



Kenya Building Construction Timber Furniture Industries Employees Union v Radheshyam Ltd (Cause E888 of 2021) [2023] KEELRC 3116 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E888 OF 2021
DKN MARETE, J
NOVEMBER 22, 2023**

BETWEEN
**KENYA BUILDING CONSTRUCTION TIMBER FURNITURE INDUSTRIES
EMPLOYEES UNION CLAIMANT**
AND
RADHESHYAM LTD RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Claim dated 22nd October, 2021. The issue in dispute is herein cited as;

Wrongful termination and under payment of six employees.
2. The Respondent in a statement of Response dated 23rd March, 2022 denies the claim and pray that this be dismissed with costs.
3. The claimant's case is that at all material times to his suit, the grievants were employees of the Respondent and members of the claimant.
4. The claimant's further case is that since the parties do not have a negotiated CBA, the wages schedule applicable herein is the Building and Construction Wages Order of 2004 read through with wage order of 2013.
5. The claimant's other case is that the six (6) grievants were hired by the Respondent as heavy commercial drivers on diverse dates as hereunder;



Name	Date of Employment	Assignment	Rates of Payment per Month	Date of Termination
Enos Ngunza Mbithi	April 2012	Driver	Ksh.30,000/=	29 th Oct 2019
Josphat Musyoka	May 2004	Driver	Ksh.30,000/=	29 th Oct 2019
Carlos Kazungu Muramba	April 2014	Driver	Ksh.30,000/=	4 th Nov2019
Alfred Lilunya	Oct 2013	Driver	Ksh.30,000/=	18 th Oct 2019
Morton Majani	June 2012	Driver	Ksh.30,000/=	13 th Sept 2019
Gideon Njuguna Kinyara	May 2017	Driver	Kshs.30,000/=	10 th Nov 2019

6. The Claimant's avers that on the month of September the first grievant, Morton Majani was declared redundant, while Enos Nguza, Josephat Musyoka and Alfred Khayumbi followed in the month of October, while Carlos Kazungu and Gideon Njuguna were declared redundant in the month of November. All these redundancy fall court of the right procedure under the Employment Act, 2007. They were never paid their terminals benefits despite the demand.
7. It is the claimant's further averment that attempts at conciliation would not bear fruits due to the uncooperative nature of the Respondent even at the Minister's conciliatory stage.
8. She claims thus;
1. Enos Ngunza Mbithi
Total Kshs. 243,763.00
 2. Josphat Musyoka
Total Kshs.390,281.00
 3. Carlos Kazungu
Total Kshs. 211,435.00
 4. Alfred Lilunya
Total Kshs. 10,666/=
 5. Morton Majani
Total Kshs.243,743.00
 6. Gideon Njuguna Kinyua
Total Kshs.1,449,785.00
9. She prays;



- a. A declaration that the dismissal of the grievant was most unfair and unlawful.
 - b. KSHS. 1,449,785/= being terminal benefits for the grievant.
 - c. Compensation for unlawful loss of the employment by the grievant.
 - d. Cost of the suit.
10. The Respondent's case is that the grievants were not members of the Claimant Union and further there has never been a recognition or attempt thereof inter partes.
 11. It is the Respondent's case that the grievants were contract employees engaged on various dates. Their terms of service were inter alia to be paid per trip made as provided by the contracts executed by the parties.
 12. The Respondent denies termination and posits that the grievants left or abandoned their service contracts variously due to their default and on performance, his conduct other failures. This cannot be visited on herself.
 13. The issues for determination therefore are;
 1. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
 14. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in a written submission dated 18th September, 2023 brings a case of unfair termination of the employment of the grievants. It is her further case that the Respondent has not adduced any evidence in support of lawful termination of employment through disciplinary process as envisaged by section 41 – 45 of [Employment Act](#), 2007.
 15. The Respondent submits a lawful termination of employment. This was not on grounds of redundancy as is submitted by the Claimant but by a termination of their contracts through their own conduct. The periodic contracts were abused by the grievants as follows;
 - i. Syphoning and theft of fuel by the 1st grievant;
 - ii. Stealing 80 litres of fuel and purportedly collecting on behalf of the Respondent Kshs.150,000/= by the 2nd grievant.
 - iii. Leaving the vehicle at a customer's site and taking up employment with the said customer by the 3rd grievant.
 - iv. Joining employment of the Respondent's sister company, Silverstone, by the 4th grievant.
 - v. Stealing 50 litres of fuel and leaving the vehicle to another driver by the 5th grievant, and
 - vi. Stealing excavation murrans from a site by the 6th grievant.
 16. The Respondent therefore distinctly brings out a case of lawful termination of employment both in her written submission, pleading and evidence.
 17. This is illustrated by the witness statement of Joseph Odhiambo, the Respondent's witness who is explicit on the terms and eventualities of a employment of the grievants on term contracts. This has



not been repudiated by the Claimant. The Respondent's case therefore remains undisturbed and not countered.

18. The Respondent's case overwhelms that of the Claimant on preponderances of evidence and balance of probabilities. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.
19. The 2nd issue for determination whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he becomes disentitled to the relief sought.
20. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances

Miss Chege for the Claimant Union.

Mr. Chacha holding brief for Purity Makori instructed by Mogeni & Co. Advocates for the Respondent.

