Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Design Workers Union v Wanxin Investments Limited (Cause E006 of 2021) [2023] KEELRC 193 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 193 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E006 OF 2021

J RIKA, J

JANUARY 31, 2023

BETWEEN

KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND INTERIOR DESIGN WORKERS UNION ..... CLAIMANT

AND

WANXIN INVESTMENTS LIMITED ..... RESPONDENT

JUDGMENT

Court Assistant: Emmanuel Kiprono

general secretary Dishon

Angoya for the claimant

Ndugutse Malinzi & Company Advocates for the respondent

1. The claimant filed an amended statement claim, seeking 10 orders, summarized as below: -
    i. The respondent to pay from its own kitty trade union dues, to the claimant.
    ii. The respondent to sign recognition agreement within 14 days.
    iii. The respondent is restrained from harassing the claimant's members on the basis of this litigation.
    iv. Declaration that termination of the contracts of 12 members of the claimant union by the respondent is unfair and unlawful.
    v. Unconditional reinstatement of the 12 members of the claimant without loss of benefits.
    vi. The respondent to adequately compensate the claimant for time lost out of employment.

vii. In the alternative, the respondent to compensate the claimant for unfair and unlawful termination.

viii. Compensation for economic damage.

ix. Any other suitable orders.

x. Costs.

2. The respondent filed a statement of response, dated September 17, 2022. Its position is that some of the employees indicated to be claimant's members recanted their membership. The claimant has not established that it has recruited a simple majority of the respondent's unionisable employees. The respondent has over 30 employees out of which only 13 are unionisable. The respondent has not received all check-off forms for employees who were alleged to have joined the claimant union. Deduction of trade union dues has been made and remitted, with respect to the employees who have confirmed their membership of the claimant. The respondent further states that the claimant has not followed the proper procedure under section 54 of the *Labour Relations Act*.

3. The court made a ruling on September 24, 2021, upon an application filed by the claimant, where the following orders issued: -

a. The prayers on recognition and execution of CBA shall be considered upon hearing of the claim in full.

b. The claimant is granted 21 days to file and serve the amended statement of claim.

c. The respondent in the meantime shall deduct and remit trade union dues, with respect to the uncontested members of the claimant union.

4. On September 21, 2022, parties were directed to file and exchange submissions on the remaining aspects of the dispute, which they confirmed to have filed, or undertook to file, at the last mention on November 2, 2022.

The Court Finds: -

5. There is no evidence that the 12 employees listed at paragraph 32 of the amended statement of claim were dismissed for their involvement in trade union activities. The dates when they joined the claimant union are not indicated in the check off lists marked DA1-3 in the claimant's documents. The 12 have not given evidence to persuade the court that they were unfairly dismissed. Termination appears to have taken place individually, on diverse dates. To avoid mixing up issues, each of the 12 employee should have pursued claims for unfair termination, and justified orders of compensation or reinstatement. The Court does not find persuasion that the employees were unfairly dismissed, in this claim where various other collective grievances are pleaded, and collective remedies pursued. there is no evidence, to justify reinstatement.

6. There were orders issued against harassment of the claimant's members. There is no evidence that the respondent has violated the orders, and continues to harass members. No evidence of continuing harassment has been placed before the court.

7. Prayers No 6, 7 and 8 are problematic. Prayer 6 seeks the court to adequately compensate the claimant for time lost. Why should the respondent compensate the claimant union for time lost? what time was lost by the claimant union?

8. Prayer No 7 asks for full compensation of the claimant for unfair and unlawful termination. The claimant was never an employee of the respondent. The claimant is a trade union, representing certain employees. It did not have any employment contract with the respondent, to plead unfair termination and compensation.

9. Prayer 8 again pleads compensation for economic damages, in favour of the claimant union. The claimant has not marshalled evidence to warrant payment of economic damages on its account. There is no judicial authority cited by the claimant union, where an employer was ordered to pay economic damages to a trade union.

10. The prayers that were introduced by the claimant in its amended statement of claim are not well conceived and articulated. They have no foundation in law and fact. They are declined.

11. On recognition and collective bargaining, the first test is whether the claimant has established recruitment of a simple majority, of the respondent's unionisable employees. This is normally a mathematical proposition. It is about numbers. It has to be shown that a simple majority has been recruited. It has to be shown what the total number of unionisable employees at the unit, is.

12. The check off lists exhibited by the claimant should have part of this information. But they fall short of establishing what number of unionisable employees, was recruited. The lists do not include the designations of the employees. They do not include the employment numbers. There is no document from the employer's side, such an extract of the payroll to assist the court, in confirming whether the employees worked for the respondent, in what positions, and whether they were unionisable. It is difficult, without the employees' oral or affidavit evidence, to conclude whether they were all employed by the respondent, and whether they were in unionisable ranks.

13. The numbers are disputed. The lists contain about 37 employees. The respondent pleads it only has 13 unionisable employees. Some employees are said to have voluntarily resigned from the claimant, while others were casuals who left employment. it was incumbent upon the claimant union to establish that it has the required numbers. The court is not persuaded that the union has established it recruited, a simple majority of the respondent's unionisable employees.

14. Lastly, the claimant has not explained why it jettisoned the dispute resolution procedure, prescribed by section 54 of the *Labour Relations Act*. Section 54 [6] requires a dispute on recognition to be referred to conciliation. If not settled on conciliation, the dispute is presented to the court. The claimant invoked section 54 of the *Labour Relations Act* from the inception, in the original memorandum of claim, on the paragraph referenced 'issues is dispute.' This was in relation to the issue of 'refusal to sign recognition agreement.' Why did not the claimant, embrace section 54 in full, by submitting itself to the dispute resolution procedure prescribed thereunder?

It is ordered: -

a. The claim declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY, 2023.

JAMES RIKA

JUDGE