



REPUBLIC OF KENYA



KENYA LAW
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Kenya Engineering Workers Union v Consulting & another (Cause E019 of 2022) [2023] KEELRC 2548 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2548 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E019 OF 2022
CN BAARI, J
OCTOBER 19, 2023

BETWEEN

KENYA ENGINEERING WORKERS UNION CLAIMANT

AND

MORALS BUSINESS CONSULTING 1ST RESPONDENT

ROCK INDUSTRIES LIMITED 2ND RESPONDENT

JUDGMENT

1. This suit was lodged through a Memorandum of Claim dated 28th March, 2022, and filed on 4th April, 2022. The Claimant seeks the following reliefs on behalf of her members, the grievants herein:
 - i. A declaration that the redundancy of the grievants is unfair and/or unprocedural and should be declared null and void.
 - ii. An order against the Respondent reinstating the Employees/grievants without loss of any benefit.
 - iii. In the alternative, the Honourable Court issues an order against the Respondents to pay the grievants one month's salary in lieu of notice, severance pay of 15 days per every completed year of service, accrued leaves, house allowance arrears and 12 months' salary to each grievant as compensation.
 - iv. Interest at the Court's rate on the above prayer from the date of filing the suit.
 - v. The Honourable Court issues an order for the Respondents to share the burden of payment of terminal dues herein.
 - vi. The Respondents to issue the Employees with certificates of service.
 - vii. The costs of the suit be borne by the Respondents.



2. The 1st Respondent entered appearance on 25th July, 2022, and subsequently filed a response to the Claimant's claim dated 29th November, 2022.
3. The Claimant's case was heard on 25th January, 2023, when one Alloyce Obunga testified in support of Claimant's claim. He adopted his witness statement and produced documents filed in support of the claim.
4. The 1st Respondent's case was first heard on 31st January, 2023, and again on 27th June, 2023, after the 1st Respondent made an application to file more documents and recall his witness. The 1st Respondent presented a Mr. Joash Okonjo to testify on its behalf. He adopted his witness statement and produced documents filed in support of the 1st Respondent's case.
5. The 2nd Respondent did not participate in the suit.
6. Submissions were filed for both parties.

The Claimant's Case

7. The Claimant's case is that its members namely; Alloyce Obunga, Frankline Muhando, Kelvine Owino, Lawrence Okara, Ronald Ochieng, Felix Omondi and Juma Gilbert Abudi were unfairly and unprocedurally dismissed from employment by the Respondents.
8. It is the Claimant's further case that the employees/grievants were outsourced to the 2nd Respondent by the 1st Respondent, and were each earning Kshs. 25,000 per month.
9. The Claimant states that the grievants were verbally engaged by the 2nd Respondent as barbed wire machine operators.
10. The Claimant states that on 3rd May, 2021, the grievants joined the Claimant trade union by signing form 'S', which was then forwarded to the Respondents.
11. The Claimant states that the grievants reported to work on 24th May, 2021, but were informed that their services were no longer needed by the 2nd Respondent.
12. The Claimant states that the grievants were dismissed verbally and without notice by the 2nd Respondent, and not given any reasons for their dismissal, but suspect it is because they joined a trade union.
13. The Claimant states that it served the 1st Respondent with a demand letter dated 28th May, 2021, demanding the reinstatement of the grievants, but their efforts were futile.
14. The Claimant's witness in his oral testimony, denied that they were casual employees, and nor had they deserted duty as was suggested by the Respondent.
15. It is CW1 testimony that no communication was made to them, informing them that there was no work due to the Covid pandemic.
16. CW1 further told this Court on cross-examination that their employer was the 1st Respondent, but which deployed them to the service of the 2nd Respondent.

The 1st Respondent's Case

17. It is the 1st Respondent's case that the grievants were not dismissed, but were instead temporarily stopped from working due to a shortage of raw materials, and there was a drawback in staff as per the Ministry of Health COVID-19 protocols.



18. The Respondent states that the grievants refused to report back to work when it resumed, and were therefore summarily dismissed.
19. RW1 told the Court that the 1st Respondent, and the Claimant do not have a recognition agreement. It is his further testimony that he engaged the grievants in 2021 and paid them in cash since they had not completed their probation period.
20. RW1 denies that the grievants earned Kshs. 25,000 per month and states that they worked on piece rate and were paid according to the amount of work done.
21. It is RW1 testimony that the grievants were paid every 2 weeks in cash, and that they signed for the payment and the payment schedules were produced in evidence before court.
22. RW1 further told this Court that the grievants were not declared redundant, but were required to report back to work and were called back to work but that they failed to report.
23. It is his testimony that when the grievants did not return to work they were verbally dismissed.
24. It is RW1 evidence that the 1st Respondent did not pay the grievants any benefits since they were not present nor did it issue them with certificates of service for similar reason.
25. RW1 states that the 1st Respondent did not give the grievants letters of dismissal nor inform the labour office because they did not see the need.
26. It is the 1st Respondent's prayer that the Claimant's claim be dismissed with costs.

The Claimant's submissions

27. It is submitted for the Claimant that the grievants were locked out through the 2nd Respondent's management, and that the 1st Respondent reaffirmed the lockout/redundancy after discovering that the grievants joined the Claimant union and check off forms forwarded with a letter asking for enforcement of Section 20 of the Employment Act, 2007, dated 20/05/2021.
28. It is submitted that the grievants were paid a basic salary of Kshs. 25,000 per month without house allowance as shown by the NSSF statements and the Conciliator's report.
29. The Claimant submits that the 1st Respondent is in violation of Articles 36, 41 and 47 of the Constitution and Section 20 of the Employment Act, 2007.
30. The Claimant submits further that it complied with Section 62 of the Labour Relations Act, by reporting a trade dispute to the Ministry of Labour, but the 1st Respondent did not adhere to the recommendations of the Conciliator.

The 1st Respondent's Submissions

31. The 1st Respondent submits that the Claimant has not demonstrated that they were unfairly terminated from employment, rather they abandoned and absconded their duty, which forced the 1st Respondent to terminate their services.
32. It is the 1st Respondent's submission that the Claimant has not proved its case on a balance of probability, and reiterates that the Employees were not dismissed from employment. It is its further submission that the grievants had barely worked for 3 months.
33. It is the 1st Respondent's submission that it was not served with a demand letter, hence the Claimant should be condemned to bear the costs of the suit.



Analysis and Determination

34. I have considered the pleadings, the witnesses' testimonies and the rival submissions. The issues that arise for determination are:
- i. Whether the grievants were unfairly terminated
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Who should bear the costs of the suit.

Whether the grievants were unfairly terminated

35. The Claimant's case is that the grievants, who are its members were verbally dismissed from the service of the 1st Respondent without notice, and were not given any reason (s) for their dismissal.
36. It is the Claimant's further assertion that the dismissal of the grievants came hot on the heels of their joining the Claimant union, and thus attributes their dismissal to joining the union.
37. The Claimant's witness (CW1) told the Court that they were declared redundant having simply been told one morning that the 2nd Respondent did not have any more work for them.
38. The 1st Respondent on its part, stated that the grievants were temporarily stopped from working due to the Covid.19 pandemic and for lack of raw materials. The 1st Respondent further argued that the grievants then absconded duty and did not return when asked to, resulting in their summary dismissal for absconding duty.
39. RW1 told the Court that the 1st Respondent did not issue the grievants with dismissal letters and certificates of service because they simply did not return to work. The issue is whether the grievants' summary dismissal is unfair in the circumstances.
40. In *William Gituma v RAA Limited* [2020] eKLR, the court cited the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, and held that it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is therefore not enough for an employer to simply state that an employee has deserted duty.
41. Further, Abuodha J in *Simon Mbiti Mbane v Inter Security Services Ltd* [2018] eKLR had this to say on desertion of duty: -
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
42. The 1st Respondent outsourced its employees to the 2nd Respondent. It is not clear on what terms the grievants served in the service of the 2nd Respondent, and for reason that the direct employer of the grievants is the 1st Respondent, and which is a fact the 1st Respondent did not dispute, this Court will not interest itself in the kind of relationship the 1st Respondent had with the 2nd Respondent. The buck stops with the 1st Respondent.
43. Further, when the 2nd Respondent abruptly stops the services of the 1st Respondent's employees, and the 1st Respondent does nothing to within the law separate with the grievants, if indeed there was no more work for them, then the 1st Respondent is solely to bear the consequences.



44. Nothing shows that the 1st Respondent informed the grievants of the shortage of raw materials or the need to work in shifts on account of the Covid.19 pandemic. There would certainly not have been away for the grievants to know that they were still employed in the absence of communication on the prevailing circumstances, including a work roster to inform them when next they are expected to be on duty.
45. It is also telling that the grievants were dismissed shortly after joining the membership of the Claimant union, and the union requiring the 1st Respondent to make deductions in respect of union dues from the grievants' salaries. This in my view confirms their suspicion that their dismissal was for reason of taking up membership in the Claimant's union.
46. The grievants were not informed of the reasons for their termination contrary to the express provisions of Sections 43, 45 and 47(5) of the *employment Act*. Further, they or their union were not given notice of redundancy, if indeed there was no more work for them in violation of Section 40 of the *Employment Act*. (See *Kenya Union of Journalists and Allied Workers v. Nation Media Group*, (2013) eKLR).
47. Finally, the 1st Respondent made no effort to conduct the grievants if it believed the assertion that they had absconded duty. (See *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR) so that whichever way one looks at the manner of separation between the grievants and the 1st Respondent, nothing points to a fair separation, either by the process adopted or the basis for the dismissal.
48. This analysis further confirms the Claimant's assertion that the dismissal of the grievants violated articles 36, 41 and 47 of *the Constitution*, in addition to the already cited provisions of the *Employment Act*.
49. In the final analysis, I find and hold that the grievants herein, were unfairly dismissed from the service of the 1st Respondent.

Whether the Claimant is entitled to the reliefs sought

50. The first relief that the Claimant seeks is the reinstatement of the grievants. Reinstatement or re-engagement, is a remedy available under section 49 (3) of the *Employment Act*. Further, Section 12(3) (vii) of the *Employment and Labour Relations Court Act* states thus on reinstatement:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

.....

- (vii) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law”

In *Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others* [2014] eKLR the Court of Appeal held that the factors to be taken into account when considering reinstatement are the ones set out under SThe Respondent did not file any response or submissions nor did it participate in these proceedings despite being served.

51. Section 49(4) of the *Employment Act*, including the wishes and expectation of the employee; the common law principle that there should be no order of specific performance in a contract of service, except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment.



52. The 1st Respondent contended that reinstatement is not practicable because the trust between it and the grievant has irretrievably broken down and the court cannot force the parties mend the broken relationship.
53. Considering the circumstances of this case, no exceptional circumstances have been shown to support a case for reinstatement. It is simply not practicable to reinstate the grievants without confirmation that the 2nd Respondent, in whose service the grievants were deployed, has any work for them, or without evidence to show that the 1st Respondent still has a valid contract to allow it deploy workers to the service of the 2nd Respondent, or to any other entity for that matter.
54. The claim for reinstatement fails on this account and is dismissed.
55. On the claim for one month salary in lieu of notice, there was clearly no notice issued to the grievants and the 1st Respondent's witness confirmed as much. The claim succeeds and the grievants are each hereby awarded one-month salary in lieu of notice.
56. In regard to the claim for severance pay, this claim is an available remedy for employees who are declared redundant. The circumstances under which the grievants were dismissed point to redundancy and not desertion of duty as alleged by the Respondents.
57. Low supply of raw materials and Covid.19 are grounds that would justify termination by redundancy, which is termination for no wrong on the part of the employee.
58. The 1st Respondent's position is that the grievants were in their service for barely three (3) months, while the Claimant's assertion is that they served the Respondents from the year 2018. The NSSF statements produced before court show that the grievants were in the service of the Respondents from as far back as the year 2015.
59. I thus return that the grievants are entitled to payment of severance pay and are hereby awarded as tabulated in the memorandum of claim.
60. The dismissal of the grievants has been found to be unfair and which entitles them to compensation. The grievants were outsourced to serve the 2nd Respondent. The 1st Respondent did not in my view have control of the business of the 2nd Respondent as to guarantee the grievants continued service with the 2nd Respondent.
61. In the circumstances, the Claimant has not proved a case for maximum compensation, and I deem an award of one (1) month salary sufficient compensation for their unfair dismissal.
62. Though the Claimant did not produce any evidence to show that the grievants were owed on account of house allowance and accrued leave, the obligation to keep employee records is one that the *Employment Act* places on the employer's door step.
63. The 1st Respondent did not show that either it paid house allowances or that the salary paid was consolidated.
64. This entitles the grievants to payment of house allowances and accrued leave. House allowance and accrued leave are payable monthly and thus amount to what Section 90 of the *Employment Act* refers to as continuing injury. The claim in respect of house allowances and accrued leave, are thus only valid for one year by dint of the limitation period provided under Section 90.
65. In the premise, the grievants are hereby awarded house allowances and accrued leave for only one year. The rest of the claims in this respect are statute barred.



66. I conclude by holding that the Claimant's suit is merited and orders granted as follows: -

- i. A declaration that the grievants' dismissal is unfair.
- ii. Payment of one month's salary in lieu of notice.
- iii. Award of severance pay.
- iv. One-month salary as compensation for the unfair dismissal.
- v. Payment of one-year house allowances and accrued leave.
- vi. Costs of the suit and interest until payment in full.

67. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Makale present for the Claimant

Mr. Lugano present for the Respondent

Ms.Christine Omolo & Erwin– C/As

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