



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 129 OF 2017

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

THE CATHOLIC BOOKSHOP DIOCESE OF EMBU.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair termination of the services of 3 Grievants and for non-payment of their terminal dues. The Claimant averred that the issue in dispute was the underpayment of salary and house allowances for Cicily Wanjiru Mbogo who was the bookshop sales assistant, Francis Ithuki Njuguna, who was a machine operator, Samson Musyoka Nziu who was an accountant clerk. The Claimant averred that the Respondent is a member of the Collective Bargaining Agreement between the churches and the Union. The Claimant averred that the 3 Grievants were indirectly declared redundant by being served with termination letters dated 29th February 2016. The Claimant averred that their termination was unfair and reported the existence of the trade dispute between the parties under Section 62(1) of the Labour Relations Act. The Claimant averred that the Ministry of Labour accepted the dispute under Section 65(1) of the Labour Relations Act and appointed Miss L. Mburu of Embu Labour Office to act as a conciliator. The Claimant averred that the conciliator invited the parties for the conciliation meeting and the parties failed to settle the dispute at the conciliation level. The Claimant averred that the 1st Grievant Cicily Wanjiru Mbogo was a bookshop sales assistant that she was unfairly terminated without reasonable grounds. The Claimant averred that the Respondent violated Section 40(1)(d) of the Employment Act and the 1st Grievant had served the Respondent with a letter to request for salary increment but she was issued with a letter of employment dated 6th September 2016 with a salary package of Kshs. 8,000/- per month instead of Kshs. 12,116/- as per the CBA, and house allowance of Kshs. 1,200/- per month instead of Kshs. 2,600/- as per the CBA. The 1st Grievant sought her terminal dues being underpayment of salary arrears from September 2013 to February 2016 – Kshs. 80,486/-, underpayment of house allowance arrears from September 2013 to February 2016 – Kshs. 35,560/-, 12 months' compensation pay for the loss of employment – Kshs. 145,392/- making a grant total of Kshs. 261,438/-. The Claimant averred that the 2nd Grievant Francis Ithuki Njuguna was a machine operator and that he was unfairly terminated. The Claimant averred that the 2nd Grievant was served with a letter of absence from work without permission and which allegations he replied to. He was also served with a letter of negligence of duty and he replied to the allegations as well. The Claimant averred that the 2nd Grievant was later served with a letter of compulsory leave and another letter requiring him to appear before the management board. The Claimant averred that the 2nd Grievant averred that he was being harassed by the Respondent for demanding salary increment and for underpayment of salary arrears and house allowance for his 10 years in employment. The Claimant averred that the 2nd Grievant sought dues for underpayment of salary arrears from 2006 to 2016 – Kshs. 392,172/-, arrears of underpayment of house allowance from 2006 to 2016 – Kshs. 94,732/-, 12 months' compensation pay for loss of employment – Kshs. 172,776/- all totaling to Kshs. 659,680/-. The Claimant averred that the 3rd Grievant Samson Musyoka Nziu an accounts clerk was unfairly terminated and that he was not issued with an appointment letter contrary to Section 8 of the Employment Act. The Claimant averred that the 3rd Grievant had requested for salary increment and that the Respondent violated Section 40(1)(d) of the Employment Act. The Claimant averred that the 3rd Grievant is entitled to terminal benefits being underpayment of salary arrears from March 2015 to March 2016 – Kshs. 66,976/-, underpayment of house allowance arrears from March 2015 to March 2016 – Kshs. 10,049/-, 3 months' compensation for loss of employment – Kshs. 53,772/- all totaling Kshs. 130,797/-.

2. The Respondent filed a response to the statement of claim and averred that the union neither signed any recognition agreement nor negotiated a Collective Bargaining Agreement with the Respondent. The Respondent averred that the Grievants' were its employees and that they left at different times and were being paid their salaries as per the contract of employment signed between parties as well as per the Minimum Wages Order as Gazetted from time to time hence the claim for underpayments as presented is misplaced and has no legal or factual basis. The Respondent averred that it was never served with check offs by the Claimant Union requesting for deduction and remittance of union dues or even a letter informing the Respondent about a Collective Bargaining Agreement in place binding the parties until when this suit was filed when the Respondent came across a collective bargaining agreement. The Respondent averred that Cicily Mbogo Susan was issued with a fixed term contract which was to expire on 27th February 2016 and she was issued with a letter by the management requiring her to apply for a renewal if she was interested and a notice issued on 29th February 2016 informing her that her employment had ceased with effect from 27th February 2016. The Respondent averred that Samson Nziu and Francis Njuguna were also on fixed term contracts that came to an end on 27th February 2016. The Respondent denied having dismissed the Grievants and averred that they

used to receive some gratuity from the Respondent at the end of the contract. The Respondent averred that the Claimant union filed a dispute with the Minister for salary underpayments but parties failed to agree as the Respondent raised the issue of recognition agreement and CBAs of which the management denied having knowledge about and the Minister referred the matter to the Employment Court for adjudication. The Respondent averred that the Union does not have *locus standi* to institute the proceedings herein on behalf of the former employees of the Respondent as the Grievants were not members of the Union. The Respondent averred that the claim is misplaced and without merit as the Union moved this court with malice since the contract did not come to an end by an act of the Respondent so that the Claimant can now claim to have been dismissed. It averred once a fixed term contract comes to an end, the relationship of the employer-employee also ceases and as a good practice even though the employer was not under an obligation to inform the Claimant that the contract was coming to an end, the Respondent did so. The Respondent thus prayed that the claim be disallowed with costs to the Respondent.

3. The Claimant replied to the statement of defence and averred that the Respondent is a member of a specified churches and institutions of the CBA between the parties under the group of churches. The Claimant averred that the Respondent is covered by the church CBA and the Recognition Agreement signed by the Catholic Secretariat and the FKF on behalf of the churches. The Claimant averred that the statement by the defendant on check-off for union dues is null and void, because the dispute filed in this court is for termination of the Grievants and not for the union dues. The Claimant averred that the Grievants were served with termination letters dated 29th February on grounds that it wanted to declare them redundant for demanding the dues on account of underpayment and house allowance but not for renewal of contract. The Claimant averred that the employees of the Respondent were members of the union and that the Respondent was aware of the CBA and that is why the Minister of Labour referred this matter to court. The Claimant further averred that the Respondent project was permanent hence the Grievant's employment was permanent and their retirement age was denied by the Respondent unfairly. The Claimant averred that the churches and their institutions are covered by the CBA and FKE has a responsibility to defend it when the members they present fail to implement it, and they should not depart from it when there is a crisis between the parties. The Claimant thus averred that the statement of defence is defective and it should be dismissed with costs to the Claimant.

4. The Claimant presented the Grievant Cicily Mbogo informed the Court that she was called by the manager who gave a letter of dismissal. The manager told her that he was given instructions by the bishop. She testified that she had written a letter requesting for salary increment. She also testified that she was not given a notice and/or a hearing prior to dismissal as she got the letter at 5.30 pm after the day's work. In cross examination Cecily confirmed that her contract was not on a fixed term. She added that the contract renewal was on 16th February 2016 and that she had wrote seeking for renewal but she instead received a termination letter. The Grievant testified that there existed a CBA which was signed by Cardinal John Njue of the Archdiocese of Nairobi but she did not have evidence of the registration of the CBA. She testified that she joined the Union in 2013 and she possess a membership card and dues were being deducted but she did not avail any proof of deductions. The 2nd Grievant Francis Ithuki testified that he received a letter of termination that was copied to the Vicar General, the Bishop and the Legal Advisor. He went to the Vicar General to confirm the reason for dismissal but the Vicar told him that he will establish the reason. The 2nd Grievant testified that he always applied for leave except once when he received an emergency call that his father had lapsed into a coma but he wrote to them and explained why he was absent but the letter was not responded to. He also confirmed that he did not copy the letter to the Bishop. He confirmed that he was a union member and had a membership card and that he used to pay union dues secretly. The 3rd Grievant Samson Musyoka Nziu testified that he was employed in October 2014 and posted at Siakago for 3 months and later to the Catholic Bookshop in Embu. He said that he was not given an appointment letter but he worked for 1 year 5 months. He testified that he received a termination letter on 29th February 2016 after writing a letter requesting for increment. Since no reasons were given they decided to go to the Vicar General to seek for an explanation, the Vicar General told them to give him time and that they should wait for official communication but none was received to date. The 3rd Grievant testified that he had no discipline or misconduct issues and that after they met the Vicar General, the Grievants forwarded the dispute to the Union but the management failed to cooperate. He testified that he joined the union in 2014 and had a membership card. He confirmed that he did not ask for a check off as joining the Union was a personal choice and he could make payments from his pocket.

5. The Respondent's witness was Agatha Watiri the Respondent's bookshop manager in Embu. She testified that the Respondent does not have a Recognition Agreement with the Union and that the Bookshop operates under the Diocese of Embu and the Diocese has no CBA with the Union. He added that there were no union dues deducted on behalf of the Grievants as there are no check off forms from the Union. She stated that the Grievants never notified them of the union membership. She stated that there was a CBA between January 2012-December 2013 and the separation was in 2016. She testified that the Grievants were on a one year contract after which they were to renew it one month prior in writing. She stated that they applied for renewal but the Respondent declined to renew their contracts and they were paid their terminal dues. In cross-examination she confirmed that they did not issue the Grievants with a notice as they were aware that the contract would come to an end.

6. The Claimant submitted that the Respondent violated Sections 35, 36 and 41 of the Employment Act. The Claimant submitted that any member of the trade union is allowed to pay the union dues direct to the union office as required under Section 48(1) of the Labour Relations Act and that the Respondent further violated Section 59(5) of the Labour Relations Act by refusing to implement the CBA between the churches and union dated 14th October 2013. The Claimant thus urged the court to observe the authorities of the court in Cause No. 383 of 2010, Cause No. 30 of 2012 and Cause No. 84 of 2014 and order the Respondent to comply and implement the churches agreement.

7. The Respondent submitted that for a union to represent Grievants in court, such Grievants must demonstrate that they are indeed members of the Union and membership to a Union for purposes of suing an employer must be in conformity with Section 48(3) of the Labour Relations Act through recruitment. The Respondent submitted that in the present case all Grievants are reliant on undated and unsigned membership cards as evidence of membership to the Claimant Union. The Respondents submitted that membership alone without proof of check off forms is insufficient to demonstrate membership for purposes of court representation and therefore the Claimant union lacks the *locus standi* to file this suit on behalf of the Grievants. The Respondent relied on the case of **Communication Workers' Union v Safaricom Limited [2014] eKLR**. The Respondent submitted further that for the CBA to be binding it must be registered in court and no certificate of registration was availed to show the court that the CBA relied on was registered. The Respondent submitted that the CBA in support of the claim was effective for 2 years beginning 1st January 2012. The Respondent submitted that the prayer for compensation lacks merit as the Grievants fixed term of employment lapsed through effluxion of time and the Grievants had received letters informing them of the non-renewal of their contracts that would end on 29th February 2016. The Respondent submitted that the prayed for underpayment and house allowances are untenable because they constitute continuous injuries under Section 90 of the Employment Act and any claim thereof ought to have been filed not more than one year from cessation thereof. Reliance was placed on the case of **Samuel Otiende Lukoko v Shiners Girls**

High School [2015] eKLR for this proposition. The Respondent submitted that there was no termination of employment as the contracts came to an end through efflux of time and the Grievants are not entitled to the remedies sought and the suit should be dismissed with costs to the Respondent as it lacks merit.

8. The Claimant sued on behalf of the 3 Grievants who were its members. The Respondent asserts that the Claimant lacks *locus standi* to sue on their behalf. The Collective Bargaining Agreement between the Claimant and the churches and religious institutions covered in the Schedule thereto incorporates the Embu Diocese which the Catholic Bookshop and Printing Press is a part of. The Respondent sued is therefore the correct party to sue and is covered by the CBA exhibited. The Claimant however adverted to a Collective Bargaining Agreement that was not exhibited being the one entered into in 2016. As there was no evidence of the CBA, the Claimant was not the proper party to sue for the 3 Grievants. The Court substitutes the 3 Grievants as the 1st, 2nd and 3rd Claimant respectively. They were dismissed when they sought a wage increase. This was not seriously contested though the Respondent asserts their contracts came to an end. The Respondent exhibited the letters dated 29th February 2016 which clearly indicated the contracts had come to an end on the same date. In the letters the Respondent promised to compute their gratuity payments and other dues together with one month salary in lieu of notice. The Respondent indicated that the payment would be made within one month. As there was no evidence of the payment promised having been made, the 3 Claimants will be entitled to recover and the Respondent to compute the sums due as follows:-

- i. 1st Claimant Cicily Wanjiru Mbogo
 - a. One month salary in lieu of notice
 - b. gratuity
- ii. 2nd Claimant Francis Ithuki Njuguna
 - a. One month salary in lieu of notice
 - b. gratuity
- iii. 3rd Claimant Samson Musyoka Nziu
 - a. One month salary in lieu of notice
 - b. gratuity

There will be no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 5th day of December 2019

Nzioki wa Makau

JUDGE