



Kenya Union of Commercial, Food and Allied Workers v Murang'a Cooperative Creameries Ltd & another (Cause E025 of 2022) [2023] KEELRC 841 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 841 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E025 OF 2022
ON MAKAU, J
APRIL 13, 2023

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

MURANG'A COOPERATIVE CREAMERIES LTD 1ST RESPONDENT

MURANG'A COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The claimant is a registered trade union and brings this suit on behalf of its member Mr. Erick Karau Ng'ang'a (herein after called the grievant). The claimant alleges that the grievant was unfairly dismissed from employment by the respondent on 5th August, 2020. Therefore the claimant prays for the following reliefs: -
 - i. The grievant to be reinstated back to his position of Maintenance Officer without loss of benefits.
 - ii. In alternative and where the reinstatement will not be tenable the grievant to be paid the following as his final terminal benefits.
 - a. An order of separation commenced on judgment date.
 - b. One month Notice =59,410.00
 - c. Unpaid salaries for three months=178,230.00
 - d. Overtime for 312 hours=90,922.50
 - e. Annual leave=68,550.00



- f. Prorate leave=19,993.75
 - g. 19 months salary before expiry of contract=1,128,790.00
 - h. Gratuity for three years as per the contract=37,581.30
 - i. Maximum for unlawful termination=712,920.00
 - j. Any other or further relief that the court deems fit and just to grant in the circumstance meet justice
- Total Payable=KSHS.2,296,397.55
- k. Cost of the claim in favour of the claimant

2. The respondents filed a joint defence on 7th July 2022 contending that they have no Recognition Agreement with the claimant and as such the claimant lacks capacity to represent the grievant. The respondents further denies all the facts of the suit.
3. In its reply to the defence, the claimant avers that the grievant is her member pursuant to Section 52 of the Labour Relations Act. It further avers that an employee's right of representation by a trade union is derived from members hint to the trade union and not a Recognition Agreement. Therefore, it prayed for the reliefs sought.
4. The suit was disposed of by written submissions on the strength of the pleadings and documentary evidence filed.
5. The brief facts of the case are that the grievant was employed by the respondent as Maintenance Officer for a contract of three years starting 14th February 2019. His contract is contained in the Appointment letter dated 12th February 2019.
6. By a letter dated 22nd February, 2020 he was suspended. The letter was captioned 'Leave of Absence' and it directed him to take leave to pave the way for investigation into his gross misconduct. Thereafter he was accorded a disciplinary hearing on 26th May 2020 followed by letter dated 29th May 2020 by which his role was re-designated. Matters did not end at that since the claimant wrote a letter dated 5th August 2019 alleging that the grievant had been verbally dismissed by the respondent's General Manager Mr.Paul Macharia, and demanded for reinstatement.
7. The demands were not heeded to and the matter was referred for conciliation but again there was a deadlock and the parties came to this court.
8. The respondents did not controvert the above facts. In facts in their written submissions the respondents admits all the facts of the case and adds that the grievant absconded duty. It is denied that the grievant was thrown out of work place.
9. The claimant has reiterated its averment in the claim.

Determination

10. The facts of the case are fairly straight forward. The claimant was employed by the 1st respondent and after working for about a year he faced some problems leading to suspension from duty. Thereafter he was accorded a hearing and served with warning letters and his roles re-designated. Thereafter he was dismissed from employment by Mr.Paul Macharia. The issues for determination are:
 - a. Whether the termination was unfair.



- b. Whether he is entitled to the reliefs sought.

Unfair termination

11. Section 45 of the *Employment Act* provides that:
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”
12. The respondents did not adduce any evidence to prove why Mr. Paul Macharia dismissed the grievant from employment on 5th August 2020. The evidence on record is that the grievant was given warning letter for the offence which had led to his suspension. Thereafter his role was re-designated and he reported back to work.
13. There is further no evidence adduced by the employer to prove that the grievant was accorded a hearing before the termination. It follows that without prove of any valid reasons for the termination and, that a hearing was conducted before the termination of the claimants contract the said termination was unfair within the meaning of Section 41 of the *Employment Act*. The termination was also wrongful and a breach of contract because the grievant was not served with prior notice as per the contract of employment.

Reliefs

14. The claimant prays for reinstatement but it did not demonstrate any special circumstances to warrant the order for specific performances in favour of the grievant. In fact it seems that the relationship between the grievant and his seniors is toxic and reinstatement may be impracticable. In any case the contract term has ended. Therefore I will grant the alternative prayer for damages.
15. Under section 49 read with section 50 of the *Employment Act*, I award him one month salary in lieu of notice plus three months compensation for unfair termination considering that he served for less than two years in which time he was served with warning letters. I have also considered the fact that he was to serve for 3 years term but had more than a year left.
16. The claim for salary for three months from May 2020 has not been controverted or rebutted by evidence. He was still in employment until 5th August 2020 and therefore I award him the 3 months salary as prayed being Kshs.178,230.00.
17. The claim for overtime worked has not been particularized and substantiated and it is therefore declined.
18. The claim for leave also lacks particulars but from the appointment letter, he served for one and a half years equaling to 45 leave days. I therefore award him $Kshs.40,410 \times 45/26 = Kshs.69,940.38$



19. The claim for salary for 19 months he would have served before expiry of his contract is declined for lack of legal or contractual basis. The violation by the unfair termination has already been compensated under Section 49 of the Act above.

20. However I award him gratuity for the 17 months served being $Kshs.40,410 \times 17/12 \times 31\% = Kshs.212,960.70$

21. In conclusion I enter judgment for the claimant in the following terms: -

Notice.....Kshs.59,410.00

Compensation.....Kshs.178,230.00

Unpaid salary.....Kshs.178,230.00

Leave.....Kshs.69,940.38

Gratuity.....Kshs.212,960.70

Kshs.668,771.10

The said sum is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.

ONESMUS N MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

