



**Kenya Union of Commercial, Food and Allied Workers v Ndithini Community Development Association Ltd (Employment and Labour Relations Claim E024 of 2021) [2022] KEELRC 4095 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4095 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CLAIM E024 OF 2021  
DKN MARETE, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**NDITHINI COMMUNITY DEVELOPMENT ASSOCIATION  
LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a memorandum of claim dated April 15, 2021. The issue in dispute is therein cited as;  
Unfair/unlawful termination of:
  1. Daniel Karanja Willy
  2. Bernard Kamau Makau
  3. Bernard Muia Muteti
  4. Stephen Maingi Kimeu
2. The respondent in a respondent's memorandum of response dated June 8, 2021 denies the claim and prays that the same be dismissed with costs.
3. The claimant's case is that she is a registered trade union with jurisdiction to operate within the respondents domain and sector.



4. The claimant's further case is that at all material times relevant to this cause, the grievants were employees of the respondent with Daniel Karanja Willy having been verbally employed on August 14, 2018 in the position of Accountant on a one year contract at Kshs 50,000.00 but instead was paid Kshs 25,000.00.
5. This instant grievant had a blemish free stint of service w.e.f August 14, 2018 to December 8, 2018 when he was dismissed with no salary despite his clean record.
6. The other grievant, Bernard Kamau Makau was employed on January 2, 2018 as a loans officer at a salary of Kshs 15,000.00. He did this for 4 months and was later promoted to branch manager where he sat until termination of employment.
7. The claimants other case is that after the company's financial year, he got a salary increment of Kshs 18,000.00. He did not take leave and had a clean stint of service.
8. The third grievant, Bernard Muia Muteti was employed on October 28, 2016 as a loans officer at a starting salary of Kshs 10,000.00. As at termination he earned Kshs 15,000.00. He also had a clean stint of service.
9. The 4th grievant, Stephen Maingi Kimeu was employed on September 16, 2016 and was designated loan officer. His starting salary was Kshs 12,000.00. He served on a clean record and was terminated from service on December 23, 2018.
10. The grievants raised an issue of salary raises and agitated for salary raises but were all subsequently dismissed from employment on diverse dates.
11. The claimant's further case is that the grievants, with others wrote to the board members their grievances and burning issues at work. These were;
  - i) Cashier salary to Kshs 25,000
  - ii) Loans officer salary to be Kshs 30,000
  - iii) Branch manager salary to be Kshs 40,000
  - iv) Project officer salary to be Kshs 35,000
  - v) Accountant salary to be Kshs 50,000
12. They therein requested for a meeting with the board members.
13. The claimants' further case is that when they met on November 13, 2018, they felt they needed representation and sought out Central Organization of Trade Unions, and she recommended Kenya Union of Commercial, Food and Allied Workers, which they joined.
14. Their subsequent termination of employment came in as follows; December 7, 2018- Bernard Kamau Makau December 14, 2018 – Bernard Muia Muteti December 6, 2018- Daniel Karanja Willy December 6, 2018- Stephen Maingi Kimeu
15. Further, on December 18, 2018 the respondent's Chairman wrote to both Ms Anastacia Syombua and Bridgit Ndinda Muisyo giving them a stern warning. See Exhibit 14(i) & (ii) attached herewith.
  38. On February 12, 2019 the claimant reported an existence of a trade dispute in accordance with section 62 of *Labour Relations Act, 2007*. See Exhibit 18 attached herewith.



39. Accordingly on March 15, 2019, the chief Industrial Relations Officer appointed R Kiiru of Thika Labour office to act as Conciliator in line with section 65 (1) of the Labour Relations Act, 2007. See Exhibit 19 attached herewith.
63. The termination of the grievants employment was unfair/unlawful. Section 46(c) of the Employment Act, 2007 states clearly;
46. “the following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty:
  - (c) an employee’s membership or proposed membership of a trade union”
64. The respondent does not have a manual policy that guided the workers.
65. Gross Misconduct means unacceptable or improper behaviour of a very serious kind, especially by an employee or professional person. The following acts entails gross misconduct which calls for an immediate sack:-
  - i) Theft, fraud and dishonesty
  - ii) Breach of health and safety rules
  - iii) Offensive behaviour
  - iv) Damage to property
  - v) Serious incapacity or misconduct caused by an excess of alcohol or drugs at work.

16. She prays thus;

A

- i) Reinstatement the grievants and treat them in all respects as if their employment had not been terminated; or
- ii) Re-engage them in work comparable to that in which they were employed prior to their dismissal, or other reasonably suitable work, at the same wage.
- iii) Cost of the suit to the claimant.

B. In the alternative and where reinstatement is not possible the hon court orders as follows;

Stephen Maingi Kimeu-Loans Officer

Days worked in December 6days x 21,811.10/26 5,033.33

1 month notice in lieu of notice 21,811.10

Service pay 15 days x 21,811.10/26x2 25,166.65

House Allowance 15/100 x 21,811.10=3,271x28 55,618.30

Leave not taken 21,811.10 x 26/26 x 1 21,811.10

Underpayments:

1.5.2017 (21,811.10-15,000) =



6,811.10 x 12 81,733.20

1. 5.2018- December, 2018 (27,023.95-15,000) =  
12,023.95x7 84,167.65

Compensation for unlawful

Termination 27,023.95x12 324,287.40

TOTAL 619,628.73

Benard M.Muteti-Loans Officer

Days worked in December 17 days x 27,023.95/26 4,261.10

1 month notice in lieu of notice 27,023.95

Service pay 15 days x 27,023.95/26/6 93,544.40

House Allowance 15/100x27,023=4053.60x72 291,859.20

Leave not taken 27,023.95x 26 x 48 40,266.60

Underpayments

28.10.17 – 28.6.18=8 months 21,811-15,000=6,811.10x8 54,888.80

28.6.18 - 28.12.2018-7months

27,023.95-15,000=12,023.95x7 84,167.65

Compensation for unlawful termination 27,023.95 x 12 324,287.40 Total 857,936.20

Bernard K.Makau-Loans

Officer/Branch Manager

Days worked in December 38,000/26 x 6 8,769.20

1 month notice in lieu of notice 38,000.00

House allowance 15/100 x 27,023.95=4053.50x

3 months 12,160.50

15/100 x 38,000=5,700x9

Months 51,300.00

Service pay 15 days x 38,000/26 x 1 21,923.10

Leave not taken 38,000 x 26/26 38,000.00

Underpayment for:

3 months 27,023.95- 15,000=12,023.95 x 3

9 months 38,000 – 15,000= 23,000 x 9 207,000.00

Compensation for unlawful

Termination 38,000 x 12 456,000.00

Total 965,416.25

Daniel K.Willy- still on probation



Days worked in December 27,023.95/26x6 6,236.30

I month notice in lieu of notice 27,023.95

House Allowance 15/100 x 27,023.95=4053.50x4 16,214.40

Underpayments:

15.8.2018 -6.12.2018-4 months 27,023.95-25,000.00=2023x4 8,092.00

Unlawful cancellation of contract 27,023.95 x 9 months 243,215.55

Total 300,782.20

- ii) Cost of the suit to the claimant.
- ii) Any other relief this court may find fit and just to meet the ends of justice.

The Respondent denies the claim and states as follows;

17. The respondent states in response to paragraphs 19, 20, 21,22, 23,24, 25, 26 and 27 of the memorandum of claim that;
- a) The respondent states that the termination of the claimants was both substantively and procedurally fair.
  - b) The claimant's members incited other workers against fellow workers and have confirmed having held illegal meetings in one of their houses without any official notice to the employer, the respondent.
  - c) The respondent states that the claimant's members illegally organized unsanctioned meetings hosted in the house belonging to one Daniel Karanja with an intention to incite other workers against fellow workers while intimidating and threatening their employer.
  - d) The respondent states that pursuant to the provisions of section 43(2) of the Employment Act, 2007, the reasons it gave for the termination of the claimants' contracts were matters that, it being the employer at the time of their termination, genuinely believed to exist as demonstrated hereinabove and which caused the respondent employer to terminate the services of the claimants.
  - e) The respondent states that after investigations and after hearing each of the claimants, the respondent opted to terminate the claimant's members on grounds that:
    - 1. They convened illegal meetings without informing and/or issuing notice to the employer.
    - 2. The claimants issued threats to the employer that read in part that, "...we expect feedback before November 23, any failure to the above matter will lead to another cause of action" (emphasis)(Refer to the claimant members letter contained at pages 40 of the claimants' bundle of documents)
    - 3. The claimant's members were unable to avoid trouble while on probation.
  - f) The respondent states that the claimant's members were subjected to a fair hearing and were given opportunity to prepare for the disciplinary hearing ('the interview').
  - g) The employer heard and considered the explanations by the employees before considering terminating them from employment.



- h) The respondent explained to the employees in a language the employee (claimant members) understand the reasons why termination was being considered.
  - i) The import of this is that the decision to terminate the claimant members was made after giving the claimants an opportunity to be heard.
18. The Respondent further states that claimants have admitted to have approached the court with unclean hands having not followed the proper channel before opting to pursue the dispute in court.

**Particulars of Admission**

- a) The claimant has admitted its members having not raised a formal complaint and/or no complaints at all to their employer but instead resorted to holding several irregular meeting in one of their houses.
- b) The claimant has admitted its members having intentionally held illegal meetings which they now purport to term as a “lawful strike” and/or picket which was conducted without adhering to the provisions of the law.
- c) The claimant has admitted its members having threatened their employer to an intended and unknown course of action if their dictatorial demands are not fulfilled.
- d) The claimant has admitted that parties never appeared before the conciliator to make their representation on the dispute.

**The issues for determination therefore are;**

- 1. Whether the termination of the employment of the grievants by the respondents was wrongful, unfair and unlawful.
  - 2. Whether the claimant is entitled to the relief sought.
  - 3. Who bears the costs of the case.
19. The 1st issue for determination is whether the termination of the employment of the grievants by the respondent was wrongful, unfair and unlawful. It is not disputed that the termination of employment of the grievants was borne out of misunderstanding between themselves and the respondents.
20. This was borne out of a dispute as to what was paid to the grievants vis-a-viz what was payable to them in terms of their letters of appointment. It would appear that the grievants made several attempts to have this resolved through meetings with the management but this was not forthcoming due to the reluctance of the respondents.
21. The grievants sought counsel from COTU and were advised to seek the services of KUCFAW which they resorted to. However, even attempts at intervention by the union were not successful. The grievants services were terminated on grounds of incitement of workers against their employer whereas theirs was an attempt to get the workers to meet and foment the way forward in a resolution of their issues in dispute.
22. The reasons adduced for termination of grievants’ employment fall short of the threshold of section 43 of the *Employment Act, 2007*.
23. I therefore find a case of unlawful termination of employment of the grievants and hold as such.



24. The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment of the grievants by the Respondent she becomes entitled for the reliefs sought.
25. I am therefore inclined to allow the claim and order relief as follows;
- i) Stephen Maingi Kimeu Days worked in December 5,033.33 One (1) months salary in lieu of notice 21,811.10 Eight (8) months salary for unlawful termination of employment (Kshs 21,811.10 x 8) 174,486.80 Service Pay 25,166.65 Underpayments (May 1, 2017 – May 1, 2018) 81,733.20 Underpayments (May 1, 2018 – December 2018) 84,167.65 Total of claim .....Kshs 392,398.73
  - ii) Benard M. Muteti Days worked in December 4,261.10 One (1) months salary in lieu of notice 27,023.95 Eight (8) months salary for unlawful termination of employment = (Kshs 27,023.95 x 8) 216,191.60 Service Pay 93,544.40 Underpayments (October 28, 2017 – June 28, 2018) 54,888.80 Underpayments (June 28, 2018 – December 28, 2018) 84,167.65  
Total of claim ..... Kshs 480,077.50
  - iii) Bernard K Makau Days worked in December 8,769.20 One (1) months salary in lieu of notice 38,000.00 Eight (8) months salary for unlawful termination of employment = (Kshs 38,000.00 x 8) 304,000.00 Service Pay 21,923.10 Underpayment for 3 months (27,023.95 – 15,000) = 12,023.95 x 3 36,071.85  
Underpayment for 9 months (38,000 – 15,000) = 23,000 x 9 207,000.00 Total of claim ..... Kshs 615,764.15
  - iv) Daniel K. Willy Days worked in December 6,236.20 One (1) months salary in lieu of notice 27,033.95 Eight (8) months salary for unlawful termination of employment (Kshs 27,033.95 x 8) 216,271.60 Underpayment for 4 months (August 15, 2018 – December 6, 2018) 8,092.00 Total of claim .....Kshs 257,633.75
  - v) The cost of the claim shall be borne by the respondents.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

**1. Ms. Lilian Munene for the Claimant union**

**2. Mrs. Njihia instructed by Punja and Kagongona Advocates for the Respondents.**

