

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 229 OF 2017

KENYA UNION OF COMMERCIAL FOOD &

ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

HOMAGE SERVICE STORES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on behalf of the Grievants Zacharia Wanjohi, Antony Wangombe, Josphat Githai, Jackson Njoki and Peter K. Mwangi. The 1st Grievant was employed on 4th September 2010 as a shop assistant earning Kshs. 5,000/- all inclusive. He resigned from employment on 30th September 2015 after the expiry of his notice. At the time he earned Kshs. 9,500/- per month. The 2nd Grievant was employed on 6th June 2006 and earned Kshs. 5,500/-. He resigned on 28th August 2015 after issuing a one month notice which expired at the end of September 2015. At the time of resignation, he earned Kshs. 9,600/-. The 3rd Grievant was employed on 16th July 2012 as a general labourer earning Kshs. 7,155/- a month and he served a resignation letter on 2nd October 2012 terminating his services on 5th November 2015 and at the time of resignation earned Kshs. 8,655/-. The 4th Grievant was employed on 2nd January 1997 as a store keeper earning Kshs. 2,000/-. He resigned on 2nd September 2015 and terminated his services on 2nd October 2015. At the time of resignation he was earning Kshs. 11,361/- a month. The 5th Grievant was employed on 1st October 2003 as a day watchman earning Kshs. 4,500/- a month. He served for 12 years and he issued a 3 month notice on 15th December 2015 and he terminated his services on 1st April 2016 upon expiry of his notice. The Claimant reported a trade dispute on the issue of terminal benefits of the 5 Grievants and the Minister for Labour appointed a conciliator. The parties met under the stewardship of Mrs. F. Gakui who had been appointed conciliator but despite several meetings the parties did not agree prompting the conciliator to issue a referral certificate on 27th February 2017. The Claimant asserts the 5 Grievants were grossly underpaid and were given distorted leave days in which the Respondent reckoned Sundays as part of the leave days. The 5 Grievants each sought leave dues for leave days taken, public holidays, service gratuity, underpayment of wages, costs of the suit and a certificate of service.

2. The Respondent in its defence averred that the Grievants all went on leave and that any claim for leave was misplaced. The Respondent denied operating on public holidays. The Respondent averred that the Claimant kept shifting the goal posts as evidenced by the claim herein leading to the failure to agree and urged the court to dismiss the suit with costs.

3. All the 5 Grievants testified as did Hexron Waweru Maina the Respondent's witness. The Grievants maintained that they were underpaid for the years of service and that they worked on public holidays and Sundays. The Respondent's witness testified that the Grievants who were members Claimant union were paid all their dues and the contention before the labour officer was the non-payment of Sundays and public holidays.

4. The Claimant and the Respondent did not avail the proposals to the Labour Officer appointed as conciliator. The only letter that seemed to shed some light on the dispute is the letter of 8th March 2016 under the hand of Erastus M. Mututo the branch secretary of the Claimant. In his letter addressed to the director of the Respondent, he asserts that the employees had resigned from the Respondent and were seeking terminal benefits. He concedes in the second paragraph that though the other allowances had been paid, the service allowances were never paid in full. The proposals they made were conspicuously kept away from court. Before me the dispute morphed into one of terminal benefits yet the Union in its letter indicates there was payment of the terminal benefits save for the service pay aspect which even then was partly settled. In my view, the Claimant has failed to avail critical evidence to aid the court in coming to a determination. The issue of Sundays and public holidays was not part of the communication the union addressed to the employer on the dispute. In my view, the Union was changing their claim as the matter progressed. In any event, if they are to be believed, what were they doing for 5 years as the Grievants were underpaid? What is the role of a trade union? Is it not to fight for better wages for staff? Sadly all one hears from unions nowadays are strikes and unlawful industrial action yet negotiation is one of the key elements of good industrial relations. How come the Claimant asserts underpayment for ages yet it represented the Grievants and had a recognition agreement with the Respondent? The dispute before me is not proved to the required standard and I find that I cannot award any of the remedies the Claimant seeks on behalf of the Grievants. The suit is dismissed and each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar