



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 55 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

**BUILDING, CONSTRUCTION, TIMBER, FURNITURE AND
ALLIED INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

VERSUS

SASAH GENERAL MERCHANTS KENYA.....RESPONDENT

JUDGMENT

The claim herein is filed by Kenya Building, Construction, Timber, Furniture and Allied Employees Union, on behalf of 62 grievants who are stated to have been employees of the respondent.

At the time material to the suit the claimants were engaged in construction of students' hostels at Bondo University College between January 2010 and December 2011.

The claimant avers that the grievants contracts were terminated because they joined membership of the claimant union.

The claimant reported a dispute to the Minister who appointed Mr. J. Omweno of Kisumu Labour Office as Conciliator. The conciliator was however unable to reconcile the parties at a meeting held on 18th July 2012 and issued a letter dated 28th august 2012 declaring the dispute unresolved.

I however note that in the dispute referred to the Minister the issue in dispute was "*unlawful declaration of redundancies and underpayments of 62 employees.*" However in the memorandum of claim the dispute is "*wrongful termination and underpayment of wages to 62 grievants.*"

The claimant prays for terminal dues of the grievants under the following heads–

1. Underpayments
2. Notice
3. Leave
4. Prorata leave

Total claim for all the grievants is Kshs.3,445,946. The claimant further prays for a declaration that the termination was unlawful, certificates of service for the grievants and costs of the claim.

The respondent filed a statement of defence on 9th September 2014 denying that the grievants were its employees.

The respondent further denies that the grievants were members of the claimant union, that the grievants had subscribed and/or made remittances to the claimant or that they executed or authorised any deductions of union dues.

The respondent avers that only some of the grievants were engaged on causal basis to execute piece work during construction of students

hostels at Bondo University College (now Jaramogi Oginga Odinga University of Science and Technology) but the said grievants were never engaged for longer than eight hours and were all paid daily wages on a daily basis, that being casual workers the said grievants were neither unlawfully terminated nor terminated without notice.

The respondent denies that the grievants' contracts were terminated after they joined membership of the union or that they were terminated for joining membership of the union.

The respondent contends that the claimant lacks locus standi to represent the grievants, that the court lacks jurisdiction to adjudicate on the claim, that the claim is statutorily time barred under Section 90 of the Employment Act and that the proceedings are contrary to the provisions of Sections 41 and 44 of the Act, premature, misconceived and bad in law and further that the claim does not disclose any cause of action against the respondent.

The case was fixed for hearing several times when either one or both parties failed to attend court.

Eventually on 20th March 2017 parties sought leave which was granted, to proceed by way of written submissions. The parties thereafter filed and exchange written submissions.

Determination

Having considered the pleadings and written submissions on record, the issues for determination are the following –

- i. Whether the grievants were members of the claimant union.
- ii. Whether the claimant served the respondent with check-off forms
- iii. Whether the grievants were unfairly terminated by the respondent.
- iv. Whether the claimant is entitled to the prayers sought.
- v. Whether the claim is time barred.

I will deal with issue no. 5 first as it is a preliminary point that if determined against the claimant would dispose of the entire claim.

The claimant avers that all the grievants' employment was terminated in December 2011 as set out in its appendix IV being the claimant's memorandum to the conciliator. The claim was filed on 14th March 2011. The period from December 2011 to March 2014 is less than three years. The limitation period would have lapsed in December 2014 by which time the claim had been filed.

I therefore find that the claim is not statute barred and that this court has jurisdiction to hear and determine the same.

The next issue for determination is whether the grievants were members of the claimant and whether the claimant has locus standi for represent them.

The claimant has attached to the memorandum of claim several check-off forms at appendix 1. All the forms have names of the members and signatures but do not contain dates when the said members signed the forms. The cheque off forms further do not have dates against the signature of the General Secretary.

There is therefore no proof of the dates when the grievants joined the membership of the claimant union. There is further no proof that the forms were ever sent to the respondent or that the respondent was aware about the grievants having joined membership of the union.

I find that although there is proof of membership there is no proof of date of joining union or proof that the respondent was aware about the grievants having joined the membership of the claimant union.

The next issue for determination is whether the grievants were terminated unfairly by the respondent.

The claimant has at paragraph 5 of the claim stated that the grievants earned daily wages and were terminated in December. There is no proof of either the engagement or the termination. The only documents that have been filed by the claimant are the check-off forms and some miscellaneous forms titled "Company's Name." The form contains handwritten records of names, date of employment, occupation and wages. The forms do not connect the names to the respondent

From the foregoing I find that there is no proof of either employment or termination of employment of the grievants.

The final issue is whether claimant is entitled to the prayers sought. Having found no evidence of employment or termination of employment of the grievants, it follows that there is also no evidence of underpayment of wages. The prayers of the claimant being notice, leave and arrears of underpayments are all pegged on evidence of date of appointment, wages and proof of termination of employment. With no proof of the same, there is no leg upon which the claim can stand with the result that it is dismissed.

There shall be no order for costs.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 30TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE