



**Public Transport Operators Union v East Africa Aquatech Drilling Limited (Cause E1035 of 2023) [2024] KEELRC 13364 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13364 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1035 OF 2023  
SC RUTTO, J  
DECEMBER 6, 2024**

**BETWEEN  
PUBLIC TRANSPORT OPERATORS UNION ..... CLAIMANT  
AND  
EAST AFRICA AQUATECH DRILLING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The instant suit has been brought by the Claimant on behalf of the grievant, Enock Maera Isaboka, who it avers is its member. The Claimant avers in the Memorandum of Claim dated 13<sup>th</sup> December 2023, that the grievant was employed by the Respondent since March 2020, as a Drilling Machine Operator. He worked as such until his resignation in April 2023.
2. The Claimant further avers that the grievant joined its membership privately and was paying his monthly union dues directly to the Union.
3. It is further averred that throughout the grievant's employment spanning three (3) years, he was never granted annual leave by the Respondent as duly provided for under Section 28 of the Employment Act. That the Respondent further failed to grant the grievant off duties as mandatorily envisioned under Section 27 of the Employment Act.
4. The Claimant further states that the grievant was required to work from 7.00 a.m. until 7.00 p.m. from Monday to Sunday but was not paid overtime for the hours he worked over and above the statutory working hours.
5. That further, throughout the grievant's employment, the Respondent failed to remit his NSSF and NHIF contributions to the relevant authorities.
6. That the grievant felt frustrated while in the employment of the Respondent hence the reason for his resignation from employment in March 2023.



7. Following the grievant's resignation, the Claimant Union wrote a demand letter to the Respondent for purposes of an amicable settlement of the matter. The Respondent replied vide their letter dated 6<sup>th</sup> June 2023 wherein they indicated their unwillingness to have the matter amicably resolved.
8. The Claimant sent a reminder to the Respondent and thereafter, reported a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection. The conciliator who was appointed convened meetings and issued a report and recommendations dated 30<sup>th</sup> November 2023 for parties to adopt and implement.
9. According to the Claimant, the labour officer recommended that the Respondent pays the grievant his accrued annual leave days, service, off days and overtime. The Respondent has blatantly refused to comply with said recommendations hence the filing of this suit.
10. Against this background, the Claimant has asked the court to award the grievant the sum of Kshs 2,016,692.00 being leave pay, service pay, unpaid house allowance, payment in lieu of off days and overtime pay. The Claimant has further prayed for the costs of the suit plus interest.
11. The Respondent countered the Claim through its Statement of Response dated 29<sup>th</sup> May 2024. In its defense, the Respondent avers that it carries out the business of drilling boreholes and has never engaged in the business of public transport for an employee to subscribe to the Public Transport Operators Union. To this end, the Claimant was put to strict proof.
12. The Respondent further avers that it never employed the grievant as a Drilling Machine Operator and that he was only engaged as a casual labourer on a temporary basis and was assigned work to do and paid the wages agreed upon.
13. The Respondent further contends that since the grievant was not its employee, he was not entitled to annual leave as per Section 28 of the *Employment Act*, off duties, overtime and the remittance of NHIF and NSSF.
14. It is the Respondent's assertion that the grievant on his own volition absconded the assignment assigned to him despite the Respondent paying him the wages they had agreed.
15. On account of the foregoing, the Respondent has asked the court to dismiss the Claimant's claim with costs.
16. The Respondent further filed a Notice of Preliminary Objection dated 29<sup>th</sup> May 2024, premised on the following ground:

That the Claimant herein does not have the requisite locus standi to institute this claim on its behalf and on behalf of the grievant party and therefore should be struck out with costs in the first instance.
17. When the matter came up for mention on 17<sup>th</sup> July 2024, both parties consented to have the matter determined by way of documentary evidence in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (now revoked).
18. Subsequently, the Court directed the parties to file and exchange written submissions with respect to the main suit and the preliminary objection within specified timelines.

## Submissions

19. The Claimant submitted that the grievant exercised his right of freedom of association by joining the Union pursuant to Articles 36 and 41 of *the Constitution*. It was the Claimant's further submission



that it has locus standi to commence or maintain this cause on behalf of the grievant by virtue of his membership within the meaning of Article 22(2) (d) of *the Constitution* and Section 12(2) and 22 of the *Employment and Labour Relations Court Act*.

20. In the Claimant's view, the Notice of Preliminary Objection has no merit and has been filed in bad faith and is an attempt to subvert justice for the grievant. Consequently, the court was urged to dismiss the objection.
21. In support of the preliminary objection, the Respondent submitted that for lack of the recognition agreement, any CBA agreement between the Claimant and the Respondent and any tangible documentary evidence produced to show that the grievant was a member of the union, the Claimant does not have the requisite locus standi to file this suit on behalf of the grievant. As such, the court was urged to dismiss the suit in the first instance. In support of the Respondent's case, reliance was placed on the case of *Communication Workers v Safaricom (2014) eKLR*.
22. It was further submitted that the Claimant has not proved that he was employed by the Respondent.
23. The Respondent was categorical that the grievant was not employed as a Drilling Machine Operator and that he was only engaged as a casual labourer on a temporary basis.

### **Analysis and Determination**

24. The Court has considered the issues raised in the pleadings by both parties, the documentary evidence on record as well as the rival submissions and isolated the following issues for determination: -
  - a. Whether the Claimant has locus standi to institute and prosecute this suit on behalf of the grievant;
  - b. Depending on the answer in (a), what were the terms of employment between the grievant and the Respondent;
  - c. Depending on the answer in (b) whether the grievant is entitled to the reliefs sought.

### **The question of locus standi**

25. The crux of the Respondent's preliminary objection is that the Claimant lacks locus standi to bring the suit herein on behalf of the grievant. In this regard, the Respondent contends that it carries out the business of drilling boreholes and has never engaged in the business of public transport for an employee to subscribe to the Public Transport Operators Union.
26. Submitting in support of the objection, the Respondent has stated that it does not have a recognition agreement with the Claimant Union and that there is no Collective Bargaining Agreement between the parties to regulate the terms and conditions of work.
27. Section 54(1) of the *Labour Relations Act* which relates to recognition agreements, provides as follows:
  54.
    - (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
28. My understanding of the above statutory provision is that recognition of a trade union is solely for purposes of collective bargaining and that it has nothing to do with the representation of members of



a trade union in legal proceedings. As such, the absence of a recognition agreement cannot deny an employee representation by a trade union in legal proceedings.

29. This position was reaffirmed by the Court of Appeal in the case of *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR, where it was held that:

“In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.... We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members....A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court..”

30. The Court adopts and reiterates the determination in the above authority which is binding.
31. What’s more Section 22 of the *Employment and Labour Relations Court Act* and Rule 63(1) of the Employment and Labour Relations (procedure) Rules 2024, permit trade unions to represent their members by filing and acting in the suits accordingly.
32. In the circumstances, the grievant was well within his rights to be represented by the Claimant Union. Such representation had no bearing on the existence of a recognition agreement between the Claimant Union and the Respondent.
33. In light of the foregoing, the Court returns that the Respondent’s argument that the Claimant lacks locus standi to move the Court on behalf of the grievant owing to lack of a recognition agreement does not hold water.
34. Accordingly, the Respondent’s preliminary objection dated 29<sup>th</sup> May 2024 is found to be without merit and is overruled.
35. Having found as much, I now turn to consider the terms of employment between the grievant and the Respondent.

### **Terms of employment between the grievant and the Respondent**

36. According to the Claimant, the grievant was employed by the Respondent as a Drilling Machine Operator with effect from March 2020.
37. This position has been refuted by the Respondent who contends that the grievant was engaged as a casual labourer on a temporary basis and was assigned work to do and paid the wages agreed upon.
38. In view of the rival positions taken by both parties over the issue, I find it imperative to revisit the provisions of Section 10 (7) of the *Employment Act* which provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.



39. The import of the aforementioned statutory provision is that the Respondent was under an obligation to prove its assertions that it had engaged the grievant as a casual employee.
40. In this case, the Respondent did not tender any evidence to prove its position that the grievant was a casual labourer engaged on a temporary basis or for that fact, disprove the Claimant's assertions that the grievant was a Drilling Machine Operator. For instance, why didn't the Respondent tender evidence in the form of its muster roll or schedule of payments to the grievant to prove that indeed, he was engaged on a casual basis?
41. Addressing itself on the import of Section 10(7) of the *Employment Act*, the Court of Appeal in the case of Jackson Muiruri Wathigo t/a Murtown Supermarket vs Lilian Mutune [2021] eKLR held that: -
- “ [15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the *Employment Act* from claiming that she was a casual employee.”  
Underlined for emphasis
42. Similarly, in this case, the Court finds that the Respondent has failed to discharge its evidential burden, by proving its assertions that the grievant was engaged on a casual basis. Differently expressed, it did not dispel any doubt that the grievant was engaged as a Drilling Machine Operator and was not a casual employee.
43. Having so found, it follows that the grievant is entitled to the rights due to an employee under the *Employment Act*, 2007.
44. That said, the next logical question to ask is what reliefs is the grievant entitled to.

## Reliefs

### Leave Pay

45. The grievant has sought to be paid the sum of Kshs 121,154.00 being payment in lieu of annual leave. Pursuant to Section 28(1) of the *Employment Act*, an employee is entitled to a minimum of 21 days of paid annual leave upon completion of 12 consecutive months of employment. In this case, the grievant is seeking to be compensated for unpaid leave for a period of three (3) years. As it is not disputed that the grievant did not proceed on leave during his employment with the Respondent, he is entitled to be compensated accordingly.

### Service pay

46. The grievant has further sought to be paid the sum of Kshs 86,538.00 being service pay for three (3) years. Under Section 35(5) of the *Employment Act*, an employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
47. It is also worth pointing out that Section 35(6) provides for instances when service pay would not be payable. This includes membership to the National Social Security Fund, a registered pension or provident fund scheme, a gratuity or service pay scheme established under a collective agreement and



any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section.

48. In this case, there is no evidence that the grievant fell within any of the exclusions enumerated above. As such, the grievant is entitled to service pay at the rate of 15 days' salary for each completed year of service.

### **Overtime**

49. The Claimant has asked the Court to award the grievant the sum of Kshs 939,000.00 and Kshs 600,000.00 being overtime pay and payment in lieu of off days respectively. Worthy to note, is that the Claimant did not attempt to give the dates when the grievant worked beyond the hours prescribed by statute or during the days he was entitled to rest but was not compensated accordingly. In essence, this relief was not particularized despite being specific in nature.

50. The court is further guided by the decision in the case of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] KEELRC 1607 (KLR) where it was held that:

“The Court is not able to agree with the Appellant on this ground. It is true the Employer is the custodian of employment records. The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee. The Claimant did not show in the Trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulation of Wages [Protective Security Services] Order 1998. He correctly argues on the application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of Kshs. 222,350 claimed as the overall overtime.”

51. I will arrive at a similar finding and hold that the Claimant did not prove entitlement to this relief to the required standard hence the grievant is not entitled to the claim under this head.

### **House allowance**

52. The grievant has further sought the sum of Kshs 270,000.00 being house allowance. It was pleaded in the Memorandum of Claim that the grievant was earning a basic salary of Kshs 50,000.00.

53. It is notable that there was no pay slip or such other documents itemizing the grievant's pay. Therefore, I cannot help but question how the grievant was able to establish that his remuneration only covered basic salary and was exclusive of house allowance.

54. For the foregoing reason, the claim for house allowance is disallowed for want of proof.

### **Orders**

55. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent and the grievant is awarded: -

- a. Unpaid leave pay being the sum of Kshs 105,000.00.
- b. Service pay in the sum of Kshs 75,000.00.



c. The total award is Kshs 180,000.00.

d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.

56. The Respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2024.**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Odunga

For the Respondent Ms. Wanjala

Court Assistant Millicent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 *Civil 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.

**STELLA RUTTO**

**JUDGE**

