



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E016 OF 2021

(An appeal from the judgment and the decree of Hon. Lesootia Saitabau,

Principal Magistrate in CMC Employment Case No. 940 of 2019

(Consolidated with 58 other Causes) and given on 30.06.2021)

BERNARD ONGETA MBURA.....APPELLANT

- VERSUS -

SIMBA APPARELS (EPZ) LIMITED.....RESPONDENT

- AND -

TAILORS AND TEXTILE WORKERS UNION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The appellant filed a memorandum of appeal on 16.08.2021 through Obinju Rondo & Company LLP. The appeal is against the whole judgment delivered by the trial Court on 30.06.2021. The grounds of appeal are that the learned trial Magistrate erred in law and in fact as follows:

- 1) By finding that the appellant's conduct was that they no longer intended to be bound by the contract of employment and therefore they unilaterally terminated the same.
- 2) By finding that there was sufficient evidence that the appellants refused to honour the return to work formula and the appellant deliberately absented themselves from work.
- 3) By finding that the notice dated 13.09.2019 was written by an unknown person from the respondent's management and therefore that the notice is not credible and having been disputed, the Court cannot rely on the same.
- 4) By finding that the appellants were not unfairly dismissed from their employment, they unilaterally terminated their employment and they are not entitled to any of the reliefs sought in the memorandum of claim.

The appellant prayed for orders:

- 1) The appeal be allowed with costs.
- 2) The judgment dated 30.06.2021 be set aside in its entirety and substituted with orders that the reliefs

The background to the appeal is as follows. The appellant filed the memorandum of claim in the trial Court on 01.11.2019 through Obinju Rondo & Company Advocates. The amended claim was filed on 16.09.2020. The appellant pleaded that the respondent employed him sometimes in 2017 to work as a machine operator on a one-year renewable contract. The last gross monthly salary was Kshs. 19, 188.64 per month. Further, on 13.09.2019 the respondent issued a notice dated 13.09.2019 summarily terminating the employment of the appellant and other employees without any plausible justification. The employees were summarily dismissed *en-masse*. The claimant alleged that the dismissal was unfair and without justifiable cause as was contrary to sections 35, 41, 43, 45, and 49 of the Employment Act, 2007 and, no terminal and contractual dues were paid. The claimant claimed for compensation for unlawful termination or constructive dismissal, accrued

leave days, one month's salary in lieu of termination notice, and gratuity pay per the collective bargain agreement (CBA) dated 21.06.2018. The claim was particularised as follows:

- a) One-month's salary in lieu of termination notice Kshs. 19, 188.64.
- b) Damages for unlawful or unfair termination $12 \times 19, 188.64 =$ Kshs. 230, 263.68.
- c) Accrued leave days $19, 188.64 \times 25 =$ Kshs.15, 990.55.
- d) Gratuity pay $19, 188.64/30 \times 15 \times 3 =$ Kshs. 28, 782.96.
- e) Total Kshs. 294, 225.83.

The claimant prayed for judgment against the respondent for a declaration that the claimant was unlawfully and unfairly terminated from employment; a declaration that the unfair termination was by way of constructive dismissal, payment of Kshs. 294, 225.83, costs of the suit, interest at commercial rates, and any other relief as the court may deem just.

The respondent filed the memorandum of response on 13.01.2020 through Opolo Akinyi Advocates for Federation of Kenya Employers. The respondent admitted that the claimant was its employee at all material time. The respondent further pleaded as follows:

- a) On 09.09.2019 some of its 2000 employees went on strike. The claimant was one of them. The reason for the strike was a demand for election of a position of shop steward despite that it was working hours and another shop steward had been elected previously by the workers and was lawfully in office. The respondent unsuccessfully requested the striking workers to calm down and to resume work. The respondent sought intervention of a labour officer and the County Labour Officer convened a meeting at the respondent's premises on 10.09.2019. Those present were workers' representatives, the claimant's union officials, and the respondent's representatives. It was agreed that the workers resume work on 11.09.2019 and the grievances discussed at the labour office on 17.09.2019 at 7.30am. The claimant was amongst the workers who failed to resume work as had been agreed and the respondent informed the Labour Officer for guidance.
- b) Another meeting was convened at the labour office on 12.09.2019 attended by the representatives for workers, union and the respondent. It was agreed and resolved that the workers resume duty on 13.09.2019. The claimant and some other workers refused to report at work as had been agreed and the respondent suffered losses in millions of shillings.
- c) Another meeting was held on 16.09.2019 convened by the Labour Officer and the representatives of the union and the respondent attended. It was agreed and resolved that the claimant having disregarded two return to work formula he was deemed to have exercised the right to terminate his contract of employment; and the respondent had the right to advertise for the positions considering the nature of work coupled with the fact that she had pending orders from clients awaiting delivery. The respondent issued a notice on 19.09.2019 declaring the relevant vacancies and notifying that the former employees like the claimant were free to apply for consideration. Thus, 1600 employees who applied resumed employment but the claimant and others who failed to apply and stayed away now alleged unfair termination.
- d) Further, the claimant was serving on a fixed term contract for a period of one year at a consolidated monthly salary of Kshs.17, 353.99. Further if the respondent was keen to terminate the claimant the same would have been on 09.09.2019 when the unprotected strike commenced. The claimant cannot allege termination and yet declined to reapply for reemployment as was agreed in meeting between the Labour Officer, the respondent and the union.
- e) The respondent urged that the claimant unilaterally terminated the contract when he refused to resume duty after an opportunity and resolution with his union and workers' representatives to do so and is not entitled to notice pay. He was never terminated and he cannot allege unfair termination. The leave days due were paid to him. Clause 29 of CBA did not entitle him to gratuity pay having not served a full year as required under the clause. Further, it was an express term of the fixed term contract that each was distinct and no benefit from one ending contract could be carried over to the next.
- f) The respondent counterclaimed for one-month notice pay, 8 days' work stoppage USD 120, 000, 10 days restart up of production USD 75, 000, and garment air freight loss occasioned by failure to meet shipment deadline USD 25, 707.83.
- g) The claimant prayed for dismissal of the memorandum of claim with costs.

The claimant filed the response to memorandum of response and response to counterclaim dated 07.10.2020. The claimant urged as follows:

- a) It was true that the workers had recently elected a shop steward but who was not effective in representing workers or had been compromised by the respondent and workers wanted fresh elections. The 4 days' strike took place because the respondent ignored the request to facilitate the fresh elections.
- b) Some criminal elements had infiltrated the work place and who made it impossible for the claimant to resume work per the return to work resolutions.
- c) The claimants reported at work on 13.09.2019 in honour of the return to work formula but biometric machines were not present to capture their presence. By the notice dated 13.09.2019 the claimants were terminated from employment. The termination was in breach of policy No. 9 of the respondent's Human Resource Policies and Procedures Manual and section 41 of the Employment Act,

2007.

d) The meeting of 16.09.2019 was held after the termination on 13.09.2019 and in absence of the claimants or claimants' representatives. The memo of 19.09.2019 sought to re-advertise the jobs shows the constructive dismissal and bad faith on the part of the respondent.

e) The union connived and worked in cohorts with the respondent to dismiss claimants from employment.

f) The counterclaim disclosed no cause of action against the claimants therein. The respondent was the architect of its own losses. The claimant prayed that the counterclaim be dismissed and judgment entered per the memorandum of claim.

The union applied and was enjoined as an interested party but did not file any papers or participate in the trial and has not participated in the appeal proceedings.

The appellant and the respondent filed submissions on the appeal and by consent highlighting of the submissions was dispensed with. The appellant filed submissions on 19.01.2022 through Obinju Rondo & Company Advocates, and, the respondent filed on 03.02.2022 through Opolo and Opolo Associates, Advocates. The Court has considered the grounds of appeal and the all material on record. This being a first appeal, the Court's obligations include revising the evidence before the trial Court and where appropriate, re-evaluating and reanalysing the evidence and arriving at its own conclusions as may be appropriate, if, the trial Court is found to have misdirected itself in principle.

The **1st issue** for determination is whether the trial Court erred in fact and law by finding that the appellant's conduct was that they no longer intended to be bound by the contract of employment and therefore they unilaterally terminated the same, and, whether it erred in fact and law by finding that there was sufficient evidence that the appellants refused to honour the return to work formula and the appellant deliberately absented themselves from work. It is submitted for the appellant that indeed the claimant and other employees went on strike on 09.09.2019 on account that they sought fresh elections for the shop steward despite there being a recently elected shop steward but whom the workers said was ineffective or compromised by the respondent. It is further submitted that a return to work formula was executed on 10.09.2019 and on 11.09.2019 the workers returned to work. It is further submitted that however, on 11.09.2019 there were criminal elements at the workplace who assaulted the workers and therefore the workers resumed strike. It is further submitted that on 12.09.2019 another return to work formula was executed and the condition therein was that the workers would return to work only if the respondent provided security in the factory. Further on 13.09.2019 the workers resumed but there was insecurity and strike occurred again and the workers were vacated by the police. It is submitted that the respondent locked the workers out despite their wanting their jobs back. It is submitted that the respondent ought to have issued a notice and a hearing prior to terminating the appellant on account of refusal to resume work as per section 41 of the Employment Act, 2007. It is therefore submitted that the termination was unfair when at the meeting of 16.09.2019 the respondent met with the union representatives and decided to re-advertise the jobs. The appeal should therefore succeed on the two grounds.

For the respondent it is submitted that the appellant's action of refusing to honour the two return to work formula or agreements amounted to unilateral termination of their contract and the trial Court's findings were correct.

In making a finding that the appellant unilaterally terminated the contract of employment, the trial Court expressed itself that the claimants were the ones who refused to resume duty and that despite intervention by their union and the labour office the claimants (appellant) continued to absent themselves from work. The trial Court further found that under paragraph 12 of the claimant's employment contract and under the CBA either party could terminate the contract of employment by giving one-month notice or payment of one-month salary in lieu of notice. The trial Court further noted that the strike the claimants had engaged in had not been protected under the Labour Relations Act but the respondent had engaged the union and the claimant's representatives; nevertheless, the claimants failed to respond to the respondent's notice that their continued stay away from duty amounted to unilateral termination of the contract of employment. The trial Court then found that by their conduct, the claimants no longer intended to be bound by the contract of employment and they had therefore unilaterally terminated the contract of service and the claim for unfair termination would fail.

The Court has revisited the evidence on record and returns that there is no error of fact on the part of the trial Court. The appellant and the other employees in issue went on strike and two return to work formula were concluded. The appellant and the other employees in issue failed to honour the return to work agreements. While pleading and urging that on 13.09.2019 they resumed work but criminal elements made it impossible for work to go on, the appellant does not plead on why he never reported at work on 11.09.2019 after the initial return to work formula. In view of that evidence, the Court finds that the trial Court did not err in finding that the appellant failed to honour the return to work formula.

The appellant's main concern is that by declaring vacancies and inviting the workers and others to apply for the jobs, the respondent had terminated the appellant's employment without due process per section 41 of the Employment Act, 2007. Section 80 (1) of the Labour Relations Act provides that an employee who participates in a strike that is not in compliance with the provisions of the Act is deemed to have breached the employee's contract and is liable to disciplinary action and is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike. By the provisions of that section, the Court finds that in view of the strike that took place herein, the respondent was required to subject the appellant to a disciplinary process per section 41 of the Employment Act, 2007.

Under section 79 of the Labour Relations Court Act, 2007 a protected strike or lockout is defined as one that complies with the relevant provisions of the Act. Under section 76 of the Act a person may participate in a strike or lock-out if the trade dispute concerns the terms and conditions of employment or the recognition of a trade union; the trade dispute is unresolved after conciliation under the Act or provision of collective agreement on private conciliation of the dispute; and 7 days' notice of the strike or lockout has been served on the other parties and the Cabinet Secretary for labour affairs, by the representative of the trade union or the employer or employers' organisation. The Court finds that the strike in the instant case related to an agitation for fresh election of a shop steward and election of a shop steward has not been shown to have been a term and condition of employment, and the relevant seven days' notice had not been served. The Court therefore finds that while the trial Court did not err in finding that the strike was unprotected, the trial Court erred in law in finding that the appellant had

unilaterally terminated himself instead of finding that having participated in unprotected strike, section 80 of the Labour Relations Act took effect and the respondent should have been subjected to disciplinary action per section 41 of the Employment Act, 2007.

The Court in upholding due disciplinary process being invoked against employees in event of unprotected strike upholds the opinion in **Redlands Roses Limited-Versus-Kenya Plantations and Agricultural Workers Union [2020]eKLR** thus, “**The 4th issue for determination is whether the dismissal of the mentioned grievants by the employer was unfair. The grievants were suspended by the respective letters dated 07.05.2014 on account of absence from duty on 05.05.2014 and 06.05.2014, or inciting workers to participate in strike on the 2 days. The show cause letters exhibited also show the same allegations. Invitation was made for the grievants to attend disciplinary hearing. For some grievants the evidence is that the disciplinary hearing took place and for others they failed to attend citing the pending court case. Subsequently each of the grievants was dismissed on account of participating in the illegal strike. Final dues payable were communicated to include on the headings of days worked up to the date of dismissal letters pay for leave days earned but not taken and overtime due if any. Those dismissed were informed about the right to appeal to management within 5 days. Maurine Asena’s case was exceptional because she was terminated on account of poor performance and was informed of terminal dues on the headings of half pay up to the date of termination, 4 earned leave days and one month pay in lieu of notice. The Court finds that at all material time the employer set out to comply with the notice and hearing of the grievants per section 41 of the Employment Act, 2007. Those of the grievants that refused or failed to attend and participate in the disciplinary process cannot fault the employer and on a balance of probabilities, the procedure invoked by the employer in terminating the grievants’ employment was not unfair on the tests in sections 41 and 45 of the Employment Act, 2007. As submitted for the employer, all the concerned employees had a duty to take steps to attend the disciplinary hearings and if in doubt, take active steps to find out the next course of action.**”

The Court finds that the respondent ought to have served letters to show cause and heard the appellant prior to their dismissal and the learned trial Magistrate erred in finding that the respondent was entitled to deem the respondent to have unilaterally dismissed himself by reason of participating in the unprotected strike and failing to resume duty per the return to work formula.

While making that finding the Court has considered the trial Court’s findings thus, “**14. The Respondent denied that it issued a notice dated 13th September 2019 exhibited by the Claimant to the effect that the factory had been closed and contracts of all workers had been terminated. I have examined the said notice. The same is written by an unknown person from the Respondent’s management; the notice in my view is not credible and having been disputed the court cannot rely on the same and the notice of termination of contract of employment it purports to convey.**”

The Court has revisited the evidence and returns that the trial Court’s analysis and findings in that regard cannot be faulted. The Court further finds that in view of the provisions of section 80(1) of the Labour Relations Act, 2007, disciplinary process would be mandatory and even if such notice had been issued, it would not have served to fairly and lawfully terminate the appellant’s contract of service. The Court upholds **Kenya Plantation & Agricultural Workers’ Union –Versus- Roseto Flowers, Industrial Cause No. 44 of 2013**. In that case, the court held that the ultimatum principle does not apply in cases of unprotected strikes and the employer is required to apply the rules of natural justice as provided for in the Constitution and legislation as well as lawful disciplinary procedures agreed between the parties to the contract of employment. The court further held that it was not open for the employer to invent the ultimatum principle as the path of terminating the employees’ service in oblivion of the clear provisions of section 80 of the Labour Relations Act, 2007 and the provisions of the Employment Act, 2007 including section 41 on notice and hearing. The court upholds that opinion and to answer the first question the court holds that section 80 of the Labour Relations Act, 2007 is the exclusive path to be invoked by employers in dealing with the employee involved in unprotected strike. The court further holds that under the section the employer must apply the due process of notice and hearing before imposing any punishment.

The Court further upholds **Kenya Plantation and Agricultural Workers Union –Versus- Carzan Flowers [2013] eKLR** thus, “**To answer issue number two whether the termination of the contract of employment is available in unprotected strike unless after due process under the Employment Act 2007, the court holds that the employer must comply with due process under the Act. As to issue three being whether collective disciplinary process and collective imposition of punishment is available in the employment relationship as appears to have happened in this case, the court holds that the employer is not permitted under the Employment Act and the Constitution to impose punishment collectively as every employee’s case must be considered on its unique merits.**”

The Court therefore finds that the trial Court erred in finding that the appellant by participating in unprotected strike and not resuming duty per the return to work formula amounted to a conduct for deeming him to have unilaterally terminated his employment and further, therefore, the issue of unfair termination did not arise at all. The first two grounds of appeal will succeed accordingly.

To answer the 2nd issue for determination, the Court has already found that even if the notice dated 13.09.2019 had been found valid, it would not have constituted a valid, fair and lawful termination of the appellant’s employment. It is submitted for the appellant that the trial Court erred in finding that there was no sufficient evidence to show that the notice had been issued for the respondent. It is further submitted that the respondent’s director signed it because the signature is similar to that of the director appearing on other documents the director signed and bearing his name or designation. The Court has already found that the trial Court did not err in finding that the document could not be relied on as the author was at large. As submitted for the respondent, the director in issue is not named and in any event, nothing stopped the appellant from getting a handwriting expert’s assistance. The Court finds that ground 3 of appeal will collapse accordingly.

Again, in relation to that notice and which would amount to a collective punishment if indeed it had been issued, the Court repeats that in our constitutional and statutory design, there is no space for imposition of collective punishments. In that regard the Court follows its opinion in **Kenya Plantation & Agricultural Workers’ Union –Versus- Roseto Flowers [2013]eKLR** thus, “**The notions of collective ownership and collective responsibility are best implemented through citizens’ participation in decision making. The idea of ownership is extended to cover control of shared resources and liabilities. The consequence is to achieve intergenerational justice and fairness. Future interests and fairness amongst varying interest groups in the state are taken care of as in “sustainable environmental management”. Collective ownership, collective responsibility and people-participation are at the core of good governance as a basis of the other principles such as accountability, transparency, affirmative action, meritocracy and constitutionalism. In that perspective, the notions of collective ownership and responsibility yield desirable outcomes.**”

However, when applied in misconduct and punishment, the notions of collective ownership and responsibility as invoked in the ultimatum principle can very easily yield into absurd and unjust outcomes. It can very easily lead to imposing punishment against innocent persons who are not aware of the ultimatum or who are not involved in the dispute at hand or who have individual explanations in self-exculpation.

The court has considered the submissions and finds that under our constitutional and statutory regime in employment and labour relations law, the string that flows throughout is that employers must uphold due process in a fair procedure in terminating employment on account of poor performance, misconduct and even ill-health. The constitutional and statutory law does not provide for the ultimatum principle as it obtains in South Africa and as submitted for the claimant, in absence of legislation on ultimatum principle, the court finds that the court may not coin an interpretation as to apply it in cases of strikes in Kenya's employment and labour relations. The court upholds the opinions as consistently elaborated in the cases cited for the claimant."

To answer the 3rd issue for determination, the Court has already found that the trial Court erred in finding that there was no unfair termination. Did the trial Court err in law in finding that the appellant was not entitled to the remedies as was claimed and prayed for? The Court finds that the evidence was that the employment came to an end when the position held by the appellant was declared vacant and applicants invited, including the appellant, to apply as appropriate. The Court finds that the declaration of vacancy without having subjected the appellant to due disciplinary action amounted to a fundamental breach of the contract of service which mandatorily required the respondent to initiate the relevant disciplinary process prior to dismissing the appellant. The Court finds that the appellant did not condone or tolerate that breach as manifested in his refusal to reapply as was invited in the notice declaring the vacancies. Accordingly, the appellant has established that he was constructively dismissed as prayed for.

The Court has considered the factors for award of damages under section 49 of the Employment Act, 2007. The appellant was serving on an annual contract. The appellant fundamentally breached the contract of employment when he engaged in unprotected strike. The Court finds that one of the aggravating factors is that despite the return to work formula being concluded between the respondent and the appellant's union, the appellant did not resume duty as was resolved. The further aggravating factor is that the appellant appears to have walked outside the binding recognition and collective agreements on grievance management and resolution as appears, he disregarded his union's efforts towards managing and resolving the grievance that was at hand. Further, the respondent invariably suffered losses by reason of the unprotected strike and the ensuing flow of events seriously disrupted the respondent's business. The Court therefore finds that the appellant and the other workers that were in his similar circumstances contributed to their otherwise unfair termination at 100% and each is undeserving of award of compensation under section 49 of the Employment Act, 2007.

The Court has considered the prayers for one-month salary in lieu of termination notice, accrued leave days and gratuity. The trial Court rightly found that payment for due leave days had been effected. Clause 29 of the CBA required service of 12 months for gratuity to accrue and the trial Court rightly found that the appellant was on an annual term contract and 12 months had not been served. The Court finds that the appellant was on an unprotected strike and section 80 (1) (b) is clear that he thereby could not be entitled to any benefit under the contract of service. The Court therefore finds that all the reliefs based on the benefits under the contract of service will fail accordingly and including notice pay as claimed and prayed for.

In view of the parties' margins of success and all the circumstances of the case including the unprotected strike the appellant and his like-minded co-workers engaged in, each party will bear own costs of the appeal and all proceedings in the trial Court.

In conclusion, the appeal is partially allowed with orders:

- 1) The trial Court's order dismissing the suit in its entirety is hereby set aside.
- 2) A declaration is hereby issued that the respondent terminated the appellant's contract of service constructively and unfairly.
- 3) Each party to bear own costs of the appeal as well as the proceedings in the trial Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE