



**Kitumu v Simba Apparel Epz Limited (Employment and Labour Relations Cause 73 of 2019) [2023] KEELRC 1666 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1666 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 73 OF 2019**

**M MBARÚ, J**

**JUNE 29, 2023**

**BETWEEN**

**JONATHAN N. KITUMU ..... CLAIMANT**

**AND**

**SIMBA APPAREL EPZ LIMITED ..... RESPONDENT**

**JUDGMENT**

1. On July 9, 2018 the respondent employed the claimant as a Compliance Manager through a written contract as a gross salary of Kshs 80,325 per month.
2. The claim is that on September 13, 2019 the respondent terminated the claimant's employment by summary dismissal together with other employees. That there was unfair termination of employment since the claimant was not issued with notice, hearing or justifiable reasons to warrant such sanction. No terminal dues were paid and he is claiming the following;
  - a. One months notice pay Kshs 80,325;
  - b. Compensation Kshs 963,900;
  - c. 25 Accrued leave days Kshs 66,937.50;
  - d. Gratuity pay for 3 years Kshs 40,162.50; and
  - e. Costs
3. The claimant testified in support of his claim that in the year 2019 the employees of the respondent started agitating for elections for the purpose of replacing the union representatives but instead the respondent directors became uncomfortable to the extent of intimidating the employees into abandoning the elections. On September 9, 2019 one of the workers was physically assaulted by others acting on instructions from the respondent's directors upon which the employees commenced a 4



- day strike to demand for fresh elections and to have officials of their own. A return to work formula was entered into on September 12, 2019 and one condition was that the respondent would ensure the security of all workers in the factory. However, upon return to work on September 13, 2019 the employees noticed that one of the employees who had assaulted the other, Meshack Mwangangi was still working. Fearing for their safety, the employee raised an alarm which created unrest. The police came on site to provide security and directed the the factory to be closed. No solution was found.
4. The claimant testified that the respondent premises remained heavily guarded by the police and on September 17, 2019 the management posted a notice advertising for fresh recruitment which commenced on September 18, 2019. The claimant wrote to the director seeking clarifications on his employment and was advised to re-apply for employment since his contract had been terminated. On September 19, 2019 another notice was issued seeking for employees to re-apply for employment and those who failed to do so would be paid their terminal dues.
  5. The claimant also testified that on October 1, 2019 he wrote to the respondent as asked to be paid his terminal dues through his bank account.
  6. In response, the respondent's case is that there was no termination of employment as alleged and the notice referenced by the claimant related to unionisable employees to which the claimant was not part of. On October 9, 2019 the employees went on strike and the respondent learnt that the claimant was behind the strike and that he had also on several other occasions held meetings with the respondent's employees in a bid to have them compel the respondent to appoint him to the position of human resource manager. When the unionisable employees went on strike on September 18, 2019 the claimant abandoned his employment and demanded to be paid his terminal dues and his claims should be dismissed with costs.
  7. The respondent called several witnesses, Hillary Atsole, Sylvester Musando, Phoda Amwayi and Nduku Munyao who testified to the fact that the claimant was not unionised but he called for meetings at the shop floor and outside of the workplace to plan for fresh elections so as to replace the incumbent union officials with the aim of being appointed as the human resource manager of the respondent. These employees of the respondent corroborated each other that the claimant was planning for industrial action and they were aware. They attended some of the meetings called and financed by the claimant at the shop floor and some in private hotels and facilities.
  8. At the close of the hearing, both parties filed written submissions which are put into account and the issues for determination are whether there was unfair termination of employment and whether the claimant is entitled to the remedies sought.

### **Determination**

9. It is common cause that on September 9, 2019 there was an industrial action within the respondent premises by employees. The agitation arose out of various matters including calls for union elections and an alleged assault of one employee by another. It was also not contested that the claimant was not unionised because he was in management.
10. Following the industrial action, a return to work formula was agreed upon but on September 13, 2019 the employees protested the presence of some of their colleagues at the shop floor forcing he respondent to call the police who evacuated the employees. To address the situation, the respondent issued notice and directed all persons to apply for the various positions available. The claimant did not apply. There was lockout due to the employees engaging in an unprotected industrial action and when invited to re-apply for employment, those who did are still in employment.



11. Engaging and involvement in an unprotected strike or go-slow is a serious breach of the employment contract contrary to Section 44(3) of the *Employment Act*, 2007 (the Act) and summary dismissal is allowed pursuant to Section 44(4) thereof as held in *Inter-Public Universities' Councils Consultative Forum of Federation of Kenya Employers v Universities' Academic Staff Union & 5 others [2018] eKLR* that an employee who takes part in a strike or calls for a strike or incites others to take part in a strike and which strike is not protected is in breach of a fundamental term of his employment contract. An industrial action that is taken without notice, and while such matter has not gone for conciliation or been referred to the court for approval, the action is unprotected and should attract disciplinary action as held in *Joash Alubale Jacob v Mega Pack Limited [2019] eKLR* that an employee who takes part in an unprotected go-slow cannot justify his individual action by asserting that all other employees were participating. Employment is personal and individual.
12. The claimant was not unionised. As part of management, he had no business agitating for union elections or taking part in an industrial action on the justification that another employee had been assaulted at the shop floor. Abandoning work for such cause while the claimant was part of management was a serious breach to the employment contract. He ought and should have been aware on how to handle such grievances. Failure to attend work under the guise that all other unionised employees had grievances removed the claimant from any legal protections which may have been available to a unionised employee. He frustrated his own employment.
13. Despite the respondent addressing the industrial action by allowing a return to work formula, the claimant as part of the employees agitating for such action left and abandoned their employment for a second time. The respondent issued notice and advisory for those interested in employment to apply but the claimant opted to seek for his terminal dues. Such conduct taken into account, the claimant ended his employment and cannot claim notice pay or compensation.
14. The claim for payment of gratuity is not part of the employment contract.
15. On the claim for 25 leave days, the contract of employment provide for 25 days per year. The claimant worked in July, 2018 to September, 2019. There is no record filed by the employer to demonstrate that the right secured under Section 28 of the *Employment Act*, 2007 on taking annual leave was addressed or payment in lieu thereof. The claim for 25 Accrued leave days as Kshs 66,937.50 is found justified.
16. Accordingly, judgment is hereby entered for the claimant against the respondent for 25 leave days all at Kshs 66,937.50 subject to Section 49(2) of the *Employment Act*, 2007. Each party to bear own cost.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

