



REPUBLIC OF KENYA



KENYA LAW
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Bakery, Confectionery, Food Manufacturing & Allied Workers Union v Joy Super Bakers Limited (Cause 2065 of 2014) [2023] KEELRC 751 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 751 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2065 OF 2014**

J RIKA, J

MARCH 24, 2023

BETWEEN

**BAKERY, CONFECTIONERY, FOOD MANUFACTURING & ALLIED
WORKERS UNION CLAIMANT**

AND

JOY SUPER BAKERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant Union brings this Claim on behalf of 5 of its Members [Grievants]. They are Lawrence Omosa, Cyrus Arwanga, Sarah Wangare, Isaac Kihuyu, and Emily Kipyegon.
2. The Grievants were employed by the Respondent Bakery on diverse dates, and in various positions. Omosa, Kihuyu and Arwanga were employed as Ovenmen. They were employed on July 17, 2011, May 17, 2009 and December 16, 2012 respectively.
3. Wangare and Kipyegon were employed on July 6, 2013 as Bakery Workers.
4. The 5 Grievants were paid monthly salaries of Kshs 10,000, Kshs 11,500, Kshs 12,000, Kshs 9,000 and Kshs 9,000 respectively.
5. The Claimant states that it recruited the Grievants as its Members in the months of June and July 2012, and notified the Respondent to effect deduction and payment of trade union dues.
6. The Respondent did not act on the notification, but instead locked out the Grievants and declared their positions redundant. The Claimant Union reported the existence of trade dispute to the Minister for Labour. The Conciliator held meetings with the Parties, and prepared a report, recommending that the Grievants' termination is reduced to normal termination, with payment of full benefits in accordance with the law, and in addition, they are paid 5 months' gross salary each, in compensation for unfair termination.



7. The Respondent did not agree with the recommendations of the Conciliator, necessitating escalation of the dispute to the Court, where the Claimant prays for Judgment in favour of the Grievants, against the Respondent, as follows: -
 - a. Declaratory order that the redundancy declared, and/or visited upon the Grievants herein on the diverse periods set out herein is substantively and procedurally wrongful and illegal.
 - b. Permanent injunction to restrain the Respondents from declaring redundant any of its Unionisable Employee.
 - c. An order of immediate reinstatement by the Respondent of all the Grievants herein unlawfully and improperly declared redundant into their former employment, without any loss of pay, benefits and seniority.
 - d. In the alternative and without prejudice to [c] above, the Grievants be paid their terminal / redundancy benefits in accordance with the law, including but not limited to notice pay and compensation for loss of employment.
 - e. Each Employee is issued Certificate of Service.
 - f. Payment of all sums due and owing save for underpayment by the Respondent.
8. The Respondent relies on its Amended Statement of Response, filed on January 17, 2020. It is denied that the Grievants were employed by the Respondent; that they joined the Claimant Union; that they were victimized by the Respondent; that they were locked out; or their positions rendered redundant.
9. The Respondent explains that the Grievants were obligated to obtain Certificates of Medical Examination, from the Public Health Department, before they could continue working for the Respondent, in line with the Public Health Regulations. They failed / refused to obtain the Certificates, and the Respondent could not retain them. The Respondent prays the Court to dismiss the Claim.
10. Isaac Kihuyu and Lawrence Omosa gave evidence on behalf of the their Co-Grievants, on November 11, 2021 and February 4, 2022, when the Claimant closed its case. Sarah Wangare, who is named as one of the Grievants, gave evidence for the Respondent on June 22, 2022. Another former Employee of the Respondent, Joseph Gichimu, closed the evidence for the Respondent on October 28, 2022. The Claim was last mentioned in Court on February 14, 2023, when Parties confirmed filing and exchange of their Closing Submissions
11. Kihuyu adopted his Witness Statement, 6 Documents contained in an original list, and 5 Supplementary Documents subsequently filed by the Claimant, in his evidence-in chief. He was asked by the Respondent's Director on July 16, 2013, to withdraw from the Claimant Union. He declined. He was told to go home. He could not continue working because of his stance on association with the Claimant Union. He was paid nothing. The Grievants sought the assistance of the Claimant.
12. On cross-examination, Kihuyu told the Court that he last worked on July 16, 2013. Director Kihang'a asked the Grievants to withdraw from the Claimant. He told the Grievants to leave, because they had disrespected them, by opting to remain in the Claimant. He was paid salary for the month of June 2013, but not for July 2013. He worked for 15 days in July 2013. He has not pleaded unpaid salary for July 2013. He made cakes and biscuits. He was required in law, to have a Medical Certificate. He had one as of June 30, 2013. He was examined on July 1, 2013. It is not true that termination was for lack of Medical Certificate. Redirected, he told the Court that the Respondent did not issue termination letter. He had Medical Certificate from the inception. He was not issued demand letter



- by the Respondent requiring him to supply his Medical Certificate. There was no hearing on the issue. He supplied the Certificate dated July 6, 2013.
13. Omosa similarly adopted his Witness Statement and Documents filed by the Respondent. Cross-examined, he told the Court that he was an Ovenman and a Mixer. He was not trained but was experienced. He was not issued letter of appointment. He was dismissed on July 6, 2013. He did not have a Medical Report as of this date. His boss was to procure one. Omosa obtained a Medical Certificate on July 9, 2013. He did not avail it to the Respondent. He was not allowed to go back to work. The business was at Bulbul in Ngong, Kajiado County. There was a medical at facility at Ngong, which could issue Medical Certificates to the Grievants. Omosa obtained one at Nairobi. He did not know if it could suffice in Kajiado. He was dismissed for joining the Union. He did not agree that dismissal was for lack of Medical Certificate. Redirected, the Witness told the Court that he was not asked to supply the Respondent with the Medical Certificate, lest he is dismissed. He was not heard.
 14. Sarah Wangare told the court that she did not sign the claimant union check-off list. The signature indicated to be hers, was not hers. She told the Court that she is not aggrieved in this dispute. She did not instruct any Lawyer to sue the Respondent on her behalf. Cross-examined, she told the Court that she worked for 1 year. She did not have a Medical Certificate for the last year worked. The Respondent asked for Medical Certificates, when Wangare was in the middle of her service. She was advised that without the Medical Certificate, she would not continue working, after July 2013. She did not have money to procure one.
 15. Joseph Gichimu adopted his Witness Statement and Documents filed by the Respondent in his evidence. He was the General Manager for the Respondent. He confirmed that the Grievants did not have Medical Certificates, to continue working. Cross-examined, he stated that he was employed on June 1, 2013. He was not aware that the law requires the Employer to facilitate Employees in procuring Medical Certificates. He did not know if the Employees had Medical Certificates before. The Respondent denied that the Grievants were its Employees, in the Amended Response, before bringing up the issue of Medical Certificates. The issue was not an afterthought. There were no letters to show cause why disciplinary action should not be taken against the Grievants, issued to the Grievants. There was no disciplinary hearing. Redirected, he told the Court that he called the Grievants for a meeting on July 1, 2013, where Medical Certificates were discussed. Omosa and Kihuyu obtained Medical Certificates on July 9, 2013. They were no longer in employment. The Certificates were issued by the County Government of Nairobi. The business was in the County of Kajiado. Certificates would not have been accepted, at Kajiado.
 16. The issues are whether the Grievants' contracts were terminated by the Respondent fairly or at all; and whether they merit the prayers pleaded.

The court finds :-

17. The grievants were employed by the respondent bakery, in the positions of ovenmen and bakery workers.
18. Grievant Sarah Wangare, has disowned the Claim, and the Court begins, by striking her name off the list of Grievants.
19. There is no evidence to disclose that there was a redundancy situation at the Respondent, or that the Grievants were informed by the Respondent, that their roles had been rendered redundant for economic reasons. The prayers asking the Court to declare that redundancy was procedurally and substantively wrongful and illegal; that an order of permanent injunction issues restraining the Respondent from declaring the Claimant's Unionisable Employees redundant; and that the Grievants



- are paid redundancy benefits, are prayers which are not well-founded in law and fact. There was no redundancy situation at the Respondent.
20. The Respondent did not at any time, inform, or suggest to the Grievants, that there was a redundancy situation. The Grievants had no reason to concluded that termination was founded on redundancy.
 21. Their prayers relating to redundancy are not well-founded in law and fact. The Court has no reason to declare that redundancy was substantively wrongful and illegal; there is no reason whatsoever to issue an order of permanent injunction, barring the Respondent from declaring redundant any of the Unionisable Employees of the Claimant; and there is no evidence of a redundancy situation, to warrant redundancy payments.
 22. Even if there was a redundancy situation, it would not warrant an order of permanent injunction, restraining the Respondent from declaring redundancy against any of its Unionisable Employees. Such an order would be illegal and unreasonable. The Respondent has the discretion in running its business, and cannot be permanently restrained from declaring redundancy, if the economic situation demands that it does so.
 23. The Grievants left employment, on the ground that they had failed to renew their Medical Certificates. Employees in the food industry are required under the *Food, Drugs and Chemical Substances Act*, cap 254, [Food Hygiene Regulations] to have Certificate of Medical Examination – Form D.
 24. The General Manager told the Court that he required all Employees to have Medical Certificates by June 30, 2013. The Grievants did not comply and could therefore, not continue working for the Respondent.
 25. The 2 Grievants who gave evidence told the Court that they were examined on July 1, 2013, and issued Medical Certificates on July 9, 2013.
 26. The Certificates were issued by the Nairobi City County at Rhodes Clinic at Ngara. The Respondent took issue with this, arguing that its business is in Kajiado County, and the Certificates would not be acceptable at Kajiado County.
 27. The Court does not see why the Certificates would not be acceptable at Kajiado County. The *Food, Drugs and Chemical Substances Act*, is not a County Legislation. There was no reason shown by the Respondent why a Medical Certificate issued by a qualified Medical Practitioner at Nairobi, would not be sufficient.
 28. The failure to obtain the Certificates by June 30, 2013, does not seem to this Court to have been a fair and valid reason, to justify termination. At least 2 of the Grievants obtained their Certificates by July 9, 2013. A delay of 1 week after the deadline set by the General Manager, was not unreasonable. It was not entirely in the hands of the Grievants, to say when the Medical Certificates would be ready. There was a process involving the medical authorities. Once the Grievants were examined, it was not in their hands to say when the Medical Certificates would be ready.
 29. The Respondent terminated their respective contracts on different dates, almost immediately after June 30, 2013. The dates are July 6, 2013, July 16, 2013, July 5, 2013 and July 6, 2013 for the 4 remaining Grievants respectively. Kihuyu's Certificate is dated July 9, 2013. By the date of termination on July 16, 2013, he had obtained the Medical Report.
 30. The Respondent did not show that the Grievants were perennial defaulters on procuring Medical Certificates. It was not disputed that they had Certificates for the previous years. The Respondent ought to have given them time to renew their Certificates, particularly because it does not seem to have assisted the Grievants financially, in obtaining the Medical Certificates.



31. Lastly, the Respondent did not convene any disciplinary hearing, or require the Grievants to explain their default or delay in obtaining Medical Certificates. After June 30, 2013, fair procedure under Sections 41, 43 and 45 of the Employment Act, demanded that the Grievants are presented with specific charges; they are given an opportunity to explain themselves; and decision taken to terminate their contracts, based on the findings by the Respondent. It was contrary to fair procedure to just set a date by which the Grievants were to have obtained Medical Certificates, failing which their contracts stood terminated.
32. Termination was unfair, and the Grievants are entitled to notice pay and compensation for unfair termination. The prayer for reinstatement is too remote in time, termination having taken place about 9 years ago. They did not specify the nature of terminal dues sought. The court did not understand the last prayer [f] in the statement of claim, which is that the grievants are availed “payment of all sums due and owing, save for the underpayments by the Respondent.”
33. The Court notes that the dispute was subjected to conciliation. The Conciliator recommended that the Grievants are paid unspecified terminal benefits and equivalent of 5 months’ gross salary in compensation for unfair termination. The would adopt the recommendation of payment of 5 months’ salary in compensation, and grant 1- month salary *in lieu of* notice for each of the 4 Grievants.

It is ordered : -

- a. Termination was unfair.
- b. The Respondent shall pay through the Claimant Union -
 - i. Lawrence Omosa – notice 1 month at Kshs 10,000 and equivalent of 5 months’ salary in compensation for unfair termination at Kshs 50,000.
 - ii. Isaac Kihuyu- notice 1 month at Kshs 11,500, and equivalent of 5 months’ salary in compensation for unfair termination at Kshs 57,500.
 - iii. Cyrus Arwanga – notice 1 month at Kshs 12,000 and equivalent of 5 months’ salary in compensation for unfair termination at Kshs 60,000.
 - iv. Emily Kipyegon- notice 1 month at Kshs 9,000 and equivalent of 5 months’ salary in compensation for unfair termination at Kshs 45,000.
- c. Certificates of Service to issue.
- d. Costs to the Claimant.
- e. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 24TH DAY OF MARCH 2023

JAMES RIKA

JUDGE

