



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC NO. 227 OF 2018**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**MIDAL GROUP (K )LTD.....1<sup>ST</sup> RESPONDENT**

**WOOLMART LTD..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondents for allegedly victimizing the claimant's members on the basis of being claimant's union members, changing the terms of employment to contractual basis, failing to deduct union dues and remit the same to the claimant and for unfair labour practices against the Claimant's members at the employ of the 2<sup>nd</sup> Respondent.
2. It is stated that the 1<sup>st</sup> Respondent is a group of companies dealing in Agency services, access control among others which is contracted by the 2<sup>nd</sup> Respondent as labour outsourcing company which the 2<sup>nd</sup> Respondent has outsourced some of its employees working in various positions such as shop assistants, till operators, loaders, back office clerks among others.
3. The claimant states that it has a registered Collective Bargaining Agreement with the 2<sup>nd</sup> Respondent which came to force for 2 years effective 1<sup>st</sup> May, 2017 and is to run for 2 years.
4. That the Claimant's members who were outsourced by the 2<sup>nd</sup> Respondent from the 1<sup>st</sup> Respondent joined the claimant's union however that when the claimant presented the check off forms to 1<sup>st</sup> Respondent on 22<sup>nd</sup> June, 2018 for remittance of Union dues, the 1<sup>st</sup> Respondent declined and instead asked their employees to sign new contracts that would last for only 3 months which action was protested by the 1<sup>st</sup> Respondent employees.
5. That despite efforts by the claimant to have the said turn of events reversed, the 1<sup>st</sup> Respondent became adamant.
6. That the 2<sup>nd</sup> Respondent has outsourced employees performing its core functions contrary to the decision in **Nairobi Petition number 22 of 2012; the Wringley Company EA Limited –v-Attorney General & 3 others, Sheer Logic Management Consultants Ltd,interested party.**
7. The claimant contends that the outsourced employees in the 2<sup>nd</sup> Respondent's employ can be represented within the existing recognition agreement with the principal employer.
8. That the Respondent have connived to discriminate against the outsourced employees who are paid Kshs.8,000/- as gross salary against the employees of the 2<sup>nd</sup> Respondent performing similar duties taking home salary of Kshs. 18,000.
9. It is for these reasons that the claimant prays for judgment for the claimant as against the Respondent for the Court to;

**i. Declare that the 1<sup>st</sup> Respondent has violated employees right of freedom of association and representation.**

**ii. Orders the 1<sup>st</sup> Respondent to stop any form of victimization, threats and intimidation of employees on account of their union membership.**

iii. Issues an order directed at the 1<sup>st</sup> Respondent to deduct and remit union dues from their employees who have acknowledged their union membership by signing the claimants check off sheets

iv. Issues an Order directing the 1<sup>st</sup> Respondent to reverse the contract terms forced on employees after joining the Union.

v. An order directing the 2<sup>nd</sup> Respondent to ensure that the outsourced employees are not engaged on lesser wages and are not placed on inferior terms than those enjoyed by its regular employees and that such employees are not subjected to any form of discrimination.

vi. Issues and award any other appropriate relief as it deems fit and proper to meet the ends of justice.

vii. Orders costs of this suit to be paid to the claimant.

10. The 1<sup>st</sup> Respondent through the firm of Obura Mbeche filed a response to the Memorandum of claim on the 17<sup>th</sup> September, 2018 denying the claim in its entirety and stating that the employees outsourced by the 2<sup>nd</sup> Respondent were not members of the Union between the claimant and the 2<sup>nd</sup> Respondent as alleged and are therefore not covered by the CBA therein.

11. It was stated further that there is no CBA between the claimant and the 1<sup>st</sup> Respondent therefore the checkoff forms could not be acted upon in absence of a valid and registered Collective Bargaining Agreement between them, in essence the 1<sup>st</sup> Respondent was not under any obligation to remit Union Dues.

12. The 1<sup>st</sup> Respondent stated that the contracts were willingly signed by its employees and were not coerced as alleged, further that the contracts were renewable.

13. That the three employees who wrote statements of protest being Brian Osai Adunge, Rose Kerubo Momanyi and Evans Owino Otieno applied for work with the 1<sup>st</sup> Respondent and accepted to work on contractual basis that lasts for 4 months knowing that they could be deployed to any company.

14. It is stated that the above mentioned employees were found with various misconducts in their work stations which forced the 1<sup>st</sup> Respondent to reassigning them other duties and instead of taking up the reassigned duties the said employees absconded duty culminating to these proceedings.

15. The 2<sup>nd</sup> Respondent filed its response to the claim on 16<sup>th</sup> June, 2021 with leave of Court granted on 10<sup>th</sup> June, 2021 and denied the entire claim on the basis that there is no privity of contract between it and the claimant based on the claim before Court as the employees who are subject of this suit are outsourced from the 1<sup>st</sup> Respondent therefore the claim herein is between the Claimant and the 1<sup>st</sup> Respondent. It also denied discriminating the outsourced employees as alleged.

16. On the 19<sup>th</sup> September, 2018 when the Claimants application dated 23<sup>rd</sup> July, 2018 came up for hearing, the Respondent's Advocate raised the fact that the matter ought to be remitted for conciliation. Subsequently, the Court directed the same to proceed before a conciliator and stayed the proceeding herein. The conciliation proceedings were conducted and a report dated 24<sup>th</sup> January, 2019 filed in Court as additional claimant list of documents dated 16<sup>th</sup> November, 2019.

17. From the record, it seems the parties herein abandoned the Claimant's application dated 23<sup>rd</sup> July, 2018 and decided to proceed with the main cause which they agreed on 4<sup>th</sup> May, 2021 to dispose of by way of written submission with the Claimant filing its submissions on 26<sup>th</sup> May, 2021, the 1<sup>st</sup> Respondent on 9<sup>th</sup> June, 2021 while the 2<sup>nd</sup> Respondent filed on 17<sup>th</sup> June, 2021.

#### **Claimant's submissions.**

18. The claimant submitted that the 1<sup>st</sup> Respondent's employees have a right to join a trade union of their choice as provided for under Articles 36 and 41 of the Constitution and section 4 of the Labor Relations Act. He Argued that, the 1<sup>st</sup> Respondent's employees serving the 2<sup>nd</sup> Respondent joined the Claimant's union by signing claimant's check off forms which were served upon the 1<sup>st</sup> Respondent therefore the 1<sup>st</sup> Respondent was obligated to deduct Union dues as soon as they were served with the check off forms with or without any CBA between them.

19. It was submitted that the 2<sup>nd</sup> respondent was under a duty to ensure that all its employees enjoy good terms and conditions of working in their premises and are not discriminated against as was held by a 3 judge Bench in **Nairobi Petition number 22 of 2012; the Wringley Company EA Limited –v-Attorney General & 3 others, Sheer Logic Management Consultants Ltd, interested party.**

20. He submitted further that the 2<sup>nd</sup> respondent ought not to have outsourced employees performing its core function as was held in the case above.

21. It is the claimant's submissions that employees who were outsourced can be represented within the recognition agreement with the principal employer therefore ought to enjoy the same terms and conditions of service enjoyed by the employees of the principal employer as was held in **Kenya Union of Commercial, Food and Allied workers –v- Tusker Mattresses Limited [2015] eklr.**

## **1<sup>st</sup> Respondent's Submissions**

22. The 1<sup>st</sup> Respondent submitted that they have not denied their employees to join a union of their choice, it infact referred the Court to paragraph 5 of the contract of employment between it and its employees which allowed its employees to join trade unions but that the employee was under an obligation to inform the employer of the trade union it joins.

23. It was submitted that the 1<sup>st</sup> Respondent does not have any CBA with the claimant that would enable it remit any union dues to it. He argued that the claimant has not met the initial requirement of recognition under section 54(1) of the Labour Relations Act as the employees that have allegedly joined the Union from the 1<sup>st</sup> Respondent employ are about 40% which falls below the threshold of 50% + 1 therefore the 1<sup>st</sup> Respondent is not obligated under the law to deduct any dues for the claimant in light of the fact that there is not recognition agreement or CBA between them.

24. The 1<sup>st</sup> Respondent maintains that the CBA between the claimant and the 2<sup>nd</sup> Respondent cannot be extended to the sourced employees who are the 1<sup>st</sup> Respondent employees. Further that not discriminatory practices have been demonstrated by the claimant to warrant the issuance of the orders sought and cited the case of **Rashid Odhiambo Allogah and 245 others –v- Haco Industries limited [2015] eKLR** and argues that in absence of such proof the claim remains an allegation which must fail.

25. On whether the 1<sup>st</sup> Respondents employees were unfairly terminated, it was submitted that the 1<sup>st</sup> Respondent's employees were under a contract of 3 months renewable at the discretion of the employer, a contract that was accepted by the said employees voluntarily and later absconded duty upon being reassigned other duties thus the reversal of the 3 months contract is baseless as the contract is between the employer and the employee which the court ought not to interfere with unless the said employment is based on fraud, misrepresentation or coercion as was held in **National Bank of Kenya Limited –v- pipe plastic samkolit K Limited and another [2000] EA 503** which was cited in **Joel Phenehas Nyaga and Joseph Nyaga Nzau ( Suing as the chairperson and treasurer of Kemagui Electrification self-help group) –v- Aloysuis Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR**.

26. He therefore submitted that it has not acted unfairly as alleged and prayed that the Claimants claim be dismissed with costs to them.

## **2<sup>nd</sup> Respondent's Submissions.**

27. It was submitted on behalf of the 2<sup>nd</sup> Respondent that Claimant has acknowledged in its pleadings herein that the 2<sup>nd</sup> Respondent outsourced some of its employees from the 1<sup>st</sup> Respondent therefore that there is no Privity of contract between the claimant and the 2<sup>nd</sup> Respondent and that any engagement of the 1<sup>st</sup> Respondent with its employees is beyond the mandate of the 2<sup>nd</sup> Respondent. It cited the case of **Securicor Guard K Limited –v- Mohamed Saleem Malik & Another [2019] eKLR**.

28. It was submitted that the reliefs sought are not enforceable against the 2<sup>nd</sup> Respondent as it is legally impossible to impose obligations on the 2<sup>nd</sup> Respondent stemming from contract between the claimant and the 1<sup>st</sup> Respondent.

29. He concluded that the suit as against the 2<sup>nd</sup> Respondent is vexation and an abuse of court process which ought to be dismissed with costs to it.

30. I have examined the evidence and submissions of the parties herein. The main issue raised by the claimant are as follows;

- 1. Victimization of outsourced labour by the 1<sup>st</sup> and 2<sup>nd</sup> respondent on account of their union membership.**
- 2. Forcing the said employees to sign a three month employment contract as opposed to permanent and regular employment as a punishment for their union membership.**
- 3. Refusal by the 1<sup>st</sup> respondent to deduct and remit union dues.**
- 4. Unfair labour practices against outsourced labour in terms of wages and other terms and condition of services.**
- 5. Failure by the 2<sup>nd</sup> respondent to ensure that outsourced labour are not denied their right of freedom of Association and of union membership.**

31. From the evidence submitted by the parties herein, the claimant and 2<sup>nd</sup> respondent have a recognition agreement effective 1/5/2017.

32. The claimants members were however outsourced by the 2<sup>nd</sup> respondent from the 1<sup>st</sup> respondent.

33. These employees attempted to join the claimant's union and presented check off forms to 1<sup>st</sup> respondent on 22/6/2018 for remittance of union dues but 1<sup>st</sup> respondent declined and forced their employees to sign new contracts lasting only 3 months.

34. The claimants have complained that all their members employed by 1<sup>st</sup> respondent have been outsourced by the 2<sup>nd</sup> respondent contrary to the law.

35. The respondents have denied this claim and aver that there is no CBA between 1<sup>st</sup> respondent and claimant so they could not deduct any Union dues. They also aver that the contracts were willingly signed by the employees and they were not coerced to do so.

36. From these averments, it is evident that there is a CBA between the claimant and the 2<sup>nd</sup> respondent signed on 28/9/2017.

37. It is also evident that the claimant union submitted check off forms to the 2<sup>nd</sup> respondent on 11/4/2018 and in June, July, 2018, April 2018 but the 2<sup>nd</sup> claimant did not honour the check off form request by deducting the union dues as expected.

38. The 2<sup>nd</sup> respondent indicated that they didn't honour the request to deduct Union dues because the employees had been outsourced from the 1<sup>st</sup> respondent.

39. In determining this claim, I wish to refer to a decision by a three Judge bench of this court being JJ Nduma, Ndolo and Makau in **Pet. No. 22 of 2012. The Wrigley Company (East Africa) LTD VS the Hon. AG, The Industrial Court & Others** where the learned Judges set out what they felt was a credible outsourcing programme as follows inter alia;

**a) "Ordinary employers are not to outsource their co-functions.**

**b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligation to its employees.**

**c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement taken effect and**

**d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise."**

40. This position was also taken by my learned brother J Abuodha in **Nairobi ELRC Cause No.1654 of 2019 Kenya Union of Commercial Foods & Allied Workers VS Tusker Mattresses LTD** where he reiterated the parameters to be used for outsourcing.

41. In the circumstances of this case though there is no recognition agreement between the claimant and 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent are still obliged to deduct and remit Union dues because deduction and remittance of Union dues is dependent on Union membership and not recognition as per Article 41 of the constitution which states as follows;

**41.**

***(1) Every person has the right to fair labour practices. (2) Every worker has the right—***

***(a) to fair remuneration; (b) to reasonable working conditions;***

***(c) to form, join or participate in the activities and programmes of a trade union; and***

***(d) to go on strike.***

***(3) Every employer has the right—***

***(e) to form and join an employers organisation; and***

***(f) to participate in the activities and programmes of an employers organisation.***

***(4) Every trade union and every employers' organisation has the right—***

***(a) to determine its own administration, programmes and activities;***

***(b) to organise; and***

***(c) to form and join a federation.***

***(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. Constitution of Kenya, 2010 31 Environment.***

42. Section 48 (2) of the Labour Relations Act 2007 also states as

follows;

***48. In any complaint made under section 47, no advocate shall represent a party in the proceedings before a labour officer, but***

***any party may be assisted or represented by an official of a trade union or an official of an employer's organisation notwithstanding the fact that the official is an advocate.***

43. The issue here is therefore not dependent on any CBA registration nor recognition. I therefore agree with the claimant that the 1<sup>st</sup> respondent's refusal of deduct and remit Union dues was unfair to the claimants and the members and denied them the right to Freedom of Association and of Union membership.

44. Other than that, the members of the claimant Union complained that they were paid less than the others directly employed by the 2<sup>nd</sup> respondent though doing a similar job.

45. This in itself would amount to discrimination against such employees against the requirement of the law and the constitution.

46. The claimant however did not adduce evidence to establish the disparity in payment of salary between the outsourced workers and those employed directly.

47. On issue of forcing the workers to sign a three month contract, the claimants have not established this "forceful nature" of signing the contracts.

48. The upshot of this claim is that this court finds that the failure of the 1<sup>st</sup> respondent to deduct and remit Union dues for the members of the claimant union was against the law and discriminatory and the request to deduct and remit Union dues should henceforth be effected.

49. This court also reiterates the parameter for proper outsourcing which will not support discrimination in terms of wages and other terms of condition of service, for the employees.

50. Whereas outsourcing per se is legal, victimization of any outsourced labour is illegal and should therefore be discouraged.

51. Those are the orders of this court.

52. The respondent will pay costs of this cause.

Dated and delivered in open Court this **29<sup>TH</sup> day of JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Tacko for claimant present

Ms. Mbeche for 1<sup>st</sup> respondent present

Mr. Kairu for 2<sup>nd</sup> respondent present

Court assistants – Fred and Wanyoike