



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1280 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

EURO PETROLEUM PRODUCTS.....1ST RESPONDENT

PABARI DISTRIBUTORS.....2ND RESPONDENT

JUDGMENT

The Claimant herein filed a Memorandum of Claim on 26th July 2012 on behalf of 5 grievants; Joseph Muinde Muli, Chris Ouma Okoth, Denis Omondi, George Abuta and Maurice Otieno Aloba. It avers that the Respondents unfairly terminated the employment of the grievants on account of their union membership. The Claimant therefore seeks the following reliefs:

a) That the 1st and 2nd Respondents be ordered to reinstate the five locked out employees namely Joseph Muinde Muli, Chris Ouma Okoth, Denis Omondi, George Abuta and Maurice Otieno Aloba and others who may be unfairly terminated back to their duties without loss of benefits.

Or in the event that reinstatement is not viable, they be paid their terminal benefits as follows:-

- i. Pay in lieu of notice – 30 days wages
- ii. Payment for days worked and not paid
- iii. Payment for all accrued and pending annual leave entitlements at 21 days per year worked
- iv. Pay in lieu of service payment for the individual years worked at 21 days per year.
- v. Underpayment of daily/monthly wages in accordance to the Regulation of wages order 1st May 2011/2012
- vi. 12 months' salary compensation for unfair termination/lock out within section 15 of the Labour Institutions Act 2007 to each grievant

vii. Certificate of service within Section 51 of the Employment Act 2007

- b) That, the 1st and 2nd Respondent be ordered to effect/implement Trade Union dues in accordance to section 48 and 50 of the Labour Relations Act- in favour of the Claimant Union.
- c) That the 1st and 2nd Respondent be compelled to sign a recognition Agreement with the Claimant Union pursuant to section 54 of the Labour Relations Act-2007.
- d) That the 1st and 2nd Respondent be ordered to enter into collective bargaining negotiation for the unionisable employees terms and condition of employment.
- e) That the 1st and 2nd Respondent be permanently restrained for locking out intimidating/threatening or unfairly terminating the unionised employees for exercising their constitutional right to belong to the Claimant Union.

The Respondents filed their joint Memorandum of Response on 15th October 2018 in which they deny having employed any of the grievants. They aver that they were not aware of any of their employees' actual or intended union membership and that none of their employees was terminated for any such reason.

Claimant's case

CHRIS OUMA OKOTH, CW1 testified that he was employed as a welder in 2009 earning a salary of Kshs.200 per day. He testified that he was terminated in July 2012 together with other employees. He testified that he was not given the reasons for termination but it was after he joined the union. He testified that he was never issued with any warning letter.

In cross-examination he testified that he started working in 2009 though his witness statement indicated that he started working in 2008. He testified that the office of the two respondents is at the same place and that there was a garage owned by the same group called Safety Auto Spares. He testified that he did not have any document to prove that he was employed. He testified that in the original claim there were check off documents in respect of Euro Petroleum Ltd, the 1st Respondent, which is a shop and is owned by the 2nd Respondent . He testified that some people were paid daily but he was paid weekly. He further testified that he was not granted leave. He testified that he was dismissed by Raju the Managing Director of the 2nd Respondent.

BENEDICT OWOUR OSIRO, CW2 testified that he was employed as a mechanic in 2009 earning a salary of Kshs.300 per day. He testified that he was not issued with a letter of appointment despite requesting. He testified that he was terminated in 2012. He was not given any reason for termination but it was upon joining the union that he was terminated. He testified that he was informed by Mohamed to go away as there was no work and that staff were terminated on different days.

He testified that he never received any warning letter. He further testified that he was underpaid as he was in Grade 3. He was never granted leave.

In cross-examination, he testified that he worked for both the 1st and 2nd Respondents. He testified that he was terminated for no reason. He was one of the front bearers of the union and was informed by Mohamed who was in charge of Safety Auto Spares. He testified that he was given a letter before he was employed. He testified that he did not have any document to prove that he worked for the Respondents and he was not a member of NSSF or NHIF. In re-examination, he testified that he worked under Mohammed of the said Safety Auto Spares.

Respondent's Case

KABUE MATHENGE, RW1 testified that he worked as the Legal Officer for Euro Petroleum Products ,

the 1st Respondent. He testified that the respondent engaged its workforce who are permanent employees and also engages casual labourers on a day to day basis when need arises, mostly in loading fuel. He testified that the respondent pays casual based on gazetted schedules. He further testified that the casual workers are paid daily according to the work done which is about Kshs.1,500 per day.

In cross-examination he testified that the human relations officer in conjunction with the legal department decide what jobs are to be done by casuals. He testified that he was familiar with the Employment Act and that they have records which he had perused. He testified that nobody was declared redundant.

1st and 2nd Respondent's Submissions

The claimant relied on the submissions in the Memorandum of Claim. The Respondents submitted that the Claimant filed a Memorandum of Claim on 15th May 2017 following the order of the Court to proceed with the suit to the extent of unfair termination. That the Claimant did not file an application to amend its Memorandum of Claim and even if it did the claim of the additional claimants are already time barred. Therefore, the claims in respect of Njeru Mwaniki and Benedict Owour Osire are untenable and should be dismissed.

The Respondents submitted that they never employed any of the purported grievants and that this was admitted by the Claimant's witnesses. They testified that the Claimant's witnesses confirmed that they were not employed by either of the Respondents. They submitted that RW1 testified that they do not own a garage and as such, they are not capable of employing mechanics.

They submitted that they have never received and there has been no attempt to serve them with check-off forms with respect to the unionisation of their employees. They further submitted that the letter forwarding the check-off forms as well as the recognition agreement relate to the 1st Respondent only. In conclusion they submitted that the Respondents could not have terminated the employment if grievants who were not their employees.

Determination

Firstly, in respect of the two Memorandums of Claim as referred to by the Respondents the court finds the Claimant filed a Notice of Motion dated 15th May 2017 and annexed a Memorandum of Claim to the Claim but it did not seek an order to amend the Memorandum of Claim. It only sought prayers for unfair termination. Consequently, the Memorandum of Claim filed on 26th July 2017 is the only properly filed claim before this Court pursuant to the Employment and Labour Relations Court (Procedure) Rules 2016 as no leave was sought under Rule 14(6) to amend the claim.

Secondly, the issues for determination are whether the grievants termination was unfair and whether they are entitled to the reliefs sought. Prior, to considering these two issues the court shall determine whether the Claimant has established the existence of an employment relationship between the grievants and the employees.

CW1 testified that the Respondents have the same office and that he worked for the Respondents but did not have any document to demonstrate that he was employed by the Respondents. In re-examination he testified that he was terminated by the 2nd Respondent. He testified that he started working in 2009 and in cross-examination he admitted that his witness statement stated that he started working in 2008 when he was on probation holding on after another welder died. CW1 was inconsistent on when he started working for either of the Respondents.

CW2 on his part testified that he worked for both Respondents. He testified that he was informed by Mohamed whom he worked under that there was no work. According to CW2 Mohamed was in charge of Safety Auto Spares. Safety Auto Spares are not party to this suit, therefore the employment relationship between the Respondents and CW2 was in doubt since he stated that he reported to Mohamed of Safety Auto Spares and not to either of the Respondents. CW2 testified in cross examination that he was given a

letter of attachment before he was employed but he did not produce the said letter to advance his claim that he was employed by either of the Respondents.

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records.

In *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR* the Court held:

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

The Claimant herein has failed to prove the existence of an employment relationship between the grievants and the Respondents. In the absence of an employer-employee relationship the Court is not in a position to consider the issue of termination of employment under the Employment Act.

The claim therefore fails and is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE