



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2023 OF 2012

KENYA NATIONAL UNION OF COMMERCIAL,

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

DIAMOND COFFEE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The claimant's case is based upon the amended memorandum of claim filed on 16.05.2014. The suit is filed by the trade union on behalf of its 21 members (the grievants) listed in the amended memorandum of claim said to have been in the employment of the respondent. The claimant has made prayers for payment to the grievants as follows:

- a) One month pay in lieu of termination notice Kshs. 188, 854.00.
- b) Annual leave not taken equivalent to 21 days each for 3 years for each of the grievants Kshs.457, 397.60.
- c) Service pay at 15 days for each completed year of service Kshs.556, 823.80.
- d) House allowance at 15% of basic wage Kshs.808, 674.20.
- e) Underpayment of wages in view of applicable statutory minimum wage orders and as tabulated on record Kshs.1, 691, 913.00.
- f) 7 months gross wages to each of the grievants being compensation for unlawful and unfair termination as agreed under paragraph 29 – 30 of recommendation by the conciliator a total of Kshs.1, 520, 274.70.
- g) Total claim of Kshs.5, 223, 937.90 as per table 4 annexed as Appendix A.

The claimant has computed the particulars of the amount claimed for each of the claimants in the amended claim and in the exhibits and in particular table 4 annexed as Appendix A.

The parties are in a dispute on whether they should conclude a recognition agreement. In the meantime, it is the claimant's case that it is the sector union with respect to the respondent company which is engaged in the enterprise of processing or sorting and grading of coffee for the export market. It is the claimant's case that the respondent employed the grievants on diverse dates and the respondent terminated the grievants' contracts of service on 12.05.2011 on account of their joining the union. The claimant's case is that the termination was verbal. That the grievants were paid on a daily basis at Kshs. 250.00 per day between May 2007 to May 2011 regardless of the specific job that each grievant performed.

The claimant's further case is that the grievants signed to join the union between 12.01.2010 and 13.01.2011 and on 11.03.2011 the claimant forwarded to the respondent the check off forms for deduction and remission of union dues. The claimant forwarded to the respondent a draft recognition agreement on 31.03.2011 but the respondent was unwilling to negotiate the agreement. On 05.05.2011 the respondent reported a trade dispute to the Minister for Labour for the refusal to sign recognition agreement and as per section 62 of the Labour Relations Act, 2007. The letter was delivered to the respondent and the respondent acted by dismissing the grievants, Dickson Achesa and 20 others. The claimant issued the letter of 12.05.2011 asking that the issue of dismissal of Dickson Achesa and 20 others be discussed on 17.05.2011 at 11.00am but the respondent appointed Julius Nyakiangana & Company Advocates who issued the letter denying that Dickson Achesa and 17 others had been the respondent's employee. The claimant met the respondent's advocates on 04.08.2011 but the issue of the dismissal was not amicably resolved prompting the claimant to report another trade dispute about the dismissal per the letter dated 04.08.2011.

On 23.08.2011 P.N. Macharia was appointed as conciliator in the matter. The parties attended a meeting with the conciliator and the conciliator issued his report on 03.04.2012. The conciliator found that the 21 grievants had been dismissed verbally in May 2011 on account of their joining the union; the grievants had worked for the respondent between 4 and 10 years as coffee sorters; the grievants had respondent's documents with which they could access the coffee auctions on behalf of their employer, the respondent. The conciliator then recommended that the grievants be accorded normal termination with all benefits including payment for underpayments as per law; 7 months' gross salaries in compensation in view of the unfair dismissal; and the County Labour Officer at Nairobi to assist in computation of the dues. The conciliator urged the parties to accept the recommendations as a settlement to the dispute. The respondent failed to accept the settlement and the claimant moved to file the present suit. The claimant further urges that the grievant's otherwise unbroken casual service converted into a service subject to minimum terms of service as per section 37 (1) (b) of the Employment Act, 2007.

The respondent filed the memorandum of response to the amended claim on 09.06.2014 through Julius Nyakiangana & Company Advocates. The respondent prayed that the suit be dismissed with costs. The respondent denied that it had employed the grievants and further denied that it dismissed the grievants on 12.05.2011 on account of joining the trade union, the claimant. The respondent denied engaging the grievants on continuous service for a period between 2 to 10 years. The respondent admitted that the conciliation proceedings took place as per the claimant's account and the respondent refused to accept the conciliator's findings.

The **1st issue** for determination is whether the respondent and the grievants were in a contract of employment. Claimant's witness No. 1 (CW1) was Peter Marathi Nderitu. He testified that he was employed by the respondent 01.10. 2007 and he worked in the respondent's enterprise (the respondent as a coffee dealer) involving sampling, selecting and processing coffee for export. He was a supervisor and he earned Kshs. 250.00 per day. The grievants were paid in cash without signing anywhere and the payment was by a clerk known as James Mwangi Muiruri who as at the time of hearing of the suit was still in the respondent's employment. Further, he testified that all the 21 grievants were terminated on 12.05.2011. The circumstances were that Dickens Achesa had been dismissed the same day in the morning and matter reported to the union. The respondent had discovered that the grievants had joined the union and CW1 testified that at about 2.00pm on 12.05.2011 the respondent verbally dismissed the remaining 20 grievants. CW1 testified that whenever the grievants went to KPCU to sample and process the coffee, the respondent gave them a gate pass to access the coffee stores. CW1 in cross-examination testified that he served at different times as a loader, sampler, supervisor and machine operator and that he had been employed through connection with the one Alli Khan and the boss was one Jasmin Khan who employed CW1 on behalf of the respondent. CW1 stated that all claimants were his colleagues at work and that they recalled their respective dates of employment as was stated in the claim.

Claimant witness No. 2 (CW 2) was Dickens Achesa. He testified that the respondent employed him on 08.04.2008 as a machine attendant and the work entailed sampling of coffee. His supervisors Alli, Kibali and Yasmin told him on 12.05.2011 that there was no work because he had joined the union. The grievants served without annual leave or holiday off. Further, he had a gate pass to access KPCU and a health certificate to handle food in his favour with the respondent as the employer.

Claimant witness No. 3 (CW3) was Harrison Kitove. He testified that he was employed by the respondent up to 12.05.2011 as a machine operator. CW3 testified that the respondent as the grievants' employer required them to take out health certificate confirming their fitness to handle food, the coffee they were employed to work on. He was paid Kshs.250.00 per day and that was an underpayment for a machine attendant.

The respondent's witness was Mohammed Zulfikar Ali Khan (RW), the respondent's administration and logistics officer. His evidence was that the respondent was not a manufacturing company but it was a trading company with a dealer's licence to transact only when there was a contract to export coffee which was purchased at a public auction. Further the claimants had never been the respondent's employees and their suit should fail. That it was only at the time the union forwarded the draft recognition agreement that the respondent came to know about the union. The muster roll filed in court for the period 2001 to 2013 was the respondent's only record of employees. The medical certificates merely read "**Diamond**" or "**Diamond Coffee**" and not the respondent's proper name and such medical certificates could be issued without reference or introduction by the employer. Further there was no evidence of continuous service. RW confirmed that his own letter of appointment was not dated. It was RW's evidence that the respondent did not process the coffee but it instructed the bonded warehouses where the coffee was stored to repack the coffee and the same warehouses arrange for the transport.

The Court has considered the evidence, the pleadings, and the submissions.

The **1st issue** for determination is whether the grievants were employed by the respondent.

James Mwangi Muiruri whom CW1 testified to have been the paying master is listed at No. 10 of the answers filed by RW on 22.05.2018 as being an employee of the respondent. RW while denying that the grievants were employed by the respondent, failed to offer specific rebuttal to the claimant's detailed evidence that the contract of service was oral and the said Muiruri was the paying officer on behalf of the respondent. The Court finds that RW while denying that the grievants were respondent's employees, offered no coherent explanation of the grievant's medical certificates and though the certificates merely read "**Diamond**" or "**Diamond Coffee**" and not the respondent's full name, in absence of any other material the Court returns that on a balance of probability, the certificates were issued to the grievants as employees to enable them handle the coffee as they were employed by the respondent and as per their detailed account. Further the Court returns that the respondent did not file any contracts or evidence of outsourcing or engaging the bonded warehouses as was testified by RW. The evidence was that the respondent had to reprocess the coffee and repack it and the Court returns that the grievants performed that work and were each paid Kshs. 250.00 in circumstances whereby the respondent opted to abdicate its statutory duty under the Employment Act, 2007 to keep the employee records. Taking all these findings into account, the Court returns that the respondent was in an oral contract of employment with the grievants and on a balance of probability, each of the grievants was in continuous and unbroken service and for the period as pleaded in the amended claim.

To answer the **2nd issue** for determination, the Court returns that the service being unbroken and as submitted for the claimant, the grievants' otherwise casual service converted to a service subject to minimum terms and conditions of service as provided for under the Employment Act, 2007 and the conversion being under section 37 (1) (b) of the Act.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1) The termination of the employment contracts was unfair for want of a valid reason as envisaged in section 43 of the Act. The Court finds that as per the claimant's consistent evidence the reason for the termination was the grievant's joining of the trade union. The grievants were entitled to join the trade union under the provisions of Article 41 of the Constitution of Kenya 2010 and it was unconstitutional and unfair labour practice for the respondent to dismiss the grievants on account of joining the union. In particular, section 46 (c) of the Act, an employee's membership or proposed membership to a trade union does not constitute a fair reason for dismissal or imposition of a disciplinary action. Considering that the grievants did not contribute to the dismissal, they desired to continue in employment, and the period they had served and could have continued in service, the Court finds that the 7 months' gross salaries as recommended by the labour officer in compensation for unfair termination per section 49 of the Act will meet the ends of justice in the present case.

2) The Court further finds that the claimant has established that the grievants are entitled to the other remedies as computed in the amended memorandum of claim and they are awarded. While making that finding the Court considers that the present case was indeed a referral from the statutory conciliation proceedings. The parties had chance to participate in the proceedings and all evidence, unless rebutted before the Court, was taken before the conciliator. The only defence the respondent offered during the conciliation was that the grievants had not been employed by the respondent but which the Court as well as the conciliator found not to have been the case. The Court finds that there was sufficient material on record and therefore evidence, to support the claimants' case. They are awarded accordingly.

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

- a) The respondent to pay the grievants a sum of **Kshs. 5, 223, 937.90** being to each grievant a sum of money as computed specifically in the amended claim filed on 16.05.2014 and the decree to have a schedule showing the name of each grievant and the amount due accordingly.
- b) The respondent to pay the amount of money in (a) above by 01.09.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 6th July, 2018**.

BYRAM ONGAYA

JUDGE