



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT NAIROBI

ELRC CASE NO. 1518 OF 2015

KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENPLASTICS LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant union brought this suit on behalf of its thirteen (13) members (herein after called (“the grievants”), on 28.8.2015. She alleged that the grievants were locked out with other unionsable employees of the respondent on 7.1.2015 on grounds that they had joined the trade union in December 2014. The dispute was first referred to conciliation but after the hearing the recommendations by the conciliator were rejected by the respondent and the claimant brought to court.

2. The claimant prayed, on behalf of the grievants,

- (a) reinstatement without loss of benefits.
- (b) underpaid salary for unfair termination.
- (c) salary for 2 days worked in January 2015
- (e) costs in the suit.

3. The respondent filed defence on 21.9.2015 denying that any of her employees was a member of a trade union. She further denied existence of any trade dispute between her and her employees that warranted a lock out that entitled the claimant to institute conciliation proceedings. She averred that the claimant did not have any mandate to represent her employees because she did not do the business of manufacturing plastics as required in the unions constitution. She further averred that the claimant lacked *locus standi* to sue on behalf of the grievants because there was no recognition agreement between her and the claimants.

4. In addition to the foregoing objection, the respondent averred that the grievants were employed on casual basis. She denied that the grievants were under paid and further denied that they were not machine operators. She accused the grievants of deserting their employment without any prior notice and contended that their positions have since been filled. She therefore prayed for the suit to be dismissed with costs.

5. The main issue for determination arising from the pleadings is whether the grievants were locked out by the respondent or they deserted their employment without notice. To answer the said question the claimant called two (2) witnesses but the respondent never tendered any evidence. After the hearing only the claimant filed written submissions. 333j

CLAIMANTS CASE

6. Mr. Felix Mutisya testified as CW1. He stated that he was employed by the respondent on 6.8.2006 as a machine operator for recycling plastics and his salary was Kshs. 11,944/- per month. On 6.8.2014, he joined the claimant union and when his boss learned about the same in December 2014, he was not pleased.

7. CW1 further testified that when he reported back from Christmas holiday, all the employees who had joined the union were locked out. Only those who signed forms revoking their union membership were allowed back but the thirteen (13) grievants refused to revoke their membership and they were denied employment. The union reported a trade dispute but after the hearing, the respondent refused to recommendations by the conciliator.

8. He prayed for salary in lieu of notice, salary for 2 weeks before lock out, leave for all the years of service, service pay for 9 years plus 12 months' salary compensation for unfair termination.

9. M/s. Mary Ndinda Mbithi testified as CW2 . She stated that she joined the respondent also on 6.8.2006 as a general labourer earning Kshs. 11300/- per month. She further testified that she joined the claimant union and on 6.1.2015 after reporting back from Christmas holiday, the manger went to her workstation and told them that he had received a letter from the union and demanded that she and her colleagues signs revocation of their membership from the union. She further stated that when they refused to revoke their union membership they were locked out. However, some signed the revocation of membership but the thirteen (13) grievants herein refused and reported the matter to the union.

10. She further testified that the union reported the dispute to the labour office and a conciliator, Mr. Mbai was appointed but the respondents boss never attended the conciliation meeting and a report was made. Thereafter the suit was filed in court. She prayed for salary for two (2) weeks worked before the termination, leave for the years served, service pay and 12 months salary compensation for unfair termination.

ISSUES FOR DETERMINATION

11. There is no dispute that the grievants were employed by the respondents until 6.1.2015 when there arose a dispute about their membership to the claimant union. The issues for determination are:

- (a) whether the grievants were unfairly dismissed by the respondent or they deserted their employment.
- (b) whether the grievants are entitled to the reliefs sought..

ANALYSIS AND DETERMINATION

UNFAIR TERMINATION OR DESERTION

12. The allegation that the grievants deserted employment was made by the respondent in her defence. The defence was however not prosecuted because the respondent never tendered any evidence. I therefore dismiss that allegation because it was not proved by evidence.

13. On the other hand, he claimant alleged that the grievants were dismissed for joining the claimant union. Both CW1 and CW2 testified that they joined the claimant union in 2014 and when the union wrote to the employer the employer demanded that they must sign a document revoking their membership in the union. That when they refused to revoke their union membership, the employer locked them out of work and eventually dismissed them.

14. Under Section 45 (2) of the Employment Act, termination of employees contract of service is unfair, if the employer fails to prove that it was grounded on a valid and fair reason and, that fair procedure was followed. In this case, the reason for dismissal of the grievants was their membership of the claimant union and refusal to withdraw the same. The said reason was not a fair reason for dismissing the grievants from service and as such the termination was unfair.

15. The foregoing view is fortified by Section 46 of the Act which provides that:

“46. The following do not constitute fair reason for dismissal or imposition of a disciplinary penalty . . .

(c) an employee’s membership or proposed membership of a trade union; . . .

(f) an employee’s refusal or proposed refusal to join or withdrawal from a trade union . . .”

RELIEFS

16. In view of the foregoing finding, the court grants the order that the respondent acted unfairly, unlawfully and in breach of the Labour Relations Act and Article 28,36, and 41 (2) (c) of the Constitution.

17. The court was not properly moved on the alleged contempt of court order dated 12.12.2014 by the respondent’s director, Mr. Wang Juan, consequently the court makes no relief on that prayer.

18. The prayer for underpayment is granted as prayed by the claimant based on the Wage Order for 1.5.2913 which continued in 2014. The claim for underpayment is for the period from 1.5.2013 to 31.12.2014 which equals to 20 months. I have carefully considered the said wage order and the pleadings by the claimants for the first grievant who was a turn boy, the rest were either machine attendants or machine operators under the said Wage Order, the daily wage for turn boy, machine attendant and machine operator was Kshs. 507.75, 532.60 and Kshs. 634.35 respectively. After careful consideration of the said Wage Order and the pleadings, I find that indeed the grievant daily wage was underpaid. I therefore award each one of them the arrears of the withheld daily wage as follows:

SAMMY KIOKO (Turn boy)

Correct rate.....Ksh. 507.75

Less paid	Ksh. 327
Difference per day	Ksh. 180.75
Monthly under payment	<u>Ksh. 5422.40</u>
TOTAL in 20 months	<u>Ksh. 108,450</u>

FELIX MUTISYA (Machine Operator)

Correct rate.....	Ksh.634.35
Less paid	<u>Ksh.352</u>
Difference per day	Ksh.282.35
Monthly underpayment	<u>Ksh.8470.50</u>
Total in 20 months	<u>Ksh.169.410</u>

WAMBUA NZIOKA (Machine Operator)

Applicable rate.....	Ksh.634.35
Less paid	<u>Ksh.250</u>
Difference per day	Ksh.384.35
Monthly underpayment	<u>Ksh.115.35</u>
Total in 20 months	<u>Ksh.230.610</u>

JARED OGETO, JOSEPH MUTUKU AND GODFREY SIFUNA (Machine Operators)

Correct rate.....	Ksh.634.35
Less paid	<u>Ksh.270</u>
Difference per day	Ksh.364.35
Monthly underpayment	<u>Ksh.10930.50</u>
Total in 20 months	<u>Ksh.218,610</u>

BENSON MUTUA, DUNCAN OKELLO AND BENSON MULWA (Machine Operators)

Correct rate.....	Ksh.532.60
Less paid	<u>Ksh.270</u>
Difference per day	Ksh.262.60
Monthly underpayment	<u>Ksh.7,878</u>
Total in 20 months	<u>Ksh.157,560</u>

MARY NDINDA (Machine Attendant)

Correct rate.....	Ksh.532.60
Less paid	<u>Ksh.377</u>
Difference per day	Ksh.155.60

Monthly underpayment	<u>Ksh.4668</u>
Total in 20 months	<u>Ksh.93360</u>

LUCY KAVINDU AND JOSEPHINE KAMUYA (Machine Operators)

Correct rate.....	Ksh.634.35
Less paid	<u>Ksh.376</u>
Difference per day	Ksh.258.35
Monthly underpayment	<u>Ksh.7750.50</u>
Total in 20 months	<u>Ksh.155.010</u>

SYOMBUA MBEVO (Machine Attendant)

Correct rate.....	Ksh.532.60
Less paid	<u>Ksh.397</u>
Difference per day	Ksh.135.60
Monthly underpayment	<u>Ksh.4068.60</u>
Total in 20 months	<u>Ksh.81360</u>

19. The Claimant prayed for compensation leave and service pay during the hearing of CW1 and CW2 and also in the written submissions filed. The said prayers were however not pleaded in the statement of claim. I, therefore decline to grant the unpleaded pleadings because parties are bound by their pleadings.

20. The claimant also prayed that the report by the conciliator be upheld same for the payment of the underpaid salary, the conciliator recommended for reinstatement of the grievant without loss of benefits and that they be issued with appointment letters. Due to the lapse of three (3) years from the date of separation in January 2015, reinstatement is barred by Section 12 of the Employment and Labour Relations Act.

CONCLUSION

21. I have found that the grievants employment was unfairly terminated by the respondent. I have further found that each grievant daily wage was underpaid and award each the amount withheld between 1.5.2013 and 31.12.2014. Consequently I enter judgment for the claimant as follows:

1. SAMMY KIOKO Ksh. 108.450
2. FELIX MUTISYA Ksh. 169.410
3. WAMBUA NZIOKA Ksh. 230.610
4. JARED OGETO Ksh. 218.610
5. JOSEPH MUTUKU Ksh. 218.610
6. BENSON MULWA Ksh. 157.560
7. MARY NDINDA Ksh. 93.360
8. LUCY KAVINDU Ksh. 155.010
9. JOSEPHINE KAMUYA Ksh. 81.360
10. SYOMBUA MBEVO Ksh. 81.360
11. GODFREY SIFUNA Ksh. 218.610

12. DUNCAN OKELLO Ksh. 157.560

13. BENSON MULWA Ksh. 157.560

TOTAL Ksh. 2,121,720

The award is less statutory deductions but in addition to costs and interest at court rate from the date of filing the suit.

Dated, signed and delivered in open court at Nairobi this 20th day of December, 2019.

ONESMUS N. MAKAU

JUDGE