 failing interest to run thereon at court rates from the date of this judgment until full payment.
4. The respondent to pay the claimant's costs of the suit to be assessed and determined by the Deputy Registrar.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

