



Amalgamated Union of Kenya Metal Workers v JB Motors Limited (Employment and Labour Relations Cause E934 of 2021) [2023] KEELRC 2848 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2848 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E934 OF 2021
BOM MANANI, J
NOVEMBER 9, 2023

BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
JB MOTORS LIMITED RESPONDENT

JUDGMENT

1. This claim encompasses a series of causes of action. It raises the following disputes: -
 - a. A dispute relating to recognition of the Claimant by the Respondent pursuant to the provisions of section 54 of the [Labour Relations Act](#).
 - b. A dispute relating to collection and remittance of union dues from the Respondent's employees who are members of the Claimant.
 - c. A dispute relating to alleged declaration of redundancy of five (5) employees of the Respondent and who are members of the Claimant.
 - d. A dispute relating to the alleged unfair termination of the employment of Ephraim Barasa, an employee of the Respondent and a member of the Claimant.
2. The Claimant's case is that it recruited twenty-five (25) employees of the Respondent as its members. The Claimant asserts that it notified the Respondent of this development and issued the Respondent with a notice to commence deduction and remittance of union dues in respect of the twenty-five (25) employees. The Claimant contends that despite this notice, the Respondent did not implement the deductions aforesaid.
3. The Claimant states that the twenty-five (25) employees recruited by it comprised seventy eight percent (78%) of the Respondent's workforce. As a result, the Claimant asserts that it had attained the 51%



threshold for recognition under section 54 of the *Labour Relations Act*. It is the Claimant's case that despite meeting this threshold, the Respondent has refused to grant it recognition.

4. The Claimant avers that in a bid to disrupt the aforesaid threshold, the Respondent declared five (5) of the Claimant's members redundant. It is the Claimant's case that this redundancy was part of a wider scheme by the Respondent to deprive the Claimant of the simple majority membership that is required for recognition.
5. The Claimant also avers that the Respondent unfairly terminated the services of Ephraim Baraza around 11th December 2020. It is the Claimant's case that efforts to have the Respondent rescind its decision in this respect hit a brick wall.
6. As a result of the matters aforesaid, the Claimant avers that it reported a trade dispute to the Ministry of Labour. The Claimant avers that despite this action, the Respondent failed to resolve the matter thus necessitating this court action.
7. On its part, the Respondent has denied the Claimant's assertions. The Respondent denies having deliberately refused to accord the Claimant recognition. It is the Respondent's case that the Claimant has never forwarded a recognition agreement to it for consideration. Further, the Respondent denies having received a notice to make deductions of union dues from some of its employees for the benefit of the Claimant.
8. The Respondent contends that although it had issued redundancy notices to the five (5) employees in question, it has since withdrawn the notices. As a result, the issue of redundancy has been closed.
9. In respect of Ephraim Baraza, the Respondent denies having sent the said employee away. The Respondent avers that this employee absconded from duty on 11th December 2020. It is the Respondent's case that efforts to get the employee to resume duty including through the Claimant have proved futile. However, the Respondent avers that the employee's position remains vacant and that he is free to resume duty when he elects.

Issues for Determination

10. From the pleadings on record, the following are the issues for determination: -
 - a. Whether the Claimant is entitled to recognition by the Respondent.
 - b. Whether the Respondent is obligated to implement deduction of union dues from the Claimant's members.
 - c. Whether Ephraim Baraza's contract of service was unlawfully terminated by the Respondent.
 - d. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

11. Although the dispute included a claim for unfair redundancy of five (5) employees, the Respondent indicated through its defense that the impugned redundancy notices were withdrawn. Importantly, this claim was not pursued by the Claimant. It is therefore deemed as having been abandoned following the withdrawal of the contested redundancy notices.
12. On issues numbers one (1) and two (2) above, these were distinct claims by the Claimant in its capacity as a Trade Union. By these claims, the Claimant averred that the Respondent had denied it recognition and refused to implement deduction of Trade Union dues for the benefit of the Claimant.



13. In order to establish these two claims, the Claimant was required to provide evidence to substantiate the averments in its pleadings. It was expected that the Claimant would call one or more of its representatives to speak to these matters. However, this was not done. None of the Claimant's representatives wrote a witness statement on the two issues or attended court to testify on them.
14. The Claimant called only Ephraim Baraza who spoke to the issue of his alleged unlawful termination from employment. This individual, being an employee of the Respondent and not an official of the Claimant could not speak to the question of recognition of the Claimant by the Respondent or failure by the Respondent to deduct and remit union dues to the Claimant.
15. In effect, although the Claimant raised the two issues of recognition and failure to deduct and remit union dues in its pleadings, it failed to call a competent witness to speak to the two matters. During cross examination of the defense witness, he denied that the Claimant had submitted a recognition agreement to the Respondent which it had failed to sign. The witness further denied that the Claimant had submitted a request for deduction of Union dues which the Respondent had failed to honour.
16. The Claimant failed to adduce evidence to establish its case in respect of the two matters. The documents that were produced by Ephraim Baraza who was incompetent to speak to the two issues were not supported by testimony by a representative of the Claimant. In the premises, these two claims must fail for want of proof.
17. The next issue relates to whether Ephraim Baraza's contract of service was unlawfully terminated by the Respondent. Section 47 of the *Employment Act* places the burden of establishing the unlawfulness of the decision to terminate a contract of service on the employee. At the same time, this provision of statute places the burden of justifying the decision to terminate a contract of service on the employer.
18. In effect, the employee must provide preliminary evidence to establish the fact that there has been termination of his contract of service and that the decision to terminate the contract is, prima facie, irregular. It is only after this has happened that the employer is required to justify the decision to terminate the contract. Thus, whilst the overall burden of justifying the decision to end an employment relation rest with the employer, the employee is not entirely absolved of the obligation to make a prima facie case in support of his claim for unfair termination.
19. In the Statement of Claim, it was alleged that Ephraim Baraza was released from employment without the benefit of a hearing. However, the exact date of termination of this employee's contract of service was not given.
20. The pleadings filed by the Claimant do not suggest that Ephraim Barasa's case was one of irregular redundancy. Yet, in evidence, the witness (Ephraim Barasa) tried to paint the picture of having been a victim of unfair redundancy. In effect, he was attempting to prove a case that was not anchored on the Claimant's pleadings.
21. From the documents that were tendered in evidence, it is evident that the issue of Ephraim's termination from employment was reported to the Ministry of Labour as a trade dispute. The report was made by the Claimant through its letter of 23rd December 2020.
22. There is evidence that the Ministry acknowledged receipt of the dispute via its letter of 26th January 2021. In the letter, the Ministry asked the parties to file their representations on the dispute.
23. Before the Ministry wrote its letter of 26th January 2021 asking the parties to make their representations on the matter, the Respondent had already done a letter dated 18th January 2021 to the Ministry on the



issue. The letter was apparently triggered by the Claimant's letter to the Ministry dated 23rd December 2020.

24. The record shows that the Respondent's letter to the Ministry dated 18th January 2021 was copied to the Claimant. The record further shows that the Claimant received a copy of the said letter on 19th January 2021 and acknowledged it by affixing its stamp on the return copy.
25. In the letter, the Respondent denied having terminated the services of Ephraim. The Respondent stated that it is Ephraim who absconded from duty on 11th December 2020 and efforts to get to him had proved futile. The Respondent stated that Ephraim's position was still vacant and he was free to resume duty.
26. The Respondent has maintained this position throughout the dispute resolution process. It is worth noting that the position by the Respondent that it had not terminated the services of Ephraim was made known to the Claimant just a month after the employee had left employment.
27. In his testimony, Ephraim asserted that it is untrue that the Respondent had expressed willingness to have him resume duty. Yet, the Respondent's letter dated 18th January 2021 and which was received by the Claimant on behalf of Ephraim explicitly indicates that the employee was free to resume duty.
28. Having regard to the foregoing, I am convinced that the Respondent did not terminate the services of Ephraim Baraza. Further, I am convinced that despite efforts to have him resume duty, the said employee has deliberately chosen to keep off duty for reasons that are best known to him. Since the Respondent has expressed willingness to have him back, I believe that the best order that I can issue in the circumstances is to require the parties to resume their active employment relation.

Determination

29. The upshot is that I issue the following orders in the cause:-
 - a. The Claimant's prayers that the Respondent be compelled to issue it with recognition and that the Respondent deducts and remits union dues to the Claimant in respect of the Claimant's members fails for want of proof.
 - b. The Respondent is ordered to allow Ephraim Baraza to resume duty immediately as this appears to be the desire of both Ephraim Baraza and the Respondent. However, since there is no evidence that the Respondent prevented the said Ephraim Baraza from working from January 2021, I decline to order the Respondent to pay him salary for the period that he was not at work.
 - c. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI

