



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1830 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

BENARD MUSYOKA NGWENZE

& 167 OTHERS.....CLAIMANTS

VERSUS

UZURI FOODS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants served the Respondent in different capacities as casual employees but were later converted to permanent employees. The Claimants initially instituted this suit on 14/10/2015 to challenge the Respondent's refusal to deduct trade union dues from their salaries. However, during the subsistence of this suit, the Respondent terminated the Claimants' employment prompting them to file an Amended Statement of Claim in 2/9/2016 to challenge the said termination where they sought the following reliefs: -

- a. A declaration do issue that the Respondent's employees have a constitution (sic) right under Article 41 of the Kenya (sic) Constitution to join the Claimant's union.*
- b. That the Respondent's lock-out of its employees for the reason of joining a trade union of their choice is illegal, null and void.*
- c. The Respondent be restrained by an order of injunction from victimizing its employees on account of their membership to the Claimant.*
- d. A declaration that the mass dismissal of the Claimants from their employment was un-procedural, unfair, unlawful and unmerited in the circumstances.*
- e. The Claimants be reinstated to their respective places of work without loss of benefits and in the alternative, they be paid their terminal benefits as set out in paragraph 9 of the Amended Statement of Claim totaling to Kshs. 49,606,050.60.*
- f. The Respondent be ordered to compensate the Claimants for unlawful termination of the equivalent of twelve months gross salary.*
- g. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act 2007.*
- h. The Honourable Court do issue such orders as it may deem fit and just to grant in the circumstances.*
- i. The Respondent to pay the costs of this suit.*
- j. Interest on the above at Court rates.*

2. In response to the Amended Statement of Claim, the Respondent filed its Memorandum of Response on 3/8/2017 denying the averments made in the claim.

The Claimants' Case

3. The Claimants aver that in a bid to hinder the deduction of union membership fees from their salaries, the Respondent intimidated them demanding that they must sign documents renouncing their union membership before they could be allowed to work.
4. The Claimants challenged the action and this Court issued orders on 15/10/2015 restraining the Respondent from intimidating, disciplining or locking out the Claimants and 450 other employees from their place of work. The orders were extended on 29/10/2015.
5. The Claimants aver that they worked diligently and dutifully until their services were unlawfully and un-procedurally terminated on 9/12/2015 without payment of their terminal dues. They were not accorded a hearing as required by section 41 of the Employment Act and the principles of natural justice. Further, it is averred that the Respondent did not have a valid reason to justify the said terminations.
6. The Claimants thus urged this Court to intervene as they stood to suffer irreparable loss and damage.
7. Hudson Mwenda Kiambi testified on behalf of the Claimants as CW1. He told this Court that he was working as an oven man earning a salary of Kshs. 18,000.00. He informed this Court that all the Claimants had filed Affidavits showing how they were employed and pay slips to show the earnings.
8. It was his testimony that he worked until 6/10/2015. On that material date, he was locked in and those who were coming to work were locked out. They were then told by the Respondent that it didn't want another union. They reported the matter to the labour office but the management refused to give audience to the labour officer.
9. It was his testimony that they were never subjected to any disciplinary proceedings prior to the termination of their employment. He told this Court that despite the issuance of orders barring the Respondent from interfering with the Claimants' employment, they were still summarily dismissed. It was his testimony that they were never issued with a summary dismissal letter.
10. He stated that he worked from 10/10/2015 to 9/12/2015 but was not paid. He also stated that he only got to know of his summary dismissal after the issuance of this Court's ruling. It was his testimony that they worked from 7:00AM to 6:00PM. He also stated that though they took leave days, they were never paid leave allowance. He therefore urged this Court to award the Kshs. 49,606,050.00 claimed with his claim being Kshs. 385,378.0/=.
11. Upon cross examination, he confirmed that they issued the Respondent with a 7 days strike notice if it failed to recognize their union. He stated that they never wrote a letter to withdraw the strike as they were locked out. He contended that they were locked out though they were ready to work.
12. He conceded that there were notices requesting them to go back to work but contending that their failure to report back was attributable to the hooligans who meted out violence against them. He maintained that they were never given notices as alleged in the dismissal letters.
13. It was his testimony that he was locked out on 9/10/2015 but that his last day at work was 6/10/2015. He conceded that the Ruling by the Honourable Justice Ndolo indicated that by 15/10/2015, he had been dismissed from employment.
14. He stated that he never participated in the strike and would like to be reinstated. He denied having knowledge of the Bakery Union. He conceded to not knowing the salary of Aluda. He maintained that he worked from 7:00AM to 6:00PM with one-hour lunch break though he never left his station for his break.
15. Upon re-examination, it was his assertion that the Respondent had not disputed his salary. He contended that that strike notice was never issued or signed by them and noted that the Respondent's notice to report back to work was unsigned.
16. Wilson Adwodo Mulima testified as CW2. He told this Court that he served the Respondent as an oven man. It was his testimony that he reported to work at 5:00PM and left at 7:00AM. According to him, they were locked out because of joining a union. It was his testimony that they never participated in a strike.
17. He reiterated CW1's testimony that the Respondent refused to grant audience to the labour officer and union officials. He also reiterated that they were never allowed back to work despite the issuance of Court orders to that effect. He denied receiving a dismissal letter and stated that they were never asked to show cause neither were they subjected to disciplinary proceedings. He therefore urged this Court to award the Kshs. 49,606,050.00 claimed with his claim being Kshs. 621,281.00 together with the costs of the suit and interest thereof.
18. Upon cross examination, he maintained that they were locked out of the Respondent's premises on 7/10/2015 and even after getting a Court order. It was his testimony that the Respondents action was prompted by their decision to join a union. He denied receiving any notice to go back to work.
19. He conceded to the fact that all the Claimants earned individual salaries and that he did not know what David Nyongesa earned. He told this Court that he was dismissed unfairly therefore was entitled to compensation for unfair termination.
20. Upon re-examination, it was his testimony that the impugned strike notice and the notice to report back to work were not signed. He also noted that the Respondent had never challenged their pay slips or the tabulation of their dues. He stated that the work records were kept by the Respondent.

The Respondent's Case

21. The Respondent on the other hand admits that it received check-off forms signed by KUCFAW for union dues deductions yet it had a valid Recognition Agreement with the Bakery Confectionary Food Manufacturing & Allied Workers Union.
22. The Respondent denies locking out its employees or intimidating them and avers that the Claimants refused to resume duty or follow instructions and instead initiated an illegal strike in the night of 6th and 7th October 2015 which amounted to gross misconduct warranting their dismissal.
23. It is the Respondent's case that the termination of the Claimants' employment was fair, procedural and lawful. The Respondent contends that the Claimants dues were duly worked out and deposited at the Labour Office for their collection while some were paid out to the Counsel on record. The Respondent thus urged this Court to dismiss the claim with costs.
24. Quinter Akoth testified as RW1. She informed this Court that she was the Respondent's Human Resource Manager. It was her testimony that the Claimants were summarily dismissed because they went on strike. She testified that the Claimants were paid their salaries for October to December 2015. She urged this Court to dismiss the suit with costs.
25. Upon cross examination, it was her testimony that the Claimants were dismissed on 9/10/2015 after going on strike on 7/10/2015. It was her testimony that at the time of the strike, there was another union called Bakers Union but conceded that she did not have documents to prove the existence of the union.
26. She stated that the strike was reported to the Industrial Area Labour Office but conceded that they never filed a suit to stop the illegal strike. She stated that she wrote to the employees to report back to work and put the same on the notice board but conceded that the gate was being manned since there was an ongoing strike. However, she contended that the several employees had been allowed access.
27. It was her testimony that the Claimants were not issued with a show cause letter but she contended that the Claimants were invited to a meeting with the director on 8/10/2015. It was also her testimony that they never wrote to the union.
28. She stated that after the issuance of Court orders, the Claimants came back to work and were paid salaries for October to December 2015. It was her testimony that they were paid in cash according to the Respondent's advocate's schedule. She stated that those who never took leave were paid. She conceded that the Claimants were working 10 hours a day with a 1-hour lunch break.
29. She admitted that the attendance schedule was not before this Court. She further admitted that the Claimants were not given a termination notice but maintained that the termination was fair. She explained that the tabulations per the Claimants' schedule was incorrect as the details of when they were employed and the salary payable was untrue.
30. Upon re-examination, it was her testimony that the Respondent was never served with a notice to produce the register, leave roster, overtime records or other employment records. She maintained that the Claimants refused to work even after being invited to a meeting hence the reason they were summarily dismissed. She pointed out that the claim did not particularize on the overtime sought.
31. Moses Mbugua Njogu testified as RW2. He informed this Court that he was the Respondent's employee since 2013. He told this Court that the Claimants had been his colleagues. It was his testimony that on 7/10/2015, the Claimants went on strike and asserted that they were never locked out. He reiterated RW1's testimony that the Claimants had been told to report back to work but they refused. As such, their summary dismissal was unfair.
32. During cross-examination, it was his testimony that he had been on duty for his morning shift when the Claimants went on strike. However, he conceded that he couldn't tell who was in the night shift and who was in the day shift. He told this Court that Nicholas, Philip Kamau, Kevin Omondi and Simon Mutinda among others who were on strike.
33. He stated that while his colleagues were on strike, he continued with his work but 6 of them attacked him since the gate was not locked. It was his testimony that no one was prevented from getting in.
34. He testified that he was not summarily dismissed and admitted that he didn't know the reason for the strike. He was not re-examined.
35. At the close of the Respondent's case, the hearing was closed and parties directed to file their submissions. Both parties filed their respective submissions.

The Claimant's Submissions

36. The Claimants submit that the Respondent had no valid reason to terminate their employment. They submit that they have proved that their employment was terminated because they chose to join a union which was not a fair reason to terminate their employment as outlined in Section 46 of the Employment Act. It is their submissions that the Respondent misled this Court by falsely alleging that they had gone on an illegal strike yet they had been locked out of the Respondent's premises.
37. It is their submissions that an employer has no prerogative to choose the union that an employee should belong to. In any event, they submit that though the Respondent claimed that they were members of another union, it did not pay union dues to that union hence the same was inexistent and there was no proof of its existence.
38. The Claimants submit that the Respondent did not follow the termination procedure as set out in Section 35, 41, 43, 45 and 46 of the Employment Act and Article 41 (1) of the Constitution. It is the position for termination to be deemed fair, it must pass the substantive and procedural fairness test. That is there must be a reason for termination and due procedure must be followed. They contend that the

Respondent did not have a valid reason for their summary dismissal neither were they subjected to any disciplinary proceedings hence the termination of their employment was unfair.

39. The Claimants submit that they are entitled to one month's salary in lieu of notice as they were not issued with the same. They further submit that they are entitled to overtime as they worked extra hours with no compensation and the Respondent did not adduce any evidence to the contrary despite the same being in its custody. The Claimants aver that they are entitled to leave as the Respondent's admitted that they never took their leave. They rely on the case of **Rajab Barasa & 4 Others vs. Kenya Meat Commission [2016] eKLR**.

40. The Claimants submit that they are entitled to payment for 35 days worked which they were never paid, being 16 days in October and 19 days in December 2015. They submit that they signed an attendance register which was in the Respondent's custody and ought to have been provided in Court. They further aver that the documents provided in Court by the Respondent did not reflect the true payments as they were underpayments.

41. The Claimants submit that they are entitled to 12 months' compensation for unfair termination as they have proved that their termination was unlawful and unfair. They also submit that the Respondent should be condemned to pay costs and interest.

42. The Respondent submits that the Claimants took part in an illegal strike and refused to resume work despite being issued with notices as evidenced by the notices on record, as such, they dismissed themselves due to their gross misconduct.

43. The Respondent further submits that it followed the right procedure in summarily dismissing the Claimants and paid them their dues through the County Labour Commission and their lawyer. The Respondent contends that the Claimants were never locked out. The Respondent relied on the case of **Joash Alubale Jacob vs. Megapack Limited [2019] eKLR** where it was held that the employees who took part in an unlawful strike had no basis to sue an employer for unlawful dismissal.

44. The Respondent contends that the claim for overtime and leave pay are misplaced as no dates or hours have been particularized hence the same have not been proved to warrant an award of the same. Lastly, Respondent submits that the Claimants have not made a case to warrant payment of one month's salary in lieu of notice and 12 months' compensation for unfair termination. As such, the suit should be dismissed with costs.

45. I have examined all the evidence and submissions of the Parties herein. The Respondents exhibited dismissal letters dated 9/10/2015 to the Claimant herein indicating that they had been dismissed for participating in an illegal strike on 6/10/2015. Not all the letters were however signed as received by the Claimants.

46. The issues for this Court's determination are as follows:-

1. Whether the Respondent had valid reason to dismiss the Claimants.

2. Whether due process was followed before the Claimants were dismissed.

3. Whether the Claimants are entitled to the remedies sought.

Issue No. 1

47. As indicated above, the Respondents dismissed the Claimants for the reason that they participated in an illegal strike on 6/10/2015.

48. The Claimants denied participating in an illegal strike and indicated that they were actually locked out of the premises by the Respondents who wanted them to denounce their union membership.

49. From the evidence of the CW1, he admitted that they had issued a 7 days' notice if the Respondent failed to recognize their union. He avers that the strike notice was never withdrawn. The strike notice in question is dated 28/9/2015 and is attached as Appendix WG4. The same however was not signed and so could not be ascertained as to who the authors were.

50. The Respondents replied to this letter with yet another unsigned letter and therefore its legality and legitimacy is also questionable. Without a signed strike notice and without a signed response to the same, it can be assumed that there was actually no such notice and no such reply.

51. The Respondents also annexed a notice dated 7/10/2015 which is also unsigned asking all workers to report back to work as the strike was illegal. It is indicated in the evidence that this was pinned on the notice board. The irony of this is that if workers were locked out of the work place with a gate manned by security, they had no way of knowing about the notice on the notice board.

52. On the whole issue of this strike, there is a report written by the Ministry of Labour dated 12/10/2015 indicating that the issue of the Union clamour for recognition was an interference in Bakers Union turf. The report is however written after the dismissal of the Claimants.

53. What really transpires from this narration is that indeed there was a clamour for the union to be recognized. The recognition is a matter that the Ministry of Labour found untenable. That notwithstanding the issue of the Claimants participating in a strike is an issue that the Respondents must prove.

54. The Respondents in their evidence stated that after the issue of the Court orders, the Claimants reported back to work and were paid

salaries for October to December 2015. The attendance register was also not submitted in Court and it is therefore not clear who was on duty and who was not on duty. She also admitted that the Claimants were not given termination letters. It is not therefore clear at what point the Claimants were actually terminated and for what reasons.

55. RW2 also testified and he indicated that the Claimants went on strike. He was cross-examined and he indicated that he used to work on morning shift and conceded that he could not tell who was in night shift and who was on day shift.

56. From the foregoing reason, it is not clear who went on strike and who did not. No schedule of employees has been presented to Court.

57. Section 43 of the Employment Act 2007 states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

58. Indeed the Respondents have not established the reason for the dismissal or termination and even the timings.

Issue No. 2

59. On due process, there is also no indication that the Claimants were asked to show cause why they should not be terminated for participating in an illegal strike. There is no indication even on the timing of the dismissal and what transpired from the time of the alleged strike to the dismissal term.

60. Section 41 of the Employment Act 2007 states as follows:-

1) "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

61. In any case in this case no such process was followed. It therefore follows that due process was not followed.

62. Section 45 (2) of the Employment Act 2007 which provides as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

63. In view of the fact that the Respondents have not established that they had valid reason to terminate each of these Claimants and neither did they follow due process before terminating the Claimants, it follows that the termination was unfair and unjustified and I declare it so.

Issue No. 3 – Remedies

64. Having found as above, I find for the Claimants and award each:-

1. 1 month salary in lieu of notice.

2. 8 months' salary as compensation for the unfair termination.

65. Due to large number of Claimants involved, these amounts will be tabulated by the Claimants as per the above direction for each Claimant and be presented to Court in 2 weeks' time for adoption or direction as part of this Court's judgments.

66. All dues will be subject to statutory deductions.

67. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this **11th day of November, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Guserwa for Respondents – Present

Wavinya holding brief Nyabena for Claimants – Present