

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 343 OF 2017

KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANTS

VERSUS

CYKA MANPOWER SERVICES LTD

SOLVOCHEM EAST AFRICA LTD.....RESPONDENTS

JUDGMENT

Introduction

1. The Claimant is a trade union registered to represent employees in the petroleum, oil and related industry in Kenya and she brought this suit on 2.5.2017 on behalf of the 11 grievants herein who were employed by the respondent until 26.4.2017 when they were all terminated on account of redundancy. It is the Claimant's case that the grievants were unfairly terminated because of their union affiliation and through breach of the redundancy procedure as laid down by the law and prayed for one month salary in lieu of notice, maximum compensation for unfair termination, accrued leave, severance pay, general damages, costs and interest. She however withdrew the case against the second respondent before she could file her defence leaving the first respondent as the only Respondent to the two suits.

2. The Respondent has admitted terminating the Claimants employment on account of redundancy but denied that the same was done unfairly. She averred that being an outsourced labour contractor, she was bound by her client's advice to reduce the labour force due to approaching general election. It is further defence case that due to urgency, she never served any redundancy notice but instead she paid all the grievants one month salary in lieu of notice. As regards Cause No. 278 of 2017, the Respondent denied that the Claimant had recruited a simple majority of her unionisable employees and averred that she was not legally bound to accord the Claimant recognition under section 54 of the Labour Relations Act. She further averred that she was not legally bound to deduct union dues from the grievants and remit the same to the Claimants because she was not served with an order from the Minister in charge of labour as required by section 48 of the Act. She therefore prayed for the suits to be dismissed with costs.

3. On 16.10.2017, the parties agreed to have the two suits were consolidated under this file. The issues for determination are whether the Claimants' contract of service were unfairly terminated and whether they are entitled to the reliefs sought in the two suits. The suit was heard on 16.10.2017 and 23.11.2017 when the Claimant called Mr. Bemwaruwa Tsuma Mkamba as CW1 while the Respondents called her Managing Director, Mr. Denis Muthamo Kariuki as RW1.

Claimants' case.

4. CW1 testified that he was employed by the Respondent in December 2008 as a supervisor over all her staff including the grievants herein. He therefore contended that he knew all the grievants some whom he found them already working there. During their employment, they never went for their annual leave and they were never paid in lieu thereof.

5. He further testified that between August and December 2016 the Claimant recruited as members, 22 out of 24 employees of the Respondent. All the recruits signed Check off forms authorizing deduction of union dues but the employer refused to accord the union recognition and declined to deduct and remit to her union dues. He produced as exhibits copies of the check off forms signed and Draft recognition Agreement which were forwarded to the Respondent by the union. On 31.3.2017, the client (Solvochem East Africa Ltd) wrote to the Respondent and copied to the Claimant giving her notice to sort her issues with the union or her contract be terminated and another contractor be hired. However, the Respondent ignored the client's advice and decided to accord the union recognition as demanded.

6. On 18.4.2017, the union filed suit No. 278 of 2017 to have the Respondent compelled to accord her recognition. As a result, the employer began to victimize the recruited members including the grievants by discriminating, threatening them and forcing them to sign forms whose effect was to change the terms of their contracts. On 21.4.2017, he was send on compulsory leave for one month while two operators were given Show cause letters for not wearing safety boots in the dining hall during lunch break.

7. CW1 further testified that, the Respondent influenced and intimidated some of the union members to resign from the union in order to defeat the claim for recognition by the union. In addition, on 26.4.2017, a day before the hearing of suit No.278 of 2017, the Respondent terminated the services of all the 11 grievants on account of redundancy without prior notice to them and the labour officer; before paying them their accrued leave and severance pay; and failing to give them Certificate of Service. The redundancy was vide the letters dated 25.4.2017. He therefore contended that the layoff amounted to unfair and wrongful termination and prayed for maximum compensation plus other dues as tabulated under schedule 7 annexed to the claim.

8. On cross-examination he admitted that the grievants were paid some money after the termination as offered by vide the termination letters but he denied that the pay constituted the rightful amount. He further denied the authenticity of the muster roll filed the defence because it did not bear any signature from the grievants. He maintained that the termination was because of their union affiliation and genuine redundancy because the other 11 union members were not terminated after they wrote letters of resignation from the union. He further contended that after termination of the grievants, the Respondent employed 10 new employees to replace them. He admitted that after the said termination, resignation, and recruitment of new staff, the union lost simple majority of membership she had acquired from the Respondent's unionisable staff.

Defence Case

9. RW1 testified that the Respondent is contractor for provision of labour through outsourcing and as such, she engages her employees on fixed term basis for periods between one and three years depending on the volume of each client's work. He confirmed that Solvochem, a company dealing with Petroleum chemicals for manufacturing of mattresses contracted her to provide 23 workers which she did including the grievants. He further stated that in 2016 the Claimants started writing letters to the her client demanding meeting at Mombasa but he offered to meet at Nairobi which was the HQs for the Claimant and the Respondent. However, the union refused and resorted to harassing the client with letters.

10. RW1 explained that the Respondent had 23 employees at Solvochem but terminated 11 of them. He further explained that of the 12 employees left, 10 were union members but 4 revoked their membership leaving 6 who are still in employment. He denied that the termination of the grievants was due to their union affiliation and contended that it is the client who, in December 2016 advised on the job cuts due to the approaching 2017 General Election, which had forced the client to reduce business. According to RW1 the selection of the employees laid off and the positions to be affected was according to the client's needs based on her business cycle.

11. RW1 contended that the grievants were terminated in compliance with the redundancy procedure by paying pending leave, salary, service pay based on the current salary. He however admitted that the grievants were not served with any notice before the redundancy but contended that that default was remedied by payment of one month salary in lieu of the notice.

12. On cross-examination, RW1 maintained that the Respondent upholds her employees' right to join a trade union and that is the reason why she has continued to employ the 6 union members who survived the layoff. He admitted that the Respondent received the check off forms and request for deduction of union dues for 22 out of her 23 employees followed by 2 reminders but never responded in writing but by phone call requesting for a meeting in Nairobi. He further stated that he never deducted union dues as requested because there was no recognition agreement with the Claimant. He further stated that the reason for requiring the grievants to fill and sign employee Particulars form was in preparation for the approaching redundancy. He maintained that the redundancy was on request by the client due to the reduced workload and denied that 10 new employees were employed to replace the grievants. He denied the damages sought by the grievant and maintained that the grievants had no accrued leave in 2017 including CW1 who was given 30 days leave but he arrogantly refused to go and continued with work.

Analysis and Determination

13. There is no dispute that all the grievants were employed by the Respondent in various positions on diverse dates but they were all laid off on 26.4.2017 and thereafter paid the terminal dues stated in the termination letters dated 25.4.2017. The issues for determination herein are:

- a. Whether the termination of the claimants' contract of service was unfair; and
- b. Whether the claimant has locus standi to sue on behalf of the her members.
- c. Whether the claimants are entitled to the reliefs sought in this suit and ELRCC 278 of 2017.

Unfair termination.

14. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was redundancy and the procedure followed was immediate termination without prior notice or payment of salary in lieu of notice. The reason for the termination has been challenged by CW1 who maintained that the reason for termination was the grievants' union affiliation. The Respondent has alleged without written evidence that the decision to lay off the grievants was advised by the client who also determined the position to be affected. The said lack of evidence to prove that the Respondent was requested by the client to reduce the workforce leaves this Court with no other alternative but to find on a balance of probability, that the reason for the sudden termination of the grievants' employment was their union affiliation, which was unfair under section 46 of the Act.

15. In addition to the foregoing, the Claimant has faulted the procedure followed to lay off the grievants for not being in accordance with the law and I agree. It is also clear from the facts of the case and the admission by the RW1 that the mandatory procedure for terminating employment contract on account of redundancy prescribed by section 40 of the Employment Act was not complied with in this case. The said provision requires in mandatory terms that, before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and the area labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy.

16. The failure by the Respondent to prove existence of a valid and fair reason to warrant termination of the grievants' employment; and the admission that fair procedure was not followed before the termination, rendered the termination of the grievants' employment unfair within the meaning of section 45 of the Act, and I so hold.

Locus standi of the union to on behalf of its members.

17. The Respondent has contended that the Claimant union lacks capacity to sue on behalf of the grievants herein because she does not represent a simple majority of the Respondents workforce. The Claimant has however contended that she recruited 22 out of 23 of the Respondent's staff and therefore lawfully representing the grievants. I agree with the claimant that she recruited more than a simple majority of the Respondents workforce including the grievants. After terminating the 11 grievants, she remained with 12 out of whom 10 were union members. This suit and the ELRCC 278 of 2017 are intertwined and arose from the same facts and as such, the allegation that the Claimant did not represent a simple majority is not factual. Consequently, if at all that is what is required, on the basis of numbers, the Claimant had capacity to sue on behalf of the grievants. In any case, the Court wonders why the Respondent had to wait until the end of the Claimants case for her to raise the issue of capacity. More interesting is the fact that the defence counsel never raised the issue during his closing submissions.

Reliefs sought in ELRCC 278 of 2017

18. In view of the finding that the Claimant had recruited 22 out of the Respondent's 23 unionisable workforce before filing the suit on 18.4.2017, I find and hold that she had represented more than a simple majority of the said workforce and under section 54 of the Labour Relations Act, she was entitled to receive recognition from the respondent. I therefore grant an order compelling the Respondent to recognize the claimant as the union to represent her employee for purposes of collective bargaining. Even if the representation has gone below a simple majority now, the court's decision is based on the status quo as at the time of filing the suit. The Respondent is further compelled to commence deducting union dues from the salary of the surviving union members still in her employment and remit the same to the Claimant. The rest of the remedies sought are declined because they have been overtaken by events.

Reliefs sought in this suit

19. In view of the finding herein above that the Respondent did not prove the substantive and procedural fairness, I make declaration that the termination of the 11 grievants was unfair and wrongful as prayed. Under section 49 of the Employment Act, I award each grievant 12 months' salary as compensation for unfair termination. In awarding the said award, I have considered the fact that they did not contribute to the termination through misconduct.

20. I however dismiss the claim for one month salary in lieu of notice, severance and overtime because it was paid to each grievant after the termination and no evidence has been tendered to prove further entitlement. Likewise, the claim for accrued leave is dismissed for lack evidence and proper particulars. Finally, the claim for general damages for discrimination is dismissed because it has been adequately compensated under unfair termination.

Certificate of Service

21. The claim for Certificate of Service is granted because it is a right guaranteed under section 51 of the Employment Act.

22. The summary of award for each grievant is as follows:

Jackson Mutia	Kshs. 23,475 x 12.....	Kshs.281,700
Lucas Modi	Kshs.16,335 x 12	Kshs. 196,020
Emanuel Mambili	Kshs. 16,335 x 12	Kshs. 196,020
Walter Mkagati	Kshs. 25,440 x 12	Kshs. 305,280
Stephen Obiya	Kshs. 16,335 x 12	Kshs. 196,020
Kombo K. Sirya	Kshs. 16,335 x12	Kshs. 196,020
Patrus Mwaringa	Kshs. 16,335 x12	Kshs. 196,020
Joseph Shikuku	Kshs. 16335 x12	Kshs. 196,020
Bemwaruwa Mkamba	Kshs. 29,190 x 12.....	Kshs.350,280
Peter Jiloh N.	Kshs. 16335 x12	Kshs. 196,020
Henry Ndoro	Kshs. 16335 x 12	Kshs. 196,020

Total

Kshs.2,505,420

Disposition

23. For the reasons stated above, I enter Judgment for Claimant on behalf of the grievants in the aggregate sum of **Kshs.2,505,420 plus costs and interest** from the date hereof. The said award shall be paid less statutory deductions. The grievants will also have Certificate of Service.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE