

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 672 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) LIMITED.....RESPONDENT

JUDGMENT

By amended memorandum of claim dated 27th November 2015 and filed on 30th November 2015 the claimant union avers that MR. DAVID OGEKA ONDITI, the Deputy Secretary General of the claimant union was wrongfully and unfairly terminated from employment by the respondent on 7th July 2014. The claimant prays for the following orders –

1. That the Deputy Secretary General termination be declared unlawful and unjust.
2. That owing to the relations that may have broken down irretrievably as to order for reinstatement, that the Court directs the respondent to compensate the grievant as tabulated below –

NO.	ITEM	WORKINGS	AMOUNT
1.	Notice Period	At Kshs.44,867.70	44,867.70
2.	Salary areas	May and June 2014, and July 2014 (7 days) (44867.7 x + 8,973)	98,607.00
3.	Bonuses for Feb and March 2014		34,600.00
4.	Gratuity for years worked in accordance to the CBA in place	44,867.7 x 29 years	1,301,143.00
5.	Maximum Compensation	44,867.7 x 12 Months	538,404.00
6.	Damages	44,867.7 x 12 Months x 10 years	5,384,040.00
7.	Leave day due	6 days. (44,867.7/30 x 6)	8,973.00
TOTAL			7,410,634.00

3. That cost of the suit be included in the suit.

The respondent filed a memorandum of response to the memorandum of response to the amended memorandum of claim on 14th December 2015 in which it avers that the grievant's employment was lawfully terminated. The respondent denied that it infringed the law as alleged by the claimant and prays that the claim be dismissed with costs.

The claimant's case was heard on 18th November 2015 but the witness (the grievant) was stood down and an order made by the court that the claimant amends the memorandum of claim. The claimant was recalled on 31st May 2016 when his testimony was concluded after he was cross-examined and re-examined by the counsel for the respondent and the claimant's representative respectively.

The case was then adjourned to 31st August 2016 for defence hearing. On 31st August 2016 when the case came up for defence hearing, counsel for the respondent sought an adjournment, which was granted with consent of the claimant's representative. The case was fixed for defence hearing on 2nd November 2016.

The case came up for hearing again on 14th February 2017 when the respondent sought adjournment on grounds that the defence witness was not in court. The court granted the respondent a final adjournment after overruling the protestations of the claimant's representative.

On 10th July 2017, the case was mentioned and fixed for defence hearing on 7th December 2017 by consent of the parties.

On 7th December 2018 when the case came up for hearing, the respondent was absent. The court proceeded to close the respondent's case for non-attendance and directed that parties file written submissions. Only the claimant filed. The respondent failed to file even after being served with the claimant's submissions. The respondent further failed to attend court on 18th December 2017 and 19th February 2018 although properly served.

Claimant's Case

The grievant DAVID ONDITI was employed by the respondent on 17th June 1985. The grievant was registered as the Deputy Secretary General of the claimant union on 10th April 2007. He worked with no incident until 8th July 2008 when he was suspended together with five other union leaders for involvement in union activities. The suspension was lifted by letter dated 11th July 2008 following a demand by workers for their reinstatement.

By letter dated 10th April 2014, the grievant was transferred from Makadara Depot to Tororo Depot in Uganda.

By application dated 22nd April 2014 the claimant applied for stay of the letter of transfer of the grievant on grounds that it was "*a spirited attempt to scuffle, frustrate, neutralise and completely suffocate the activities of the claimant.*" The claimant further saw the transfer as victimisation and intimidation of the Deputy Secretary General of the claimant. The claimant cited several cases it had filed against the respondent to protect itself from the respondent's anti-union activities being Cause No. 587 of 2013, 241 of 2013 and 116 of 2013. The court granted orders of temporary stay of the transfer of the grievant after considering the claimant's application ex parte.

In a ruling delivered on 17th June 2014, the court dismissed the application and ordered that the respondent facilitates the grievant's transfer.

The grievant testified that he did not refuse to go to Uganda, that he received the letter of transfer on 18th May 2014 and went to Headquarters to apply for advance. He received Kshs.25,000. He informed the union about the transfer on 22nd April 2014 and on 23rd April 2014 he received a court order staying the transfer. He therefore went back to work and the advance of Kshs.25,000 was recovered from his salary.

The grievant testified that by letter dated 12th May 2014 he was asked to take his leave pending determination of the court case. The letter, which was written by the Chief Human Resource Officer, also warned him that he was in breach of Clause 3.3. of his contract and would be subjected to disciplinary action once the court case is finalised. He testified that following the letter his services were terminated without him being subjected to a disciplinary hearing.

The grievant testified that after the court vacated the order suspending his transfer to Tororo he was ready to go on transfer but was not facilitated. He reported back to work on 23rd April and worked until 8th May 2014 when he was directed to vacate the office as he was a nuisance. He did not receive the letter of dismissal dated 7th July 2014. He did not receive salary for May and June 2014.

He testified that he did not receive a letter dated 27th June 2016 accusing him of desertion of duty and asking him to show cause as it was sent to his rural home to the address of his primary school.

Determination

I have considered the pleadings, evidence on record and the submissions filed by the claimant. The issues for determination are whether the grievant's employment was unfairly terminated on grounds of engaging in union activities and if the claimant is entitled to the prayers sought.

Since the respondent did not call any witness, I will consider the affidavits on record as the evidence of the respondent.

Unfair Termination

Section 41 of the Employment Act provides that an employee must be given a fair hearing before termination of employment while Section 43 provides for proof of reason for termination. Section 46 of the Employment Act prohibits termination of employment on grounds of union activities.

From the evidence on record, it is clear that there was strained relations between the claimant and the respondent. It is on record that the grievant was the Deputy Secretary General of the claimant union. It is also on record that the grievant was suspended together with five other union officials for the reasons stated in the letter of suspension which is reproduced below —

“SUSPENSION NOTICE

Name: David Ogega Onditi

Designation: Diesel Fitter

Grade: RG. 13

Department: Mechanical

SUSPENSION FROM DUTY

This is to advise you that you are suspended from duty with effect from 08/07/2008 due to the following reasons:

- 1. Your continued involvement in illegal work stoppage.*
- 2. Your participation in calling out, instigating and inciting other employees to take part in an illegal strike contrary to section 80 (1) of the Labour Relations Act, 2007.*
- 3. Issuing threats and intimidating employees who are willing to continue executing their duties as per their employment contracts.*

You will therefore on receipt of this notice remain suspended pending an official inquiry. You will hereafter be advised accordingly.

During the period of suspension, you will continue to be paid your full salary until the case is determined. Please be advised that with immediate effect and during this time you are prohibited from entering any of the company's property or premises without the express permission of your Head of Department.

AUTHORIZING OFFICER

Signature: SIGNED

Name: C. Brown

Designation: H. O. D

Department: Mech. Engineering

Date 8/7/2008”

It is further on record that the court granted a stay of grievant's transfer and that the grievant reported back to work on 28th April 2014 as reported by Fred Owino in the email dated 2nd May 2014 (refer to respondent's appendix GW8 of replying affidavit of Grace Wamiti sworn on 8th May 2014). It is further on record that by letter dated 12th May 2014 the claimant was directed by the respondent's Chief Human Resource Officer to avail himself of his leave days pending the hearing and determination of this case. The letter informed him that he would be disciplined after the court case was finalised for failing to go on transfer to Tororo in breach of Clause 3.3. of his contract.

It is further on record that by letter dated 8th May 2014 addressed to the grievant by Oliver Omondi he was informed that he could no longer work at Makadara Depot as there was no job allocation for him following his transfer.

The letter dated 27th June 2014 accusing the grievant of desertion of duty was therefore unfounded as he had reported back to work and had been sent on leave by the respondent pending conclusion of the case. The same respondent could not again turn around and accuse him of desertion of duty from 23rd April 2014. The letter of desertion of duty was written by the same Chief Human Resource Officer who had sent him on leave pending finalisation of the case.

The grievant further stated that the money advanced to him to go to Tororo was recovered from his salary and he therefore had no facilitation to proceed to Tororo on transfer after the court vacated the stay orders on 17th June 2014.

The grievant testified that he did not receive the show cause letter as it was sent to an address of his primary school in the village yet the respondent could reach him through the union, knowing that he was a union official and the case staying his transfer was pending in court in Nairobi.

The grounds for dismissal in the letter dated 7th July 2014 are therefore also invalid as the grievant was dismissed for absenteeism without lawful cause.

The grievant was not subjected to a hearing as required under Section 41 of the Act. I find that the dismissal of the grievant was unfair for want of valid reason and failure to comply with the procedure under Section 41.

I further find that the dismissal of the grievant was related to the suspension and therefore was based on his union activities. The respondent failed to discharge the burden of proving that there was valid reason for the dismissal as provided under Section 47(5) of the Employment Act.

I further find that the termination was linked to the filing of the present claim by the claimant union contesting the transfer of the grievant, which in the claimant's view was intended to weaken the union. The dismissal was therefore also contrary to Section 46(h), which prohibits termination or victimisation on grounds that an employee has filed a complaint or legal proceedings against his employer.

The dismissal was therefore both procedurally and substantively unfair and amounted to discrimination on grounds of union activities. It was as such also in breach of Section 4 of the Labour Relations Act and Article 36 and 41(20)(c) of the constitution.

Remedies

While considering the remedies sought on behalf of the grievant, I will rely on the CBA between Kenya Railways Workers Union and Kenya Railways Corporation on terms of employees upon concessioning to Rift Valley Railways, the respondent herein, signed on 24th December 2005. At clause 7, 8 and 9 thereof it provides as follows –

“7. Concessioning of Kenya Railways Corporation

The Principles

That in line with the concession process and the Concession Agreement to be entered into:-

(a) The Kenya Railways Corporation is not being sold, but its assets will be conceded and the business managed and operated by a private sector investor. Kenya Railways Corporation Act (Cap 397) of the Laws of Kenya has been amended to provide for the transfer of some of Kenya Railways Corporation staff to the Concessionaire.

(b) In the Concession Contract, the Government of Kenya has ensured that the Concessionaire will be obligated to –

(i) Employ serving Kenya Railways Corporation employees unless the required skills are not available.

(ii) Employ Kenya Railways Corporation staff under terms and Conditions of Service equal to or better than that currently offered by Kenya Railways Corporation.

(iii) The employees being absorbed by the Concessionaire will be deemed to have transferred their service and will therefore, not be eligible for a retrenchment package.

(iv) Employees offered employment but decline, will not qualify for the proposed retrenchment package but will be entitled to their normal retirement dues.

8. Absorption of Staff by The Concessionaire

That the Kenya Railways Corporation will, upon award and signing of the Concession Agreement, on the Effective Date of the Concession Contract, provide the Concessionaire with the list of employees to enable the Concessionaire consider the personnel required for the purpose of operating the concession.

Prior to undertaking the recruitment of employees who are not Kenya Railways employees, the Concessionaire will give consideration based on merit, experience and past record to Kenya Railways employees.

The Concessionaire shall on the Commencement Date transfer the service of the identified employees on Terms and Conditions of service no less favourable than those which applied immediately prior to the Commencement Date.

In order to become progressively efficient and cost effective, the Concessionaire may reduce the number of Transferred Employees through retrenchment and in a manner consistent with the terms and conditions of their contracts of employment, the Concession Agreement and the Laws of Kenya.

In the event that the Concessionaire, within the first three (3) years after the Commencement Date, retrenches up to twenty percent (20%) of the Transferred Employees, Kenya Railways Corporation and the Concessionaire shall share the costs involved in proportion to the period of the retrenched staff's employment with Kenya Railways Corporation and the Concessionaire respectively, except in the case of the Golden Handshake and Transport Allowance, which shall be the responsibility of Kenya Railways Corporation in its entirety.

Retrenchment Packages payable to Transferred Employees as stipulated in above shall be the same as the Retrenchment Package paid to Kenya Railways Corporation Employees retrenched at the Commencement Date.

9. Recognition of the Kenya Railways Workers union by the Concessionaire

That the Concessionaire shall recognize the Kenya Railways Workers Union as the sole representative of all unionisable employees.

For the purpose of the Concession Contract, the industrial Relations Machinery which is the Recognition Agreement between Kenya Railways Corporation and the Kenya Railways Workers Union is considered to be an existing Contract in which Kenya Railways Corporation shall transfer its rights and obligations in this contact to the concessionaire as from the Commencement Date and will be listed under schedule one (1) of the Concession Contract.”

(Emphasis added)

There was no other collective bargaining agreement signed after the concession agreement and the CBA applicable to all employees was the last one signed between Railways Workers Union and Kenya Railways Corporation.

Based on the said provisions, I award the grievant –

- i. One month’s salary in lieu of notice in the sum of Kshs.44,867.70
- ii. Salary for May, June and 7 days of July 2014 Kshs.98,607.00
- iii. Leave due 6 days Kshs.8,973.00
- iv. Bonuses for February and March Kshs.34,600

The grievant confirmed receiving pension and is not entitled to gratuity. The prayer for gratuity is rejected.

Taking into account all the circumstances of this case, I award the grievant compensation of 12 month’s salary being Kshs.538,400. The claimant did not make any submissions on damages and the prayer is dismissed as not having been proved.

Conclusion

In the final analysis, I make the following orders –

1. I find and hold the termination of the grievant unfair
2. I award the grievant the following –

- (i) Notice ----- Kshs.44,867.70
- (ii) Unpaid salary ----- Kshs.98,607.00
- (iii) Leave ----- Kshs.8,973.00
- (iv) Bonuses ----- Kshs.34,600.00
- (v) Compensation ----- Kshs.538,400.00

TOTAL KSHS. 725,447.70

3. Prayers (ii) and (iii) shall attract interest from 27th November 2015 when the amended claim was filed while the rest of the claim will attract interest from date of filing suit.

4. The decretal sum shall be subject to deduction of PAYE but the interest will not attract the PAYE deductions.

5. The respondent shall pay the claimant costs of Kshs.100,000 to cover reasonable expenses of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE