



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 826 OF 2012**

**KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT**

**- VERSUS -**

**FALCON TANNERS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> July, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.05.2012 alleging the wrongful or unfair termination of its members Boniface M.Nduva, Irene Kitheka, Caroline Nzeve, Peter M. Mulasya, and Francisco M. Musyoka (grievants) being the alleged employees of the respondent at all material times. It was the claimant's case that the respondent terminated the grievants' employment contrary to section 46 (c) of the Employment Act which provides that an employee's membership or proposed membership of a trade union shall not constitute a fair reason for dismissal or imposition of other disciplinary penalty. Further under section 46 (f) of the Act, it is not a fair reason to dismiss an employee or impose other punishment on account of an employee's refusal or proposed refusal to join or withdraw from a trade union. The claimant states that it recruited the grievants with a view of concluding a recognition agreement with the respondent. The respondent received the union letter on 08.11.2011 but decided to terminate the contracts of service of the employees who had joined the trade union prior to the agreed date of signing of the recognition agreement which was on 22.11.2011. The dispute was reported to the Minister for Labour under section 62(1) of the Labour Relations Act, 2007. By the letter dated 26.01.2012 the conciliator was appointed. The respondent failed to attend the meetings convened by the conciliator. On 11.04.2012 the conciliator issued a certificate of unresolved dispute and the claimant referred the dispute to the Court by way of the present suit. The claimant's case was that Articles 36(1) and 41 (2) (c) granted the grievants the right to associate and to form, join, or participate in the activities and programs of a trade union and the respondent violated the provisions.

The claimant's further case was that the grievants were rendered redundant unfairly and the termination was unfair under section 45 of the Employment Act, 2007 and they were entitled to compensation for the unfair termination under section 49 of the Act.

The claimant prayed for payment to the grievants by the respondent of leave due, pro-rate leave, days worked, severance pay at 15 days per completed year of service, notice, underpayments, and compensation as follows:

- a. Boniface M. Nduva Kshs.247, 916.30.
- b. Irene Kitheka Kshs.181, 495.90.
- c. Caroline Mwendu Kshs.387, 929.80.
- d. Peter Mutunga Mulasya Kshs.141, 202.90.
- e. Francisco Mailu Musyoka 141, 376.55.

The claimant further prayed for a certificate of service for each grievant and costs of the suit.

The Claimant stated that the claimant's employment was terminated between 18<sup>th</sup> and 21<sup>st</sup> November 2011.

The respondent filed the statement of response on 03.07.2012 through Nduva Kitonga & Company Advocates. The respondent prayed that the suit be dismissed with costs. The respondent pleaded that the grievants had never been its employees as per the Employment Act, 2007. The respondent further stated that its enterprise involves collecting hides and skins usually in small volumes and it took time to accumulate large stocks. The jobs available therefore fluctuated and reached a peak when an order was received and the large volume of hides and skins had to be loaded and off loaded. The respondent then stated that it had engaged the grievants on diverse dates for loading and off loading of the skins and hides during the peak season and the grievants were never in continuous service. The respondent failed to attend the conciliation proceedings because in such circumstances it had no employment relationship with the grievants.

The **1<sup>st</sup> issue** for determination is whether the respondent and the grievants were in a contract of service. The respondent has already conceded in the memorandum of claim that it employed the grievants but as casual employees. The respondent's witness (RW) one Charles Munda Ngeene stated that the grievants Biniface Nduva, Irene Kitheka, Caroline Nzive and Francisca M. Musyoka had not been permanent employees. For Peter Mtunga Mulasya, he could not have been engaged on 8.09.2009 because he was a minor having been born on 04.04.1992. The Court finds that the discrepancy in age was insignificant or the said Peter had already attained 18 years of age as at 08.09.2009. Taking the respondent's evidence into account the Court returns that the respondent had employed the grievants.

RW testified that he did not keep proper employee records. Thus, in cross examination he stated, **"I kept my records on expenses and casuals who are hired on daily basis. Upon payment, they did not sign anywhere. Some sign and others do not sign. In cause 378 of 2013 it was shown that there had been a forgery. Boniface fraudulently recruited people and put false signatures on form S."**

Section 10(7) of the Employment Act states that in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. RW confirmed he did not keep a check in and checkout register. The grievants say they were in a continuous and unbroken service. The Court finds that the respondent has failed to discharge the burden in section 10(7) of the Act and the Court returns that the grievants were employed in unbroken service as pleaded and over the period of time stated in the statement of claim. While making that finding the Court returns that the respondent failed to file the check in and checkout register thereby titling the findings in favour of the claimants. The Court finds that while the respondent employed the grievants, he failed to keep the proper record or to file the record of their service as required under section 74 of the Act. The Court finds that the provisions of the Act applied to the grievants' employment and their service was unbroken.

The **2<sup>nd</sup> issue** for determination is whether the termination of the grievants was unfair. The respondent's defence was that they were not its employees but the Court has found that parties were in employment relationship. The claimant's evidence was that each claimant was terminated upon joining the union. The Court finds that the termination upon that ground was unfair in view of section 46(c) and (f). The Court has considered that the very aggravating factor that the reason for termination was in violation of Articles 36(1) and 41 (2) (c) of the Constitution which granted the grievants the right to associate and to form, join, or participate in the activities and programs of a trade union and the respondent violated the provisions. The Court has further considered that the grievants wished to continue in employment. They are each awarded 12 months in compensation under section 49 of the Act. Looking at the evidence by Francisco Mailu Musyoka he testified he was employed on 08.09.2009 and not 08.09.2011 per computation in the claim, the court finds the date in the claim to have been an error in typing and he will equally enjoy the compensation.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

- a. The termination was abrupt and without notice and each is entitled to one month pay in lieu of notice per section 35 of the Act.
- b. Each grievant is entitled to pay for leave due but not taken as prayed for and as per section 28 of the Act.
- c. Each grievant is entitled to the days worked but not paid and as prayed for.
- d. The grievants are not entitled to severance pay as claimant because this was not a case of redundancy but unfair dismissal and the prayer will fail.
- e. The claimant did not justify the underpayment and no evidence was moved in that regard and the prayer will fail.
- f. Each grievant is entitled to a certificate of service per section 51 of the Act.

Thus the grievants are awarded as follows:

- a. Boniface M. Nduva **Kshs.179, 535.40.**
- b. Irene Kitheka **Kshs.140, 907.90.**
- c. Caroline Mwendu **Kshs.247, 211.00.**
- d. Peter Mutunga Mulasya **Kshs.107, 946.00.**
- e. Francisco Mailu Musyoka **107, 407.65.**

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the grievants Boniface M. Nduva **Kshs.179, 535.40**; Irene Kitheka **Kshs.140, 907.90**; Caroline Mwendu **Kshs.247, 211.00**; Peter Mutunga Mulasya **Kshs.107, 946.00**; and Francisco Mailu Musyoka **107, 407.65** by 01.10.2018 failing interest to run at Court rates from the date of the judgment till full payment.
2. The respondent to deliver to each grievant a certificate of service by 01.09.2018.
3. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 20<sup>th</sup> July, 2018.**

**BYRAM ONGAYA**

**JUDGE**