



Kenya Chemicals Workers Union v Roto Moulders (Cause E385 of 2020) [2022] KEELRC 1346 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E385 OF 2020
MA ONYANGO, J
JULY 14, 2022**

BETWEEN
KENYA CHEMICALS WORKERS UNION CLAIMANT
AND
ROTO MOULDERS RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered in Kenya to represent workers in the chemical and allied industries as more specifically set out in its constitution.
2. The Respondent is a limited liability company engaged in manufacture of plastic tanks.
3. There is no recognition agreement between the Claimant and the Respondent. The dispute herein arose while the Claimant was in the process of recruitment of the employees of the Respondent into its membership.

Claimant's Case

4. It is the averment of the Claimant that the dispute herein arose on July 24, 2017 when the Respondent realised that its workers had joined the Union following receipt of the Union's letter forwarding check-off forms in respect of the said workers for deduction of union dues together with recognition agreement for signature by the Respondent.
5. By letter dated July 24, 2010 the Respondent, in response to the Claimant's letter dated July 18, 2017, requested for time to verify if the employees whose names appeared in the check-off Form were its employees from the payroll and employment records.
6. It is the Claimant's case that after writing to the Claimant the Respondent called the employees one by one and instructed them to resign from the membership of the Claimant in order to continue in



employment. When the workers declined to resign from the Union, they were issued with letters of termination dated July 25, 2017.

7. The Claimant avers that after the Respondent started issuing the letters of termination, some workers hurriedly wrote letters of resignation from the Union in order to keep their jobs. Copies of the letters are appended at Appendix 3 of the Claimant's bundle of documents.
8. The Claimant avers that the employees who had been issued with letters of termination reported to the Claimant who immediately called for a meeting with the Respondent, but the Respondent declined, compelling the Claimant to report a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection by letter dated August 1, 2017.
9. The Minister accepted the dispute and appointed one Mr. F. I. Okello as conciliator by letter dated January 10, 2018. Mr. Okello however did not call any meeting prompting the Claimant to request for a replacement which the Minister did by appointing Mr. Joseph Makaa and withdrawing the appointment of Mr. Okello through the letter dated July 12, 2019.
10. Mr. Makaa convened a conciliation meeting on March 28, and September 18, 2019 and thereafter prepared his report dated January 20, 2020. The Claimant accepted the findings and recommendations but the Respondent, according to the Claimant, was not willing to comply with the conciliator's recommendations, hence the instant suit.
11. In the report the Conciliator made the following findings and recommendations

“ Findings

It is on record that the union embarked on a recruitment exercise in July, 2017, and had approached the management of Roto Moulders Limited to be accorded recognition as the representative of the workers vide their letter dated July 18, 2017.

The management of Roto Moulders Limited responded to the union's letter on the July 24, 2017, indicating that they would require more time to check with their records if the employees reflected in the unions check off list where their employees or not, in this communication to the union there was no mention of an impending redundancy.

On the July 25, 2017 the (12) twelve employees were issued with letters terminating their services on grounds of poor performance, warning letters, negligence, wasting time during working hours, vandalism and insubordination, with no mention of redundancies.

In the same communication it was alleged that there had been a hearing held on the July 25, 2017, the same day the termination letters were issued, but no minutes were availed of the hearings that resulted in the management's decision to terminate their services.

The Kenya Chemical Workers Union was further not involved in the deliberations leading to the employee's termination of services, despite the fact that they had notified the management of having recruited the employees to their membership on the July 18, 2017.

On the same day (July 25, 2017) a number of employees individually wrote to the management indicating that they had not joined any trade union and that the signatures apprehended on the union check off list against their names were not theirs and they were not affected by the alleged redundancies.



It was further noted that despite accusations of poor performance, negligence etc a number of the employees whose services were terminated, had been issued by the management of Roto Moulders Limited, certificates of distinguished services awards.”

12. The Claimant submits that the Respondent did not comply with Sections 40, 41, 43 and 45 of the *Employment Act* before the terminations were effected. That the conciliator found the terminations to be unfair labour practice and wrongful termination. That the Respondent also contravened Articles 2, and 3(2) of *ILO Convention No. 87*.
13. The Claimant seeks prayers as follows:
 - (i) That, this Honourable Court reinstate back the thirteen (13) employees without loss of benefits and be paid their salaries and allowances for the period they have been out of employment and as they were subjected to intimidation and injustices by terminating their services immediately without any reasons at all.
 - (ii) That if for any reason or reasons the Honourable Court finds reinstatement not tenable, and taking into account that we have no CBA on terms and conditions of service with the Respondent at that time, it is our prayer that the Court consider giving the Grievants maximum compensation permissible as per *Labour Institutions Act* 2007 Section 15(c) for loss of employment on top of other entitlements recommended by the conciliator and also as per our tabulations as indicated below:
 - (1) Justus Mbithi
 - a. Notice of one month.....17,554.00
 - b. Days worked 25 days.....16,879.00
 - c. Annual paid leave for 5 years which was from 2004 up to 2009 + 2017 = 13 days
Balance leave days =139 days.....93,825.00
 - d. Overtime worked was 25 hours.....2,109.00
 - e. Gratuity/Service benefits for 13 years.....131,625.00
 - f. Maximum compensation.....210,648.00
 - Total Kshs.....472,640.00
 - (2) Meshack Getenga Omwura
 - a. Notice of one month.....17,554.00
 - b. Days worked 25 days.....16,480.00
 - c. Annual paid leave plus pro-rata leave is 47.5 days31,303.00
 - d. Overtime worked was 23 hours.....1,895.00
 - e. Gratuity/Service benefits for 11 years.....108,735.00
 - f. Maximum compensation.....205,668.00
 - Total Kshs.....381,220.00



- (3) Shadrack Kikuvi
- a. Notice of one month.....25,234.00
 - b. Days worked 25 days.....27,175.00
 - c. Annual paid leave plus pro-rata leave is 2 months.....227,700.00
 - d. Overtime worked was 40 hours.....1,895.00
 - e. Gratuity/Service benefits for 12 years.....174,780.00
 - f. Maximum compensation 302,808.00
- Total Kshs.....762,552.00
- (4) Patrick Kimuyu
- a. Notice of one month.....17,366.00
 - b. Days worked 25 days.....16,698.00
 - c. Annual paid leave plus pro-rata leave is.....215.25 days 143,787.00
 - d. Overtime worked was 23 hours.....2,088.00
 - e. Gratuity/Service benefits for 11 years.....110,220.00
 - f. Maximum compensation.....208,392.00
- Total Kshs.....498,551.00
- (5) James Onduma
- a. Notice of one month.....18,633.00
 - b. Days worked 25 days.....17,916.00
 - c. Annual paid leave for 11 years
11 years x 21 =231 days.....165,627.00
 - d. Balance annual leave paid 14 days.....10,038.00
 - e. Overtime worked was 25 hours x 717.....2,241.00
 - f. Gratuity/Service benefits for 13 years.....139,815.00
 - g. Maximum compensation.....223,596.00
- Total Kshs.....577,866.00
- (6) Elvis Ochieng
- a. Notice of one month.....17,365.00
 - b. Days worked 25 days.....16,697.00
 - c. Pro-rata leave of three months.....3,507.00
 - d. Annual paid leave of 10 years x 21.....10,280.00
 - e. Overtime worked was 25 hours.....2,088.00



- f. Gratuity/Service benefits for 11 years.....110,220.00
 - g. Maximum compensation 208,392.00
 - Total Kshs.....495,044.00
- (7) George Onyango
- a. Notice of one month.....17,290.00
 - b. Days worked 25 days.....16,626.00
 - c. Annual paid leave of 9 years.....125,685.00
 - d. Pro-rata leave of two.....2,328.00
 - e. Overtime worked was 25 hours.....2,078.00
 - f. Gratuity/Service benefits for 10 years.....99,750.00
 - g. Maximum compensation 207,480.00
 - Total Kshs.....471,250.00
- (8) Isaac Sikuku
- a. One month's notice.....42,849.00
 - b. Days worked 25 days.....41,201.00
 - c. Pro-rata leave of five months.....14,420.00
 - d. Annual paid leave plus pro rata leave for 12 years and 5 months = 260.75 days.....429,716.00
 - e. Overtime worked was 25 hours.....5,150.00
 - f. Gratuity/Service benefits for 14 years.....346,080.00
 - g. Maximum compensation.....514,188.00
 - h. He was deducted 10,000 + 11,000.....21,000.00
 - Total Kshs.....495,044.00
- (9) Moses Mogusu
- a. One month's notice.....25,735.00
 - b. Days worked 25 days.....24,745.00
 - c. Annual paid leave plus
pro-rata = 114.5 days.....113,355.00
 - d. Overtime worked was 25 hours.....3,094.00
 - e. Gratuity/Service benefits for 6 years.....89,100.00
 - f. Maximum compensation.....308,820.00
 - Total Kshs.....564,849.00



10. Jared Marube Onkundi
 - a. One month's notice.....25,390.00
 - b. Days worked 25 days.....24,413.00
 - c. Annual paid leave plus pro-rata
8 months = 225.75 days.....220,558.00
 - d. Overtime worked was 25 hours.....3,053.00
 - e. Gratuity/Service benefits for 12 years.....175,860.00
 - f. Maximum compensation 304,680.00
Total Kshs.....753,954.00

11. Elly Owaka Migire
 - a. One month's notice.....22,896.00
 - b. Days worked 25 days.....2,205.00
 - c. Annual paid leave plus pro-rata
8 months = 397 days.....349,757.00
 - d. Overtime worked was 25 hours.....2,753.00
 - e. Gratuity/Service benefits for 19 years 261,085.00
 - f. Maximum compensation 274,752.00
Total Kshs.....923,258.0

12. Moses Mogusu
 - a. One month's notice.....25,234.00
 - b. Days worked 25 days.....25,234.00
 - c. Annual paid leave plus
pro-rata leave = 43.75 days.....42,463.00
 - d. Overtime worked was 42 hours.....3,034.00
 - e. Gratuity/Service benefits for 2 years.....29,130.00
 - f. Maximum compensation 302,808.00
Total Kshs.....427,917.00

(iii) That the costs be provided for in favour of the Claimants.

14. In the submissions filed by the Claimant it reiterates the averments in the memorandum of claim and prays for judgment as prayed.



Respondent's Case

15. In the memorandum of response dated October 13, 2020 the Respondent denies that it asked the employees to resign from the membership of the Claimant. It avers that it called the employees only to confirm they had joined the Claimant but all of them save two (2) employees, denied to have consented to membership of the Claimant.
16. The Respondent avers that there is no employee whose employment was terminated due to membership of trade union as the reasons for termination are stated in their letters of termination.
17. The Respondent states that the letters at appendix 3 of the Claimant's bundle are not resignations from the union but rather letters denying ever joining the membership of the union and disowning the signatures in the Check-Off Form.
18. The Respondent avers that the conciliation process was rushed and the conciliator did not consider lack of recognition agreement, legality of the Respondent's employees who are not its members and a finding on disciplinary issues of two (2) employees which was not pleaded.
19. The Respondent also took issue with the conciliator's report for being biased in favour of the Claimant and making outrageous recommendations.
20. In the witness statement of Maryam Kagumu, the Respondent's Human Resource Manager, she states that the following employees were declared redundant and paid severance as follows:

NO.	NAME	SEVERANCE AMOUNT PAID (KSHS.)
1.	Sikuku Isaac	204,930.00
2.	Elly Migire	159,275.60
3.	Shadrack Kikuvi	120,682.65
4.	Jared Marube	88,313.04
5.	Moses Moguso	67,134.78
6.	Justus Mbithi	61,060.88
7.	David Makau	21,942.30

Analysis and Determination

21. I have considered the pleadings, and the submissions by the parties. The issues arising for determination are whether or not the grievants were members of the Claimant's Union; whether the grievants' employment were terminated on account of redundancy or on account of joining Union membership and whether the Claimant is entitled to the remedies sought.

Whether grievants were members of the Union

22. The Respondent has submitted that the grievants were not members of the Claimant and that it does not have Locus Standi to represent them except Samuel Onyango Onganda and Joshua Marende. The



basis for this argument is that only the two confirmed their membership when the Respondent called them after receiving check off forms from the Claimant.

23. The Claimant on the other hand avers that the Respondent called each of the employees whose names appeared in the check-off list and demanded that they resign or lose their jobs. That some employees resigned because they wanted to keep their jobs. The Claimants have annexed to their Appendix 3.
24. The Respondents have not stated that the names of all the grievants were not on the check-off forms. They have not annexed any evidence to prove that they either resigned from the Union after appending their signature. The Respondent has further not denied that after receiving the check-off forms they did not call each of the employees who had signed and inquired of them about their membership of the Union.
25. The courts have stated many times before and it bears repeating that once an employer receives a check-off form from a trade union its only role is to commence deduction of union dues – from the salary of the employee and remit the same to a Union. If there is any complaint it should come from the employee.
26. Any time an employer calls an employee to make any kind of inquiry about joining union membership the employer would be deemed to be intimidating the employee because of joining membership of the Union. The fact that some employees wrote letters distancing themselves is proof of intimidation by the Respondent.
27. The Respondent further seems to mix the issue of recognition and representation. Section 48 of the [Labour Relations Act](#) provides for membership while Section 54 provides for recognition. Once an employee becomes a member of a union she would be entitled to representation by the union, while recognition is for purposes of collective bargaining.
28. I find that the Respondent has not proved that the grievants did not join membership of the Union or if they joined, that they resigned from such membership. The Claimant therefore has locus standi to represent the grievants.

Whether the Grievants’ employment was terminated on account of redundancy or on account of joining Union membership

29. The Claimant’s position is that the grievants lost their jobs due to joining of Union membership. The Respondent however insists that the employees were declared redundant. It produced a letter of notice to the Labour Office dated May 15, 2017 in which it gave notice to declare approximately ten (10) employees.
30. The Respondent however did not produce any letters to any employee notifying the employee of the intended redundancy. The letters to the grievants are all titled “Termination with Notice”. They are all dated July 25, 2017 except one dated July 24, 2017 and two dated July 28, 2017. None of the letters state that the reason for termination is redundancy. All the letters give reasons for termination as follows:



NAME	REASON(S) FOR TERMINTION
George Onyango	<ol style="list-style-type: none"> 1. For negligence in production and vandalising of machine 2. Poor performance of your duties
Elly Migire Owaka	<ol style="list-style-type: none"> 1. Poor performance in carrying out your duties.
James Onduma	<ol style="list-style-type: none"> 1. Issued with warning letters for negligence in production – rejections. 2. Poor performance of your duties.
Elvis Ochieng Oruko	<ol style="list-style-type: none"> 1. Poor performance of your duties 2. High rate of rejection of tanks. 3. Unwillingness to cooperate with your supervisor, failing to follow instructions.
Patrick Kimuyu	<ol style="list-style-type: none"> 1. Three warning letters issued on rejection of tanks. 2. Poor performance of your duties.
Meshack Getenga Omwura	<ol style="list-style-type: none"> 1. Issued with warning letters for negligence in production – rejections. 2. Poor performance of your duties. 3. Disrespectful to supervisor.
Justus Mbithi	<ol style="list-style-type: none"> 1. Disrespect to the Kaizen Co-ordinator 2. Not following instructions from supervisors in carrying out the day to day work assigned.
Moses Mogusu	<ol style="list-style-type: none"> 1. Disrespect to management staff. 2. Wasting time during working hours, not following the day to day work. 3. Poor performance.
Benjamin Muia	<ol style="list-style-type: none"> 1. Poor performance in carrying out your duties. 2. Unable to hold your team together and improve output and efficiency.
Isaac Sikuku	<ol style="list-style-type: none"> 1. Poor performance in carrying out your duties e.g. stocks not tallying. 2. Reporting ladders are not followed, no reports are handed over.



	3. Unwillingness to cooperate with the General Manager and Kaizen coordinator.
Shadrack Kikuvi	1. Poor performance of your duties

31. The body of all the letters which are identical, read as follow:

“RE: Termination With Notice

This letter serves you with a termination with notice as per clause 10 of your appointment letter.

The reason for termination is as follows:

.....

After the disciplinary hearing held on July 25, 2017, a decision to terminate your services has been agreed by the management. To this effect, you will no longer be required to work for Roto Moulders Ltd.

Your salary will be paid up to August 25, 2017. You will receive a cheque and a final payslip. Your outstanding leave days will also be paid once you have handed over any company’s property in your possession. Also, a completed hand over in the Accounts and Manager.

You will also receive a certificate of service for the term you have served Roto Moulders Ltd.

Yours Sincerely,

Signed

Raymond Goes

General Manager”

32. No reference is made to redundancy. In any event no redundancy is preceded by a disciplinary hearing. The very definition of redundancy connotes that there is no fault on the part of the employee. Section 2 of the [Employment Act](#) defines redundancy as:

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

33. Further, no evidence has been adduced by the Respondent to prove that any disciplinary hearing ever took place. Indeed, the warning letters and letters of suspension referred to in the witness statement of Maryam Kagumu give dates of the letters as follows:

“Warning Letters



NO.	NAME	REASON	Letter dated
Meshack Getanga	Failure to meet targets	14 th March, 2017	
	Being rude to the supervisor		
Moses Mogusu	Producing 5,000 litres reject tank and failure to report to the supervisor	19 th April, 2017	
	Hiding the said tank in a scrap grinder area and chopping it.		
George Onyango	Failure to notify the maintenance team to fix the Pulverizer Machine causing it damage.	12 th April, 2017	
Justus Mbithi	Absenteeism	21 st April, 2010	
Patrick Kimuyu	Producing reject tanks	6 th August 2016	
	Producing reject tanks	1 st July, 2009	

Suspension letters



NO.	NAME	REASON	Letter dated
Jared Onkundi	Failure to bring to the attention of the management discovery of a broken blower fan.	8 th July 2017	
Elvis Ochieng	Failure to follow a supervisor's instructions	11 th April 2017	
James Onduma	Production of two 10.000 litres rejected tanks.	21 st August 2012	
Meshack Getenga	Production of a 4.000 litre and 3.200 litre rejected tanks	21 st August 2012	
Moses Mogusu	Willfully neglecting to perform his work	7 th July 2017	

34. The reasons given for warning, suspension and termination dispel any notion that the termination of the grievants were redundancy as defined in Section 2 of the Act. Some of the warnings are as long ago as 2009 and could not have formed the basis of disciplinary action in July 2017.
35. Whether the grievants left employment on grounds of redundancy or on termination, the Respondent has not proved that it complied with Section 40 on redundancy, or Section 41 on procedure for termination on grounds of misconduct, poor performance or incompatibility, or Section 43 on proof of reasons for termination.
36. The termination of the employment of the grievants whichever way considered was therefore unlawful under Section 45(2) of the Act.
37. The Respondent having called each of the grievants to interrogate them on Union membership as admitted by the Respondent at paragraphs 5 of the response to memorandum of claim, further, having terminated the employees immediately after such interrogation and after writing to the Claimant on 24th July 2017 asking for "time to check if the employees are ours, if they are on our payroll and our employment records", I find that the termination was on grounds of joining Union membership and



therefore a violation of the grievants' right to association and to join and participate in Union activities as enshrined in the Constitution, the Labour Relations Act and the Employment Act.

Remedies

38. The Claimant prayed for reinstatement of the employees. This is a remedy that is no longer available as it is more than three (3) years since the termination and under the Employment and Labour Relations Court Act reinstatement is only available within three (3) years of termination.
39. The Claimant in the alternative sought payment of terminal dues as set out above for each of the grievants. From the records in Court, it is not clear whether or not the Respondent has paid terminal dues to each employee. In the tabulation in the undated letter from counsel for the Respondent with a receipt stamp of the Claimant dated 12th July 2021, it is evident that pending leave days had not been paid as it is indicated that it is subject to proof. This proof is, under Section 10 and 74 of the Employment Act, to be provided by the employer through leave records.
40. The grievants are entitled to compensation for unfair termination of employment. Taking into account the fact that the Respondent infringed on the rights of the grievants to join membership of the Union, that their employment was terminated without due process, that the reasons for termination are not valid reasons, that most of the grievants had served the Respondent for more than ten (10) years and also considering all the other relevant factors under Section 49(4) of the Employment Act, I award each grievant maximum compensation equivalent to twelve (12) months' salary.
41. Each of the grievants is also awarded annual leave for one year.
42. I therefore award each grievant the following:
 - (1) Justus Mbithi
 - a. Annual leave for 1 year....15,262.00
 - b. Maximum compensation....210,648.00
 - Total Kshs.....225,910.00
 - (2) Meshack Getenga Omwura
 - a. Annual leave for 1 year....14,903.48
 - b. Maximum compensation....205,668.00
 - Total....Kshs.220,571.48
 - (3) Shadrack Kikvi
 - a. Annual leave for 1 year....21,942.30
 - b. Maximum compensation....302,808.00
 - Total....Kshs.324,750.30
 - (4) Patrick Kimuyu
 - a. Annual leave for 1 year....15,100.87
 - b. Maximum compensation....208,392.00
 - Total Kshs.....223,492.87



- (5) James Onduma
- a. Annual leave for 1 year....16,202.61
 - b. Maximum compensation....223,596.00
- Total Kshs.....239,798.61
6. Elvis Ochieng
- a. Annual leave for 1 year....15,100.00
 - b. Maximum compensation....208,392.00
- Total....Kshs.223,492.00
- (7) George Onyango
- a. Annual leave for 1 year....15,034.78
 - b. Maximum compensation....207,480.00
- Total....Kshs.222,514.78
- (8) Isaac Sikuku
- a. Annual leave for 1 year....37,260.00
 - b. Maximum compensation....514,188.00
- Total....Kshs.551,448.00
- (9) Moses Mogusu
- a. Annual leave for 1 year....22,378.26
 - b. Maximum compensation....308,820.00
- Total....Kshs.331,198.26
- (10). Jared Marube Onkundi
- a. Annual leave for 1 year....22,078.26
 - b. Maximum compensation....304,680.00
- Total....Kshs.326,758.26
- (11) Elly Owaka Migire
- a. Annual leave for 1 year....19,990.42
 - b. Maximum compensation....274,752.00
- Total....Kshs.294,742.42
- (12) David Makau
- a. Annual leave for 1 year....21,943.30
 - b. Maximum compensation 302,808.00
- Total....Kshs.324,751.30



The total award for all the grievants is Kshs.3,509,428.28

43. The Respondent shall pay the Claimant's costs for this suit which I assess at Kshs.80,000/= to cover reasonable disbursements and other attendant expenses for the suit.
44. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

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, the 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 Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the 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.

MAUREEN ONYANGO

JUDGE

