



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 683 OF 2010
KENYA UNION OF COMMERCIAL, FOOD
AND ALLIED WORKERS.....CLAIMANT
VERSUS
NATIONAL CEREALS & PRODUCE BOARD.....RESPONDENT

JUDGMENT

1. On 18 October 2010, the Kenya Union of Commercial, Food & Allied Workers (Union) instituted legal proceedings against the National Cereals & Produce Board (Respondent) alleging that the termination of the employment of Elly Mudechi, Joseph Opiyo, Daudi Buriwa, Ezekiel Wesa, Andrew Sunuku, Paul Nyabinge, Solomon Mutungu, Solomon Musoga, Elly Mbayachi, Makenzie Sore, Peter Keya and Mukabwa Andoi (Grievants) was unfair. The Union sought reinstatement of the Grievants.
2. The Union filed an *Amended Memorandum of Claim* on 19 October 2010 (before close of pleadings as Response had not been filed) in which additional reliefs were sought (compensation, pay in lieu of notice, general damages, severance pay and accrued leave).
3. The Respondent filed a *Reply to Statement of Claim* on 10 November 2010 contending the Grievants were hired for piece-meal tasks and not on permanent basis, and that the Cause had been overtaken by events.
4. An attempt by the Respondent to have the Cause struck out on the basis of section 90 of the Employment Act, 2007 was overruled by the Court on 22 September 2011.
5. The Respondent filed its List of Documents on 9 March 2017.
6. On 31 January 2018, the Court granted the Respondent leave to file an *Amended Response*, witness statements and documents before 16 February 2018, but the directives were not complied with, and on 27 July 2018 the Court directed that witness statements be filed before 17 August 2018 and scheduled the hearing for 13 November 2018.
7. The Respondent filed an *Amended Memorandum of Reply* and Supplementary List of Documents on 25 July 2018. On 17 October 2018, the 8th Grievant filed a witness statement while the Respondent filed its witness statement and proposed list of issues on 15 October 2018.
8. The Cause was heard on 13 November 2018.
9. The 8th Grievant testified on behalf of the Union/Grievants while the Respondent's Senior Human Resources Officer testified on its behalf.
10. The Union filed its submissions on 4 December 2018 (should have been filed before 30 November 2018) while the Respondent filed its submissions on 7 January 2019.
11. The Court has considered the pleadings, evidence on record and the submissions and opted to adopt the Issues as proposed by the Respondent (the parties did not segment their submissions under the Issues as proposed and filed for determination).

Whether Union complied with provisions of the Trade Disputes Act

12. It is not in dispute that the Grievants cause(s) of action accrued around 2 May 1991 (date of alleged dismissals) during the currency of the Trade Disputes Act (now repealed).

13. In terms of that Act, it was imperative for a trade dispute to be referred to the Minister for Labour, and it was the discretion of the Minister to refer the dispute to the Court if there was no resolution.

14. The Respondent contended that the Union did not refer the dispute to the Minister at the first instance. The Court was also unable to see the referral letter from the Minister for Labour during trial.

15. However, while perusing the file while preparing this judgment, the Court found in a subfolder within the file a letter dated 24 May 2010 from Hon. Munyes Kiyonga referring the dispute to the Court. The letter was accompanied with Forms "G" and "H."

16. The record also show documents in which the Minister was informing the Union of the appointment of an Investigator (and revocation and replacement of the Investigator) and a copy of the report of the Investigator dated 17 August 2005. The report show that the Respondent participated in investigation process (under protest).

17. The Union also filed a copy of Form "A" which was the statutory form for referrals of disputes to this Court.

18. In light of the documents on record, the Court is satisfied that the pre-litigation processes as envisaged under the Trade Disputes Act (repealed) were complied with by the Union before the dispute reached the Court docket.

Limitation

19. The Respondent also assailed the Cause herein on the ground of limitation, and reference was made to section 90 of the Employment Act, 2007 and section 4 of the Limitation of Actions Act.

20. The Employment Act, 2007 commenced on 2 June 2008 and is therefore not directly implicated in the Cause.

21. The limitation law in 1991 was the Limitation of Actions Act and its provisions did not apply to the Trade Disputes Act (repealed).

22. Resolution of disputes under the Trade Disputes Act (repealed) was *sui generis* and had its own timelines and processes not dependent on the Limitation of Actions Act, and referral to the Court was at the tail end of the dispute resolution process.

23. It was the statutory duty of the Minister to refer a dispute to Court.

24. In other words, a party (Union or employer) could not directly approach the Court in a dispute such as is now before the Court.

25. Whether Employment Act and Labour Relations Act apply to the dispute

26. The dispute and/or cause of action presented before the Court accrued in 1991, and therefore the applicable statutes would be the Employment Act cap 226 (repealed) and the Trade Disputes Act (repealed) and not the Employment Act, 2007 or the Labour Relations Act.

27. An examination of the Employment Act, 2007 and the Labour Relations Act do not suggest any retrospectivity in application in disputes such as the one under consideration.

Nature of employment relationship

28. It is the nature of the contractual relationship between the Grievants and the Respondent which is in dispute and not whether there was an employment relationship.

29. The Respondent contended that the Grievants were casual employees or alternatively were engaged on piece meal tasks.

30. A *casual employee* under the statutory regime in 1991 as indeed is still the case under the current legal framework was one paid at the end of the day.

31. The 8th Grievant's testimony was that wages were paid at the end of the month through petty cash.

32. The Respondent's witness on the other hand maintained that the Grievants were paid at the end of each day by and/or through their gang leaders, and therefore there were no records.

33. It is inconceivable to the Court that the Respondent, a public body would incur expenditure of public funds without keeping of records even for auditing purposes. If indeed the gang leaders were paid and they in turn paid the Grievants, the least the Respondent could have done was to produce copies of records evidencing payments to the gang leaders, on a daily basis for onward payment to the Grievants.

34. The evidence and finding by the Investigator appointed by the Minister that the Grievants served for between 7 to 14 years was not controverted.

35. For the failure to produce such records and considering the testimony on record on length of service and interlude of payment of wages, the Court finds that the Grievants were not *casual employees* and that they were on monthly contracts, paid by the month.

Unlawful termination of employment

36. The Minister appointed an Investigator who found that the summary dismissal of the Grievants were unlawful.

37. The Respondent did not produce any evidence to suggest that the Grievants were involved in the theft of bags of maize as alleged.

38. This Court finds no reason to depart from the findings of the Investigator and relying further on the evidence on record find that the dismissal of the Grievants were unlawful.

Pay in lieu of notice

39. The Court will therefore conclude that the dismissal of the Grievants being unlawful, each is entitled to the equivalent of 1 month wages as pay in lieu of notice (monthly wage was Kshs 5,000/-).

Compensation

40. Under section 15(1) of the Trade Disputes Act (repealed), the Court could award up to 12 months compensation in cases where it found unlawful termination of employment.

41. In this case, an Investigator appointed by the Minister returned a finding that the Grievants had served from 7 to 14 years with the Respondent and made a recommendation that the summary dismissal be reduced to normal termination with payment of 2 months wages in addition to other entitlements in terms of the collective bargaining agreement in place.

42. Because the Court is unable to determine any other entitlements due to the Grievants, the Court will increase the damages payable to each of the Grievants from the 2 months to 5 months each (each Grievant was earning Kshs 5,000/- per month).

Breach of contract/statute

Leave

43. The parties did not provide the Court with any material/records/evidence upon which it could make a determination as to any accrued leave due to the Grievants and the Court will decline this relief.

Severance pay

44. The Grievants did not lose their jobs on account of redundancy. Severance pay is therefore not available to them.

Conclusion and Orders

45. The Court finds and holds that the dismissal of the Grievants was unlawful and awards each of them

(a) Pay in lieu of notice Kshs 5,000/-

(b) Damages Kshs 25,000/-

46. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 1st day of February 2019.

Radido Stephen

Judge

Appearances

For Union Mr. Nyumba (Industrial Relations Officer)

For Respondent Mr. Akwabi instructed by Lutta & Co. Advocates

Court Assistant Lindsey