



**Kenya Union of Commercial Food & Allied Workers v Midal Group
(K) Ltd (Employment and Labour Relations Cause 38 of 2021)
[2022] KEELRC 4161 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4161 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 38 OF 2021
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT
AND
MIDAL GROUP (K) LTD RESPONDENT

JUDGMENT

1. The claimant union sued the respondent for allegedly victimizing and subsequent termination of the claimant's members; Peter Mahungu Wambugu, Rose Anyango Obuya, Caren Jephchirchir Tuitoek, Otworzi Zedekiah Moanga, Mary Bosibori Mathew and Wilson Mukwana.
2. The claimant stated that the respondent was contacted by Woolmatt supermarket limited to supply outsourced labour to work as; shop assistants, till operators/cashiers, loaders, back office clerks and all other unionisable grades.
3. The 1st grievant, Peter Mahungu Wambugu was employed as the shop assistant on the December 27, 2017 earning a salary of Kshs 8,000. The 2nd grievant, Rose Anyango Obuya, was also employed as a shop steward on the March 15, 2018 earning Kshs 8,500 at the time of termination. The 3rd grievant Caren Jephchirchir Tuitoek was employed as a cashier earning Kshs 11,000 at the time of termination. The 4th grievant, Awori Zedekiah Moanga was employed on the February 20, 2018 as a loader earning Kshs 8,500 at the time of termination. The 5th grievant, Mary Bosibori Mathew was employed as a cashier on the March 15, 2018 earning Kshs 8,500 at the time of termination. The last grievant is Wilson Mukwana, was employed on the December 5, 2017 as a shop assistant earning a monthly salary of Kshs 8,500 at the time of termination.
4. The circumstances that lead to the grievants termination is that the outsourced labour (being the grievants herein) serving Woolmatt supermarket limited, on their own volition, joined the claimant



Union, Kenya Union of Commercial Food and Allied Workers, sometimes between April and June 2018.

5. The union then sent checkoff forms to the respondent to begin deducting and remitting union dues. Immediately thereafter the respondent forced all employees who had joined the union to sign a three months' contract and anyone who refused to sign the said contract was forced to stay away from work till they signed the said contract.
6. The said contracts were signed between July 4, 2018 to October 9, 2018 defeating the union membership and representation and also victimizing the employees who had joined the trade union as their employment was terminated on the lapse of the short contracts signed.
7. The union protested the action by the respondent to force employees to sign short term contract *vide* its letter of July 6, 2018 and urging them to revert its employee's employment to that of permanent terms.
8. The respondent regardless of the protest by claimant terminated the services of the grievants on the October 11, 2018. The grievants in reply wrote to the respondent *vide* their letter of October 11, 2018 protesting their harassment, intimidation, victimization assault and unfair termination of their employment.
9. After termination, the union wrote a letter dated October 16, 2018 protesting the way their members were termination and urged the respondent to reinstate the grievants and pay them all their salary arrears.
10. The labour office also voiced their concerns and wrote the letter dated October 17, 2018 cautioning against the alleged victimization of the said grievants and for the payment of their dues.
11. Meeting were held at the shop level, however no amicable solution was arrived at and on December 10, 2018 the ministry of labour appointed Mr George Abuto as the conciliator who conducted several conciliatory meeting to no avail.
12. The claimant prays for the following reliefs: -
 - a. That the respondent's action be declared unprocedural, unfair and unlawful.
 - b. The respondent be ordered to reinstate the grievants back to employment unconditionally.
 - c. In the alternative the honourable court do order payment as follows: -
 - i. Peter Mahungu Wambugu
One-month notice *in lieu* of notice – Kshs 8,000
11 days worked in October.....Kshs 2,933
11 months pro rata leave.....Kshs 5,133
Salary underpayment 11 months x 5,309 – 58,399
12 months compensation.....Kshs 96,000
Total.....Kshs 170,465.00
 - ii. Rose Anyango Obuya
One month notice *in lieu* of notice.....Kshs 8,500
11 days worked in October.....Kshs 3,116



- 6 months pro rata leave.....Kshs 5,454
Salary underpayment 6 months x 4,809 = Kshs 28,854
12 months compensation.....Kshs 102,000
Total.....Kshs 147,924
- ii. Caren Jepchirchir Tuitoek
One month notice in lieu of notice.....Kshs 11,000
11 days worked in October.....Kshs 4,033
8 months pro rata leave.....Kshs 5,133
Salary underpayment 8 months x 14,737 – Kshs 117,896.
12 months compensation.....Kshs 132,000
Total.....Kshs 270,062.00
- ii. Atwori Zedekiah Moanga
One month notice *in lieu* of notice.....Kshs 8,500
11 days worked in October.....Kshs 3,116
8 months pro rata leave.....Kshs 3,966
Salary underpayment 8 months x 4,089 – Kshs 38,472.
12 months compensation.....Kshs 102,000
Total.....Kshs 156,054.00
- ii. Mary Bosibori Mathew
One month notice in lieu of notice.....Kshs 10,500
11 days worked in October.....Kshs 3,850
6 months pro rata leave.....Kshs 3,675
Salary underpayment 8 months x 15,237 – Kshs 91,422.
12 months compensation.....Kshs 126,000
Total.....Kshs 235,447.00
- ii. Wilson Mukwana
One month notice in lieu of notice.....Kshs 8,500
11 days worked in October.....Kshs 3,116
10 months pro rata leave.....Kshs 4,958.
Salary underpayment 10 months x 4,809 – Kshs 48,090.
12 months compensation.....Kshs 102,000
Total.....Kshs 166,664.00
- d. Certificate of service



- e. Costs of the suit to the claimant
 - f. Any other order the honourable court deems fit to address the cause of justice.
13. In response to the claim, the respondent filed a defence on the August 27, 2021. With regard to the 1st grievant, Peter Mahungu, the respondent avers that he was employed as a general worker on February 2, 2018 without any designation earning Kshs 8,500 and placed on probation for 6 months, followed by a contract of 3 months that expired on October 1, 2018. It is stated that, the grievant wrote a letter revoking his membership to the union on the July 6, 2018. Also that the 1st grievant had been part of ELRC case number 227 of 2018 which determined the issue of victimization therefore the case herein as against the 1st grievant is res judicata.
 14. The second grievant, Rose Anyango Obuya, was also employed as a general worker on March 1, 2018 not March 15, 2018 as alleged. Her role was never designated and her pay was Kshs 8,500 per month.
 15. The 3rd grievant, Caren Jepchirchir Tuitoek, was not employed as a cashier but a general worker on the February 9, 2018 earning a salary of Kshs 11,000 and placed on probation for 5 months, then signed a three months' contract commencing on July 9, 2019 that lapsed on October 1, 2018.
 16. The 4th grievant, Atwori Zedekiah Moanga, was employed as general worker with no specific designation on the February 20, 2019 at a salary of Kshs 8,500 which he worked under probation for 6 months then signed a contract that lapsed and was not renewed.
 17. The 5th grievant, Mary Bosibori was also employed as a general worker on the March 15, 2018 under probation and later signed a three month's contract that lapsed in October, 2018.
 18. The 6th grievant, Wilson Mukwana, was also employed as a general worker on the December 5, 2017 earning a salary of Kshs 8,500. He was placed on probation till July 16, 2018 when he signed a three months' contracts that expired in October, 2018.
 19. The respondent denied being informed that the grievants had joined a trade union to enable it deduct the union dues.
 20. The respondent also denied the allegation that it forced the grievants to sign a three months' contract and avers that the grievants signed the said contracts voluntarily.
 21. Prior to signing the said contracts, the respondent avers that none of the grievant was employed on permanent basis. It is stated that the grievants were informed on October 1, 2018 that their contracts would not be renewed and the respondent paid them all their September dues.
 22. It is the respondent's contention that the termination was not unfair as alleged rather that the grievant contract came to an end by effluxion of time.
 23. The respondent prayed for the claim to be dismissed with costs.
 24. The cause proceeded by way of written submission with claimant filing on the June 24, 2022 while the respondent filed theirs on the July 5, 2022.

Claimant's Submissions.

25. The claimant submitted from the onset that the grievants were victimized upon joining the trade, as they were directed to sign a three – month contract without giving them an opportunity to study the contract they were signing into. It was argued that the process of termination began as soon as the claimant sent check off forms to the respondent to sign in order to deduct union dues. Instead of the



- respondent signing the said check off forms it summoned all the employees who intended to join the union and directed them to sign a three months' contract to defeat the union.
26. It is the claimant's submission that the allegation that the grievants were on probation is not true but a decoy employed by the respondent to defeat the end of justice and justify their unfair termination.
 27. It is their submissions that having failed to give the claimant's members reasons for termination or subject them to notice thereof, the termination was unfair for all purposes and intents. To support its case, they relied on the case of *Anthony Mkala Chitavi v Malindi Waters and Sewerage Company Limited* (2013) eKLR.
 28. The claimant submitted that the circumstances leading to the termination of the grievants was done in total violation of section 49 and 50 of the *Employment Act*. In this they relied on the case of *Paul Mumo Kitavi v ACME Containers Limited* (2019) eKLR.
 29. The claimant in conclusion urged this court to hold in their favour and reinstate the grievants or in the alternative grant the compensatory prayers as pleaded in the claim.

Respondent's Submissions

30. The respondent on the other hand maintain that the grievants were not terminated as alleged rather that their contracts came to an end by effluxion of time. It was argued that having been employed on a fixed term contract the termination was automatic and did not require any reason to be given by the respondent upon such termination as a result of expiry of the contract. In support of their case the respondent relied on the case of the *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho – Kariuki* (2017) eKLR where the court held that: -

“Fixed term contracts carry no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”
31. To further reinforce their argument, the respondent relied on the case of *Teresa Carlo Omondi v Transparency International Kenya* (2017) eKLR and the case of *Johnstone Luvisia v Allpack Industries Limited* (2019) eKLR and submitted that, since the grievants were employed on fixed terms contract, they are not entitled to any reason upon the lapse of the said contract.
32. On the alleged victimization for joining a trade union, it was the respondent's submissions that no evidence was tabled by the claimant to support its allegation as required under section 109 of the *Evidence Act*. It was argued that the contracts herein were entered into voluntarily without any coercion on the part of the respondent as alleged. it was further argued that the grievants were got up in various misconduct as seen in the respondent annexure 3 and 7 and the fact that the 1st grievant Peter Mahungu had brought up a similar suit under ELRC cause 227 of 2018, where the issue of victimization was decided on made his case res judicata as against the 1st grievant.
33. On the allegation of failing to remit union dues, the respondent maintained that it was not aware that the grievants were members of any union, neither did the claimant inform it to enable it remit the said union dues, therefore the allegation was baseless. To support this argument, the respondent relied on the case of *Kenya Union of Commercial Food & Allied Workers v Mitra Enterprises Limited & another* (2021) eKLR.
34. On whether the claimant is entitled to the relief sought, it was submitted that the allegation of underpayment was merely stated without any evidence showing the grievants were working in the



various position stated in the claim. Failure to produce evidence makes their claim on underpayment untenable. In support this they relied on the case of *Charles Ogola & 2 others v Mansion Hart Kenya Limited* (2019) eKLR where the Honourable Lady Justice Maureen Onyango held that: -

“On the claim of underpayment, they did not submit any proof of what the statutory wage were entitled to was. They further did not submit proof of hay they were earning during the period claimed. They also did not state which joint category each claimant was engaged in as this would determine the statutory minimum wage applicable. Without the particulars the claimants by the claimants that they were underpaid are incapable of ascertainment. The claim thus fails.”

35. In conclusion, the respondent submitted that the termination of the grievants services was based on expiry of their contract and done in accordance with the law and therefore not unfair and unlawful as alleged.
36. I have examined all the evidence and submissions of the parties herein. The claimants aver that their members had been employed by the respondents on permanent and pensionable terms which terms were changed when they opted to join the union.
37. The omission made by the claimants is that there is no evidence that the grievants had been employed on permanent and pensionable terms before the joining the union. There is no evidence of the status of the employment of the grievants before the check-off forms were filed or submitted to the respondents.
38. What is evident is that the grievants were employed on short term contracts and upon expiration of the contracts they were not renewed or extended. It is therefore true that the grievant’s employment ended by expiration of their contracts and the claim by the grievants cannot stand.
39. I find the claim by the grievants for unfair termination, victimization e.t.c is not established and cannot stand.
40. The claim is therefore dismissed accordingly with no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2022.

**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of:

Tacko for Claimant – present

Mogaka holding brief for Mbeche for Respondent – present

Court Assistant - Fred

