



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 40 OF 2020

TAILORS AND TEXTILES WORKERS' UNION.....CLAIMANT

VERSUS

UNITED ARYAN (EPZ) LIMITED.....RESPONDENT

JUDGMENT

1. The suit commenced by way of a Statement of Claim filed on 27/1/2020. The claimant prays for an order in the following terms.
 - (a) **A declaration that the Respondent's Company has violated and/failed to implement Legal Notice No. 2 of 2019.**
 - (b) **That the Respondent be ordered to implement the aforesaid Legal Notice No. 2 of 2019.**
 - (c) **The Respondent be ordered to pay damages to the Claimant Union and its members for the violation and/or breach of Legal Notice No. 2 of 2019.**
 - (d) **The Respondent be ordered to pay damages for discrimination against the Claimant members.**
 - (e) **The Respondents be ordered to pay costs of the instant suit.**
 - (f) **Any other Order that the Court may deem fit.**
2. The respondent filed a replying affidavit to the Notice of Motion and the suit filed on 27/1/2020 in which the Managing Director of the respondent denies the substratum of the claim which is that, the respondent has failed and/or neglected to implement Legal Notice No. 2 of 2019, which is a minimum wage order gazetted by the Honourable Cabinet Secretary for Labour.
3. It is not in dispute that the effective date of the Legal Notice No. 2 of 2019, is May, 2018, the date when the Wage Order was promulgated by the Cabinet Secretary during Labour day celebrations and the gazette was subsequently issued on or about 8th January, 2019.
4. The parties have by consent proceeded on the matter on the basis of their pleadings, annexures thereto and written submissions. The claimant filed supplementary affidavit on 17/4/2020 in which it joins issues with the respondent as deposed to in the replying affidavit.
5. The claimant attached to the supplementary Affidavit Kenya Gazette supplement No. 1 dated 8th January, 2019.
6. The Gazette is titled The Regulation of Wages (*General*) (Amendment) Order, 2018. The same sets out schedules of: -
 - (i) **Basic minimum monthly wage (Exclusive of Housing Allowance)**
 - (ii) **Minimum Daily and Hourly Rates (inclusive of Housing Allowance) and;**
 - (iii) **there under is a schedule of 15 categories of employees as defined by their occupation in respect of which Basic minimum monthly wages (Exclusive of Housing Allowance) and minimum Daily and Hourly Rates (including of Housing Allowance are provided.**
7. Furthermore at page 5 of the notice, the Cabinet Secretary, Ukur K. Yattani promulgated-

“The Regulation of Wages (Agricultural Industry) (Amendment) Order, 2018.”

8. There under the Cabinet Secretary provided a schedule of Basic Minimum consolidated wages for different occupations within the Agricultural Industry.
9. In the written submissions by the respondent, the respondent states that the replying affidavit sworn by Amit Bedi on 28th February, 2020 is also a response to the main suit.
10. The respondent states that the claimant has no *locus standi* as it failed to set out the employees it is acting for.
11. The respondent however makes an admission to this effect.

“The Respondent also avers that following the publication of Legal Notice No. 2 of 2019 on or about 8th January, 2019, the Respondent adjusted the salaries of the employees from the month of January, 2019 as evidenced at paragraph 16 of the Replying Affidavit as evidenced by exhibits AB2 – AD9 which are pay slips from sample employees.”

12. The Respondent goes further to depose in the replying affidavit and in the submissions that:-

“... The wage Order cannot apply retrospectively as it affects substantive rights of the company and further the orders sought would in effect be punishing the Respondent for conduct/payment of salaries that was legal at the time as clearly set out at paragraph 17-21 of the Replying Affidavit.”

13. The claimant has in fact delineated a key issue for determination as:-

“What was the effective date of the said wage order and if it applied to the Respondent’s employees.”

14. It is apparent that the respondent does not dispute applicability of the said wage order on its employees. Indeed, the wage order applies to all occupations serialised in the schedule therein without exception. The only issue therefore for determination is what is the effective date of the wage order. The wage order reads:

“This order may be cited as the Regulation of wages (General) (Amendment) Order, 2018 and shall come into force on the 1st May, 2018” (Emphasis mine).

15. The General wage Order is promulgated by the Cabinet Secretary pursuant to advice of the general wage council and agricultural wages Council established under Section 43(1) (a) and (b) of the Labour institutions Act, No. 12 of 2007.

16. Furthermore, under Section 43(2) the Cabinet Secretary establishes, Sectoral Wage Councils if the Cabinet Secretary is of the opinion that:-

(b) It may be expedient to set minimum wage and other conditions of employment in respect of employees in those sectors.

17. The key function of Wages Council is in terms of section 44(c) **“make recommendations to the Minister on minimum wage remuneration and conditions of employment.”**

18. The Wages Councils engage in extensive investigation and consultation before making recommendations to the minister on minimum wage in terms of section 44(2), (3) (4) (5) and before the minister publishes a wage order such as the one in dispute in this matter under Section 45, a draft wage order (i) is published in a Gazette and in terms of Section 45(1) (c) **“inviting comments within a reasonable period on the draft wages order, which may not be less than thirty days from the publication of the notice.**

19. Any person may submit written comments on the draft wage order and may make specific objections to the draft wage order and or recommend deletions and modifications.

20. The Wages Order is then published as in this case pursuant to Section 46(1) of the Act upon conclusion of that process in terms thereof.

“(1) The Minister may, after considering any further report of the Wage Council and any further advise from the Board, publish a wage order and

(2) A Wages Order shall be-

(a) published in the Gazette; and

(b) be laid before the National Assembly within twenty one days of publication.

21. The respondent in this suit has not alleged that any of the aforesaid processes were not followed before the publication of the Gazette on 8th January, 2019. The claimant has discharged the onus placed on it in terms of Section 107 and 108 of the Evidence Act, Cap 80 Laws of

Kenya on a balance of probabilities.

22. It behooved the respondent to discharge evidential burden of rebuttal that the Regulation of wages (*General*) (*Amendment*), Order, 2018 was not developed and published in terms of the laid down law and procedure.

23. The Court of Appeal in **Mistry Jadva Parbat and Company Limited –vs- Ameer Kassim Lakha & 2 Others – Civil Appeal (Application) No. 296 of 2001** stated:-

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the Legislation.”

24. The respondent failed to discharge evidential burden of rebuttal.

25. The claimant has therefore established that Regulation of wages (*General*) (*Amendment*) Order, 2018 is lawful and obligatory to every employer, employing persons in the occupations enumerated in the schedules and the effective date is as expressly stated in the Wage Order itself that:-

“shall come into force on 1st May, 2018.”

26. The respondent is bound to revise the wages of all categories of its employees affected by the Wage Order with effect from 1st May, 2018.

27. The respondent already revised the wages of the employees with effect from January, 2019 as evidenced by the pay slips the respondent produced in Court.

28. The Court directs the respondent therefore to implement the Wage Order for the period 1st May, 2018 to 30th December, 2018 and pay the employees accordingly.

29. In the final analysis, Judgment is entered in favour of the claimant against the respondent as follows:-

(a) The Regulation of wages (*General*) (*Amendment*) Order, 2018, came into force on 1st May, 2018.

(b) All affected employers including the Respondent are bound to implement the revised minimum wage for the occupations specified in the schedules therein with effect from 1st May, 2018. The respondent is directed to implement the Wage Order accordingly.

(c) The respondent to pay the costs of the suit.

30. For the avoidance of doubt, the claim for damages in respect of breach of the wage order and alleged discrimination of claimant's members was not proved by the claimant and the same is dismissed for want of proof.

31. The claimant did not pray for interest to be awarded by the Court and the Court does not award any interest on the payable arrear wages.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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, this 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 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this 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.

MATHEWS N. NDUMA

JUDGE

Appearances

J.A. Guserwa for Claimant, union

Mr. Weru for Respondent

Ekale – Court clerk