



REPUBLIC OF KENYA



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Amalgamated Union of Kenya Metalworks v Power Protection Limited (Cause E596 of 2020) [2023] KEELRC 2246 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2246 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E596 OF 2020
K OCHARO, J
SEPTEMBER 18, 2023**

**BETWEEN
AMALGAMATED UNION OF KENYA METALWORKS CLAIMANT
AND
POWER PROTECTION LIMITED RESPONDENT**

JUDGMENT

Introduction

1. Through a memorandum of claim dated the 4th of September 2020, the Claimant trade union instituted a claim on behalf of the grievants against the Respondent seeking the following reliefs;
 - a. Compensation of Kshs 252,804 to each as damages for unlawful and wrongful termination of employment.
 - b. One-month salary in lieu of notice to each claimant's members [Grievants].
 - c. Payment of salary arrears totaling Kshs 72,149 for both arising from the underpayment of two Grievants' salaries.
 - d. Payment of service gratuity for the two Grievants, 15 days' salary multiplied by the number of years worked by each employee.
 - e. Costs of the suit.
2. The statement of claim was filed contemporaneously with the claimant's witnesses' statements and documents under a list dated the 14th September 2020, documents that the claimant intended to place reliance on, as its documentary evidence.
3. Despite being served with the summons to enter appearance, the Respondent failed to, consequently, vide the directions by this Court of 9th June 2022, the matter had to proceed as an undefended claim.



4. The matter proceeded for formal proof on the 18th of October 2022 with Simon Daniel Muteti, one of the two grievants testifying in support of the Claimant's case.

The Claimant's Case.

5. It was the Claimant's case that at all material times, Mr. Simon Amere and Daniel Simon Mateti, the grievants were its members.
6. The claimant union stated that Simon Daniel Muteti ["the 1st grievant"] was first employed by the Respondent during the year 2011 as a fabricator, while Mr. Simon Amere ["the 2nd Grievant"] was as a cleaner. Later on, the 2nd Grievant was promoted to fabricator, after training by the Respondent.
7. The claimant further stated that on various dates it received complaints from the Grievants that the Respondent, their employer, was paying them salary that was below the minimum amounts set by the law at various times. The complaints prompted it to initiate discussions with the Respondent. The initiative didn't realise any fruit. Consequently, it reported a dispute to the Cabinet Secretary Ministry of Labour, who appointed a Conciliator, to facilitate conciliation on the dispute.
8. During the conciliation process, one Mr. Iqbal Adam sought time to have the matter settled amicably between the Claimant and the Respondent. The Conciliator acceded to the request, adjourned the conciliation proceedings, and gave the parties two weeks to attempt the settlement, but directed them to report back to him after two weeks of the date of adjournment, on the outcome of the deliberations.
9. It was further stated that after the adjournment, the Respondent went silent. The attempts to resolve the dispute failed as a result. Subsequently, Mr. Iqbal, the Respondent's Manager started frustrating the Grievants and threatening them to resign from the Claimant Union.
10. The 1st Grievant was forced to proceed on leave and when he resumed work on the 8th of March 2019, the Respondent issued him with a termination letter. Equally, the 2nd Grievant was served with a termination letter on the same day.
11. The termination of their employment was unfair and unlawful they were dismissed; without cause; on unsubstantiated ground; without any fair and justifiable reason.

The Claimant's Submissions

12. The claimant submitted that the Grievants' woes were as a result them joining it [a trade union] as members. Pursuant to the provisions of Article 36[1] and 41[2] of *the Constitution* of Kenya 2010, read together with Section 4 of the *Labour Relations Act*, 2007, their right to join a union is an undoubted right.
13. The Claimant urged this Court to note that the termination letters didn't put forth any reasons as to why the Grievants were being dismissed from employment, and conclude that therefore the same was without any fair reason. Clearly, the legal burdens under sections 41, 43, and 45 of the *Employment Act* were not discharged. Further that the dismissal offends the provisions of section 46 of the *Employment Act*.
14. As Fabricators, the Grievants, for purposes of Wage Orders fell under the category 'artisans'. According to the relevant General Wage Order, they were entitled to earn a basic salary of Kshs 18,319.50 with a 15% house allowance, therefore, Kshs 2,748 making it a gross salary of Kshs 21,068. Daniel Muteti was earning a gross salary of Kshs 18,165 resulting to an underpayment of Kshs 2,903, while Simon Amere was earning a gross salary of Kshs 17,450 with an underpayment of Kshs 3,618.



15. The claimant urges the court to find that the termination was procedurally and substantively unfair and, consequently grant the grievants, a compensatory award to the extent of 12 months' gross salary.

Analysis and Determination.

16. After careful consideration of the pleadings, evidence on record, and the Claimant's submissions the issues for determination are;
- i. Whether the termination of the Grievants' employment was fair.
 - ii. Whether the Claimant is entitled to the prayers sought?

Whether the termination of the Grievants' employment was fair

17. Where the court is invited, as is in this matter, to interrogate fairness in termination of an employee's employment, the court has to consider procedural and substantive fairness. The two aspects constitute the total unit of fairness, in matters of termination of employment. The absence of both or any one of them deprives the termination of the character of fairness, and the ability to pass the fairness test. As submitted by the Claimant, both the substantive and procedural fairness requirements are statutory. Section 41 and 45[2], of the Act, speak to procedural fairness, whilst Sections 43, 45[2], 45[5] and 47[5] speak to substantive fairness.
18. Section 41 of the Act provides for a mandatory procedure that must be followed by any employer intending to terminate an employee's employment, or summarily dismiss an employee. The fair procedure contemplated under the section has four components, the notification component- the employer must notify the employee of his or her intention, and the grounds arousing the intention, second, the hearing component- the employer has to give the employee an adequate opportunity to prepare and defend himself against the grounds, third, right of accompaniment- the employee shall be allowed to be accompanied to the hearing with a colleague [if the employee is not a member of a trade union] or a union representative [if the employee is a member of a trade union]. Lastly, the consideration component-the employer has to consider the representation[s] by the employee and or the accompanying person, before making a decision.
19. There is no doubt that the employment of the Grievants was terminated vide the letters on the 8th of March 2019. It was the Respondent's duty to prove that prior to the termination, it had adhered to the mandatory statutory procedure set in the section above-stated. It is a duty that it had to discharge. Legal burdens are discharged by the proffering of evidence sufficient and of the requisite standard to enable the discharge. Where a party with the obligation to discharge a legal burden does not tender any evidence before Court, seldom can he be said to have discharged the burden.
20. with the procedural edicts of Section 41 of the *Employment Act*. The Grievants' evidence that the procedure was not followed stood unchallenged.
21. By reason of the premises, I conclude that the termination of the Grievant's employment was procedurally unfair.
22. Section 43 of the Act places a duty on the employer to prove the reasons for the termination of an employee's employment in a dispute as is herein. Section 45 of the Act imposes a further burden on the employer, to prove that the reason[s] for the termination was fair and valid. In the instant case, no reason for termination was given to the employees either in their termination letters or at all. The Respondent didn't discharge the twin legal burdens therefore.



23. Considering the Claimant's pleadings, and evidence on the procedural and substantive fairness of the termination, I am convinced that prima facie the Claimant has demonstrated that the termination lacked fairness. It discharged the burden of proof under section 47[5] of the Act.

Whether the Claimant is entitled to the reliefs sought.

24. The Claimant sought compensation of Kshs. 252,804 as damages for unlawful and wrongful termination. Section 49[1][c] of the *Employment Act*, bestows upon this Court power to grant a compensatory award in favour of an employee[s] who has successfully assailed the employer's decision to terminate his or her employment on the account that the same was unfair. Exercise of the authority is discretionary. The grant of the relief and the extent to which, depends on the circumstances of each case. I have carefully considered the manner in which the Grievants' employment was terminated; the Respondent's failure to adhere to the expected tenets of procedural and substantive fairness; the impression that the Respondent's action was aroused by them joining a union, an act which therefore was an affront on the right to fair labour practices, and association; and the length of time they were in the service of the Respondent, and conclude that they are each entitled to the compensatory award under section 49[1][c] of the *Employment Act*, to the extent of 12 months' gross salary.
25. In my view, the Grievant's employment was terminable by a twenty-eight days' notice, no doubt, none was issued to them prior to the termination of their employment. The employment letters are a testament to this. The termination took effect the same day as the letters. This Court awards the Grievants, one month's salary in lieu of notice, pursuant to the provisions of section 35 as read with section 36 of the *Employment Act*.
26. The Claimant further claimed for payment of arrears totaling Kshs 72,149/-, an amount that it alleges was the cumulative salary underpayment to the Grievants. In my view, this claim is in nature a special damage claim. It required to be specifically proved. From the material placed before this Court, it is difficult to ascertain the period of the alleged underpayments, and the extent of the monthly underpayments considering the fact that General Wage Orders, keep varying from time to time. The Claim under this head has not been specifically proved, I reject the same.
27. The Claimant sought for service pay at the rate of 15 days' salary for each year worked by the Grievants. Section 35 of the *Employment Act* makes this an entitlement to an employee whose employment has been terminated. By reason of the premise, I grant the 1st Grievant service pay of Kshs. 72,500 [18,125x0.5 x8] and the 2nd Grievant, KShs. 69,800 [17,450 x0.5x8].
28. In the upshot, judgment is hereby entered in favor of the Claimant in the following terms;
- a. A declaration that the termination of the grievants' employment was procedurally and substantively unfair.
 - b. Compensation pursuant to section 49[1][c] of the *Employment Act* being 12 months gross salary, Kshs. 217,500 [12 x 18,125] to the 1st Grievant [Daniel Muteti], and KShs. 209,400 [12x17,450] to the 2nd Grievant.
 - c. One month's salary in lieu of notice, KShs 18,125 for the 1st Grievant, and KShs. 17,450 for the 2nd Grievant.
 - d. Service pay, KShs.72,500 for the 1st Grievant, and KShs. 69,800 for the 2nd Grievant.
 - e. Costs of this suit.



- f. Interest on the sums awarded above at court rates from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER, 2023.

OCHARO KEBIRA

JUDGE

In presence of:

Mr. Ondiege for the Claimant

No appearance for Respondent

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 March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

