



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 711 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 7th March, 2019)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

AMICUM OUTSOURCING LIMITED.....1ST RESPONDENT

ARTEMIS OUTSOURCING LIMITED.....2ND RESPONDENT

TUSKER MATTRESSES LIMITED.....3RD RESPONDENT

JUDGEMENT

1. The Claimant herein filed its Memorandum of Claim on 15th May 2018 alleging victimisation of the outsourced labour by the 1st and 2nd Respondent on account of their union membership and the failure by the 3rd Respondent to ensure the outsourced labour whose services they enjoy are protected against unfair labour practices. The Claimant therefore seeks the following reliefs:-

- 1. THAT this Honourable Court declares that the 1st and 2nd Respondent have violated employees' rights of freedom of Association and representation.***
- 2. THAT this Honourable court orders the 1st and 2nd Respondents to stop any form of victimisation of employees on account of their union membership.***
- 3. THAT this Honourable Court issues an Order directed at the 1st and 2nd Respondents to deduct and remit union dues from the employees who have acknowledged their union membership by signing the Claimant's check off sheets.***
- 4. THAT this Honourable court issues an Order directing the 1st and 2nd Respondents to reinstate the services of employees who have been suspended/terminated on account of their union membership.***
- 5. An Order directing the 3rd 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.***
- 6. THAT this Honourable Court issues and awards any other appropriate relief as it deems fit and proper.***
- 7. THAT this Honourable Court orders costs of this suit to be paid to the Claimant.***

2. The Claimant also filed a Notice of Motion under Certificate of Urgency on 15th May 2018 seeking the following Orders:-

- 1. THAT this application be certified urgent and be heard ex-parte in the first instance.***
- 2. THAT there be an order restraining the 1st and 2nd Respondents from coercing, intimidating, threatening,***

disciplining, suspending, terminating or dismissing outsourced labour serving the 3rd Respondent on account of their union membership.

3. THAT there be an Order directed at the 1st and 2nd Respondents to deduct and remit union dues from the employees serving the 3rd Respondent who have acknowledged their union membership by signing the check off sheets signifying their union membership.

4. THAT there be an order reinstating the services of outsourced employees who have been suspended or terminated and that upon their reinstatement, their contracts if service be deemed to be continuous without any loss whatsoever.

5. THAT there be an Order directed at the Respondents to place outsourced labour on similar terms and conditions of service as those obtaining for the regular employees of the 3rd Respondent.

6. THAT an Order be directed at the Respondents restraining them from discriminating against outsourced labour in terms of pay and other terms and conditions of service and that such employees should not be placed on terms and conditions of service less than or inferior to those enjoyed by regular employees of the 3rd Respondent.

7. THAT there be any other appropriate relief as the Court may deem fit to grant in the circumstances.

8. THAT the hearing and determination of this suit be expedited.

9. THAT the costs of this application be provided for.

3. The 1st and 2nd Respondents filed their respective Replying Affidavits to the Notice of Motion. The 3rd Respondent on its part filed a Preliminary Objection to the Application on 28th May 2018 on grounds that the 1st and 2nd Respondents have no recognition agreement with the Claimant and therefore the Claimant has no locus standi to institute the suit against the 1st and 2nd Respondent.

4. This Court on 27th Jun 2018 directed the Labour Officer to handle the Conciliation process. Consequently, the Conciliator, Hellen Maneno, filed a Report of the Conciliation Process on 4th December 2018 and the Court directed that the Parties do file written submissions based on the Report, for the determination the entire suit.

Claimant's Case

5. The Claimant avers that the 1st Respondent, a Human Resource Management and Training & Capacity Building Company, is contracted by the 3rd Respondent as a labour outsourcing company while the 2nd Respondent is equally an outsourcing company contracted by the 1st Respondent. In respect of the 3rd Respondent the Claimant avers that there is a valid Agreement relative to Recognition and Negotiation Procedure.

6. The Claimant avers that the said outsourced labour serving the 3rd Respondent voluntarily registered their union membership with the Claimant by signing the Claimant's check-off sheets which were sent to the 1st Respondent on 29th March 2018 to begin deduction and remittance of Union dues.

7. The Claimant avers that upon receipt of the check off sheets, the 1st Respondent prepared and backdated new contracts of employment to September 2017 and asked the employees to sign the same in April 2018. The Claimant further avers that as soon as the employees signed the new contracts, they were given the option to choose between union membership and their jobs and those who chose to be members of the union were terminated.

8. The Claimant avers that several employees succumbed to the threats and resigned from union membership and that it raised the issue of discrimination with the Respondents to no avail. The Claimant avers that the 3rd Respondent has acted in discriminately by failing to ensure that the outsourced labour doing the same jobs as regular employees of the company are paid the same wages and placed under similar terms of service.

9. The Claimant avers that the 3rd Respondent has outsourced its core functions as a supermarket contrary to the decision in Petition 22 of 2012 The Wringley Company (East Africa) Limited v The Honourable Attorney General, the Industrial Court of Kenya the Bakery, Confectionary Manufacturing and Allied Workers Union and Sheer Logic Management Consultants Ltd.

10. It is therefore the Claimant's case that the outsourced labour can be represented within the existing Recognition Agreement with the principle employer and it is only right that outsourced labour enjoy the same terms and conditions of service enjoyed by the employees of the principal employer.

1^{sts} and 2nd Respondents' Case

11. Lawrence Mosoi, the 1st Respondents Manager of the 1st Respondent swore the Replying Affidavit on behalf of the 1st Respondent while Charles Murungami, the 2nd Respondent's Manager, swore the Replying Affidavit on behalf of the 2nd Respondent.

12. Both Replies are strikingly similar in respect of the responses to the Claimant's allegation in the Application. They state that the 1st and 2nd Respondent have no privity of contract with the Claimant since they have no recognition agreement.

13. They state the 1st and 2nd Respondent have provided the 3rd Respondent with over 2,000 employees and over 1,000 employees respectively who are not the 3rd Respondent's employees. They state that they are not aware of any of their employees having joined the Union and deny receiving check off forms from the Claimant. They state that none of them has engaged in any unfair labour practices or breached any of its respective employees' rights. Further, that there is no order or regulation barring the 1st and 2nd Respondent from outsourcing employees to the 3rd Respondent for any function.

14. They state that the Claimant has no mandate to recruit outsourced employees of any entity and no capacity has been demonstrated. The 1st Respondent states that most issues raised by the Claimant were dealt with by the Court in Cause 1654 of 2015 while the 2nd Respondent states that it was not a party to Cause 1654 of 2015 and was never mentioned in that suit. In addition, the Court in Cause 1654 of 2015 did not give any positive order for the Claimant to recruit any employee they wanted.

Conciliator's Report

15. The Conciliator's findings from the parties' oral and written submissions to the dispute were that:-

1. There exists a valid Recognition Agreement between the Claimant and the 3rd Respondent and they have negotiated and registered several Collective Bargaining Agreements, the current one having taken effect on 01/08/2017 and valid for one year. The CBA does not have any clause touching on outsourced labour.

2. The Claimant has so far recruited 449 employees of the 1st and 2nd Respondent who have a total labour force of about 3,500 employees.

3. Some of the 33 employees whose services had been terminated by the 1st and 2nd Respondent have been re-employed and given new contracts.

4. Some of the employees of the 1st and 2nd Respondents have written letters withdrawing from the union.

5. The 1st and 2nd Respondents confirmed that out of the 449 employees who signed the check-off list 72 are not their employees.

6. All employees of the 1st and 2nd Respondents have employment contracts with terms and conditions of employment and that they are deployed within the premises of the 3rd Respondent but are not the 3rd Respondents employees.

7. Some of the employees services were terminated subject to a fair an open disciplinary procedure and none of them raised any objection or lodged a complaint with the union or the Labour office contrary to the assertion by the Claimant that they were unfairly terminated or victimised.

16. The Labour Officer therefore recommended:-

1. The Claimant should ensure that they meet the threshold for recognition as provided under section 54 (1) of the Labour Relations Act and sign a Recognition Agreement with the 1st and 2nd Respondents to enable them negotiate terms and conditions of service for the outsourced labour.

2. The 1st and 2nd Respondent should deduct and remit union dues for the employees who have acknowledged membership of the union by signing the check off list and have not tendered their resignation from the union.

3. It is not feasible for the 1st and 2nd Respondent to unconditionally reinstate the 33 employees as demanded by the Claimant since the employees services were terminated through the disciplinary process or the employees resigned or absconded duty.

4. There are no contracts between the 3rd Respondent and the outsourced labour hence the 3rd Respondent cannot be liable for the terms and conditions of the outsourced labour.

Claimant's Submissions

17. The Claimant submits that the Labour Officer did not tactfully address the issue of discrimination in terms of pay and other terms and conditions of service between the Respondents' own employees and the outsourced labour.

18. The Claimant submits that the Respondents acted with vengeance to punish employees on account of their union membership by terminating the services of 33 of them forcing others to withdraw their union membership.

19. The Claimant submits that the Respondents have not honoured the employee's instructions in the check off sheets to deduct and remit

union dues to the Claimant to honor their right of freedom of association.

20. The Claimant submits that all outsourced employees are employed as general workers but are deployed to serve in all other departments and in all other grades detailed at clause 1 of the Collective Bargaining Agreement. It is the Claimant's submission that section 5 of the Employment Act decries discrimination. However, it submits that it does not oppose outsourcing of labour as section 55 (2) of the Labour Institutions Act legalises the business of employment agencies.

21. The Claimant submits that 1st and 2nd Respondents are packaging and the selling labour to the 3rd Respondent, the user enterprise, which has the right, liability and duty to control the activities of an agent or agents in this case being the 1st and 2nd Respondent.

22. The Claimant further submits that this action as referred to as vicarious liability in Petition 22 of 2012 The Wringley Company (East Africa) Limited v The Honourable Attorney General, the Industrial Court of Kenya the Bakery, Confectionary Manufacturing and Allied Workers Union and Sheer Logic Management Consultants Ltd. It therefore urges the Court to revisit the decision in Petition 22 and decision by Justice Abuodha in Cause 1654 of 2015.

23. The Claimant submits that any other terms of service separate from those obtaining the employees of the 3rd Respondent working hand in hand and interchangeably with their colleagues is discriminatory and unlawful.

1st and 2nd Respondents' submissions

24. The 1st and 2nd Respondents submit that it has individual contracts of employment between the 3,500 employees provided to the 3rd Respondent and the 1st and 2nd Respondents. It is their submission that the 3rd Respondent is not a party to the contract and that there is no evidence that the terms of the contract are discriminatory. It further submits that the Claimant bases its argument on a wrong presumption that the outsourced employees are the 3rd Respondent's employees. It relies on the decision in **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR** where the Court held:-

“In the instant case, the outsourced employees entered into express contractual relationships with Jokali, which in turn contracted with Abyssinia to provide employees to perform various duties. The employees, though working in Abyssinia's premises, remained under Jokali's management and control. Faced with these facts, we find that, bar the fulfillment of the mandatory legal requirements, it was Jokali, and not Abyssinia, that was obliged to recognise the Union in respect of Jokali's employees. We therefore disagree with the learned judge that the employees outsourced to Jokali remained employees of Abyssinia. Abyssinia having satisfactorily demonstrated that some of its employees were outsourced,…”

25. The 1st and 2nd Respondents submit that the Claimant has neither informed them of the intended recruitment of their staff into the Union nor has it given them any confirmations that their employees were interested in its affairs.

26. The 1st and 2nd Respondents submit that there is no suit filed by their employee alleging unfair termination or breach of contract and that no complaint has been received from its employees whose contracts have lapsed or terminated.

27. The 1st and 2nd Respondents submit that the Claimant's allegation that the Court in Cause 1654 of 2015 issued an order allowing the recruitment of outsourced employees working at the 3rd Respondent is not true. They submit that no such directive was issued and the incidental remark made by the judge at paragraph 13 of the Judgment was merely obiter dictum. They further submit that the issues raised by the claimant in this suit were dealt with by the Court in Cause 1654 of 2015.

28. The 1st and 2nd Respondents' submit that they are not party to the Collective Bargaining Agreement between the Claimant and the 3rd Respondent. They submit that the Claimant would have sought conciliation or at least attempt the same but the Claimant has mixed up the issues of recognition, failure to deduct and remit dues and the allegations of unfair termination. They rely on the decisions in **Communication Workers Union v Safaricom Limited [2014] eKLR** and **Kenya Shoe & Workers Union v Modern Soap Factory Ltd [2017] eKLR**. They further rely on the case of **Kenya Union of Printing, Publishing, Paper Manufactures, Pulp & Packaging Industries v Raffia Bags (EA) Limited [2014] eKLR**.

29. The 1st and 2nd submit that they agree with the findings of the Conciliator.

3rd Respondent's submissions

30. The 3rd Respondent submits that it wholly concurs with the Conciliator's recommendations and reiterates the Conciliator's recommendation that there are no contracts of employment between the Tusker Mattresses Limited and its outsourced labour.

31. The 3rd Respondent submits that its obligation to the outsourced employees is confined only to availing work for them within the Tusker premises. The 3rd Respondent therefore submits that in the absence of any binding contracts between the 3rd Respondent and the outsourced employees the 3rd Respondent has absolutely no power or authority to alter the salary and terms and conditions agreed upon by the 1st and 2nd Respondents and the outsourced employees.

32. The 3rd Respondent submits that the Claimant is attempting to coerce it to include the outsourced employees in the existing Collective Bargaining Agreement (CBA) between the Claimant and the 3rd Respondent yet the CBA was negotiated by Tusker Mattresses on behalf of

its direct employees who have entered into contracts with the it.

33. It is the 3rd Respondent's submissions that the attempt by the Claimant to have the outsourced employees enjoy the benefits of the existing CBA is misconceived and an attempt to mislead this Court.

34. The 3rd Respondent submits that contrary to the Claimant's allegation that it has failed to protect its outsourced employees against any form of unfair labour practice neither the 3rd Respondent nor the 2nd Respondent has received a formal complaint from the outsourced employees.

35. The 3rd Respondent further submits that it is not its obligation to ensure that outsourced employees join a union since joining a union is voluntary.

36. I have examined all averments of the parties plus submissions filed. From the Conciliator's report, the 3rd Respondent has a recognition agreement with the Claimant.

37. The 1st and 2nd Respondent have no recognition agreement with the Claimant. The lack of recognition by the 1st and 2nd Respondent is attributed to lack of numbers. In this case then, the Claimant would need to recruit their membership from the 1st and 2nd Respondent before they can have a recognition agreement.

38. This will however not bar the 1st and 2nd Respondent from deducting and remitting union dues to the Claimant as per the check off forms.

39. The Claimant as submitted by the Respondents have mixed up issues of recognition, remittances of union dues and unfair termination.

40. The Claimant did not however prove the unfair termination due to union membership. If the Claimant is however convinced that their members were unfairly terminated due to union membership, they should file the claim accordingly.

41. Given that the recognition agreement is existence in between the 3rd Respondent and the Claimant, the terms therein cannot extent to outsourced labour by the 1st and 2nd Respondent because the employees herein have independent contracts and the issue of discrimination would not arise.

42. It is finding that the Claimant's claim on violation of employees' rights and freedoms of Association has not been proved. I however order that the Respondent's should continue to remit union dues for employees who have signed check off forms.

43. The other orders sought by the Claimant are not tenable in view of my findings above.

44. Costs of this Claim be borne by each party.

Dated and delivered in open Court this 7th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyumba for Claimant – present

Cherono holding brief Kirimi for 1st and 2nd Respondent – Present

Biamgisha for 3rd Respondent – Present