



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.329 OF 2016

FANCY KIRUI .....CLAIMANT

VERSUS

REGIONAL ROYAL TRANSMISSION CO. LTD .....RESPONDENT

JUDGEMENT

## INTRODUCTION

1. By consent of the parties dated 16<sup>th</sup> July, 2018 and filed on 17<sup>th</sup> July, 2018 and adopted as the order of the court on 18<sup>th</sup> July, 2018 it was agreed that;

1. *ELRC No.329 of 2016 Fancy Kirui v Regional Royal Transmission Co. Ltd be elected as the test suit herein.*

2. *The following case be stayed pending the hearing and determination of the aforesaid test suit.*

- a) ELRC NO. 340 OF 2016 Joyline Chepkoech v Regional Royal Transmission Co. Ltd.*
- b) ELRC NO. 323 OF 2016 Patrick Chege Karnja v Regional Royal Transmission Co. Ltd.*
- c) ELRC NO. 342 OF 2016 Zacharia Njoroge v Regional Royal Transmission Co. Ltd.*
- d) ELRC NO. 341 OF 2016 Mathew Langat v Regional Royal Transmission Co. Ltd.*
- e) ELRC NO. 324 OF 2016 Samuel Njihia v Regional Royal Transmission Co. Ltd.*
- f) ELRC NO. 330 OF 2016 Abraham Gitau v Regional Royal Transmission Co. Ltd.*
- g) ELRC NO. 333 OF 2016 Daniel Kiplangat Korir v Regional Royal Transmission Co. Ltd.*
- h) ELRC NO. 328 OF 2016 Apollo Kabare v Regional Royal Transmission Co. Ltd.*
- i) ELRC NO. 338 OF 2016 Henry Kipyegon v Regional Royal Transmission Co. Ltd.*
- j) ELRC NO. 327 OF 2016 Evans Njuguna v Regional Royal Transmission Co. Ltd.*
- k) ELRC NO. 346 OF 2016 Godfrey Mugo Kinyanjui v Regional Royal Transmission Co. Ltd.*
- l) ELRC NO. 325 OF 2016 David Waweru v Regional Royal Transmission Co. Ltd.*
- m) ELRC NO. 332 OF 2016 Michael Sigilai v Regional Royal Transmission Co. Ltd.*
- n) ELRC NO. 326 OF 2016 Peter Ongera v Regional Royal Transmission Co. Ltd.*
- o) ELRC NO. 335 OF 2016 Lokovelo Shikopo v Regional Royal Transmission Co. Ltd.*

p) *ELRC NO. 367 OF 2016 Kevin Change Ondara v Regional Royal Transmission Co. Ltd.*

q) *ELRC NO. 339 OF 2016 Daniel Bett v Regional Royal Transmission Co. Ltd.*

r) *ELRC NO. 331 OF 2016 Sharon Chelagat v Regional Royal Transmission Co. Ltd.*

2. The test suit herein had commenced and concluded pending submissions by the parties. Several other suits were part heard and or pending various directions. The suits are all filed by the same advocate for all the claimants against the same respondent and represented by one advocate. The suits arise from the same cause of action and to proceed separately and without taking into account the cause of action will lead to multiplicity of orders and directions.

3. Noting the provisions of Rule 24 of the Employment and Labour Relations Court (Procedure) Rules, 2016 it is imperative that the Rules should apply herein.

#### **Claim**

4. The claimant is seeking for orders that;

1. *A declaration that the claimant was unlawfully terminated*
2. *One month salary in lieu of notice*
3. *Unpaid annual leave.*
4. *Pro-rate leave*
5. *Leave travelling allowance.*
6. *Unpaid public holidays.*
7. *Rest days.*
8. *Service gratuity.*
9. *House allowance.*
10. *Compensation. (Section 49(1) (c) Employment Act, 2007).*
11. *Certificate of Service.*
12. *Costs of the suit.*

5. On 13<sup>th</sup> June, 2018 the respondent by consent conceded to the following claims;

1. ***Pro-rata leave at kshs.1,038.00 be struck out;***
2. ***Unpaid public holidays Kshs.923.00;***
3. ***Unpaid rest days Kshs.3,692.00;***
4. ***House allowance Kshs.2,400.00***

#### ***Issues for determination;***

1. ***Notice pay;***
2. ***Claims for alleged unfair termination of employment.***

6. The other claims were placed for the court determination.

7. On 8<sup>th</sup> September, 2016 the claimant filed the Memorandum of Claim against the respondent company situate in Nakuru County.

8. In October, 2015 The claimant was employed by the respondent as a Labourer at a wage of Kshs.12, 000.00 per month. The payments were made through a deposit to the claimant's bank account with ECOBANK (K) Ltd. Such account was opened by the claimant at the

instance of the respondent.

9. On 17<sup>th</sup> November, 2015 the respondent without any justification locked out the claimant and other employees from their employment and then ordered the claimant together with other employees to return all property in their possession and belonging to the respondent.

10. On 18<sup>th</sup> November, 2015 the claimant, through Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union [the union] lodged a labour complaint to Nakuru County Labour Office (CLO).

11. The CLO settled in conciliation the complaint by the claimant and others through a Memorandum of Agreement and between the Union and the respondent company.

12. By letter dated 30<sup>th</sup> November, 2015 the respondent wrote that the claimant no longer worked with them and had renounced any association with the union and any intended meeting with the union was futile.

13. On 1<sup>st</sup> December, 2015 the union wrote to the CLO complaining of unfair labour practices by the respondent and a dispute remained unresolved. On 7<sup>th</sup> December, 2015 the CLO called the parties to a meeting for the 10<sup>th</sup> December, 2015 but there was no resolution on 14<sup>th</sup> December, 2015 the union wrote to the CLO requesting for a claim for 30 employees of the respondent setting out the terminal dues owing with the claimant being among these employees at Number 14.

14. The dispute was not resolved and hence filed in court.

15. The claim is that the claimant was unlawfully terminated on account of participating with other employees in matters relating to a trade union. The lockout was illegal and was for the purpose of terminating employment. Such was in violation of the law and contrary to article 41(1) of the Constitution, 2010. The act of terminating employment without their being a warning, notice or hearing was arbitrary and in violation of the right to dignity protected under Article 28 of the Constitution, 2010. Such was in breach of a legitimate expectation that the claimant would work to retirement at age 60.

16. The claim is also that the termination of the claimant's employment is unfair and contrary to section 45 of the Employment act and the lockout was not protected in statute.

17. While the claimant was at work he was not given any rest day, annual leave, notice pay, house allowance, he worked during public holidays and there were no statutory remittance all contrary to clear provisions of the law. There was no payment in lieu thereof.

18. The claimant testified in support of the claims. upon employment in October, 2015 the claimant was not issued with any letter of employment and remained as a General Worker. The respondent company was making electricity poles using cement. The claimant would be at work from 7am to 6pm all week long but on 17<sup>th</sup> November, 2015 he was locked out. This affected 30 other employees. The claimant with others decided to report the matter to the union and a report was made to the CLO who invited the respondent to a meeting. The CLO reconciled the matter and the respondent agreed to have the claimant and other employees back but on 20<sup>th</sup> November, 2015 when they reported on duty, they were locked out. This was reported to the union and CLO.

19. The claimant also testified that despite the intervention of the CLO the respondent continued to lock him out and others. Such lock out was without notice, was for no reason and the claimant had not committed any misconduct to justify the same. Despite the lockout the claimant has not been paid his work dues.

20. Upon cross-examination the claimant testified that when the respondent locked him out on 17<sup>th</sup> November, 2015 the union made demand on his behalf with the respondent. the allegations made included that the claimant had refused to sign a contract of employment. The salary due had not been paid. There was no notice of payment of owing dues.

21. The claimant called Mr Geoffrey Lokpapa as his witness and who testified that in October, 2015 he was working for the union as branch secretary. The respondent locked out the claimant and other employee, all 30 in number. A report was made at the union office and a report lodged with the CLO who invited the union and the respondent for a meeting and an agreement was achieved. It was a term of the agreement that all employees be taken back at work the next day, 21<sup>st</sup> November, 2015. The claimant and other employees found the gates locked with the security guard directed not to allow access. A dispute was reported and lodged with the CLO.

22. Mr LockPapa also testified that the employees who were allowed at work by the respondent were directed to withdraw their membership with the union if they still needed employment. They were also issued with new contracts of employment. The claimants remained locked out.

23. On 7<sup>th</sup> December, 2015 the CLO wrote to the respondent and demanded submission of work records. There was no compliance and this resulted in the claimants herein.

24. In cross-examination, Mr LockPapa testified that when the claimant and other employees were locked out he went to the respondents premises and established that they had been directed to sign new contract. The claimant had been a general labourer and was being issued with a new contract. He did not sign. He remained locked out. Those who were working has signed new contracts. Those who did not sign were locked out.

## **Defence**

25. The respondent in defence confirm the claimant was an employee with a cumulative salary of Kshs.12, 000.00 per month. At the time of employing the claimant the respondent did not have a substantive human resource policy and the work engagement remained fluid and not properly defined under any written contract. Around 17<sup>th</sup> November, 2015 the respondent had a cash flow problem which was occasioned by delayed payments from its customers. Consequently the respondent delayed in paying the employees including the claimant. No employee was at work since the respondent was temporarily unable to sustain the work force. The cash flow problems were resolved and all dues paid.

26. In December, 2015 the respondent resolved to organise its human resource department and create well defined contractual relationship. This exercise required time as production went on. It was resolved that all employees willing to work would first execute three months contract and after which the company would prepare substantive contracts with its employees. Such contracts were prepared but the claimant refused to execute on his part. Those who signed were allowed back at work. All others were paid their terminal dues inducing the claimant.

27. The defence is also that the claimant lodged a complaint with his union and to the CLO and where the respondent attended and attempted a resolution. There was no lock out as alleged by the claimant. The claimant refused to execute the contract issued to him. this was not a case of termination of employment and there was no legitimate expectation accruing on employment from the respondent. such claims are without basis. A contract of service is lawful and where not executed there is no employment relationship.

28. On the claims made, the claimant has no basis to claim for travelling allowances. No annual leave is due following work for one month only. The claimant had been engaged on casual basis and claims made are not due. despite being offered new terms of employment the claimant opted to leave employment. Nothing is owing to the claimant.

29. In evidence, the respondent called Mr John Kungu Kamau a Director of the respondent and who testified that the claimant stopped work at the respondent on 10<sup>th</sup> November, 2015 when he refused to work following a delay in salary payment as the respondent was going through a financial problem following delayed payments by clients. The claimant was to resume duty on 17<sup>th</sup> November, 2017 and it was agreed that all employees should start on a fresh contract and unpaid dues all paid and acknowledged. All those who required employment were to sign the contracts but the claimant failed to sign.

30. Mr Kamau also testified that he got a letter from the union making various allegations on behalf of employees including the claimant but he had no prior knowledge of its existence. The respondent had not separated on employees with contracts and those who had refused to sign. All those who signed contract it was taken as a confirmation they were willing to work and those who refused could not be forced to work and it meant they did not want to work with the respondent. all staff had been invited to sign new contracts. Those who had joined the union were not known to the respondent and therefore no victimisation was done as alleged. The respondent was not effecting any union dues on any employee so as to know who had joined or not.

31. Mr Kamau also testified that the respondent locked its gates so that whoever signed a contract with them was allowed at work and this was to help establish who was at work and the terms of employment. Such employees are still in employment with the respondent. there was no termination of employment and the claims made do not arise.

32. The respondent kept all work records and the claimant was in the respondent's employment for one (1) month and 10 days. She then refused to sign her work contract for continued employment. Due to the nature of work, it was a period of learning. Some employees employed together with the claimant were unable to continue and this period served as probation. For work done, all payments due were made. All dues were paid through the bank. The claimant had an account.

33. At the close of the hearing, both parties filed written submissions.

34. The claimants submits that a notice pay of one month is due for a casual employee as defined under section 2 of the Employment Act, 2007 and read with section 37. Such employment converts with rights and benefits under the Act being due to the claimant and including notice pay. In **Kimilu Muywoki versus Elephant Steel Industries Ltd [2017] eKLR** the court held there was conversion of casual employment to term contract by dint of section 37 of the Employment act, 2007. In this case, the respondent's witness confirmed there was continuous employment of the claimant and dues were paid monthly.

35. The claimant also submits that compensation for unfair termination is due following a lockout that was not protected or justified. Such lockout was done by the respondent with a view to terminate employment. There was no desertion but a lockout. A lockout is defined under section 2 of the Employment Act but the respondent failed to follow due process and its witness Mr Kamau confirmed that indeed the claimant together with other employees who did not sign contracts were locked out. Such was unlawful and compensation is due. the union official Mr Lockpapa confirmed he visited the respondent's premises and found the claimant and other employees locked out. Despite an agreement before the CLO the respondent failed to ensure the claimant resumed duty. In **Kenya Plantation 7 Agricultural Workers Union versus Maji Mazuri Flowers Ltd [2012] eKLR** the court held that section 68(1) allow parties in employment to resolve a dispute by conciliation and if there is an agreement the same s to apply. Such conciliation herein was achieved when the union and the respondent signed an agreement before the CLO.

36. That the respondent was bound by the terms of the Agreement entered into with the union as held in the case of **Said Ndege versus Steel Makers Ltd [2014] eKLR**. the court therein relied on the doctrine of equity and common law and held that where parties have entered into an agreement, such should not be read with technicalities and apply the explicit promises made to each other. In the claimant's case, there was no desertion as alleged; this was a case of lock out. Desertion of duty was analysed in the case of **Bezra Nyamweya Motari versus Kanini Haraka Enterprises Ltd [2016] eKLR** but in this case, the principles set therein do not apply.

37. The respondent on their part submits that the dispute referred to the CLO was a case of lock out. Following cash flow problems the respondent closed operations and all employees were locked out. The cash flow problem was resolved and the employee paid their dues. The respondent then decided to reorganise its human resource and have employees sign contracts defining employment and those who signed are still in employment and those who declined were locked out. Section 2 and of the Employment Act, 2007 and section 76 of the Labour

Relations Act, 2007 has defined a lock out and which is allowed in law. The respondent locked out its employees to have them to execute employment contracts dated 1<sup>st</sup> December, 2015.

38. The respondent also submits that the dispute which should have been filed was to challenge the lockout as being unprotected but not as set out by the claimant. The remedies sought are therefore not due.

Taking into account the pleading, evidence and submissions of the parties, and further the suit herein having been admitted as the test suit and the consent of the parties on 13<sup>th</sup> June, 2018 that the only issues remaining for determination are for;

- 1) Notice pay and
- 2) Claims for unfair termination of employment

I will cluster emerging issues with the above and address them as follows;

Whether there was lockout and if yes, what is the remedy;

Whether there was unfair termination of employment;

Whether the remedies are due

39. On the first question as to whether there was a lockout, the respondent's witness Mr Kamau testified that indeed on 17<sup>th</sup> November, 2015 when they resumed operations after being forced to suspend work on 10<sup>th</sup> November, 2015 they required all employees to sign new contracts for three months. Those who declined to sign any contract were not allowed at work and those who signed a contract are still at work with the respondent. Mr Kamau asserted that indeed there was a lockout of employees who refused to sign new contracts of employment and who included the claimant.

40. The claimant and the witness, the union representative Mr Lockpapa also confirmed that the respondent locked its gates on 17<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> of November, 2015 and despite having an agreement before the CLO, the respondent did not allow the claimant and the employees who did not sign contract of employment back to work. That this was effectively a 'lockout'.

41. The concept of 'lock-out' in employment is therefore necessary to address.

42. Section 2 of the Employment Act, 2007 and Labour Relations Act, 2007 defines what a *lock-out* is as follows;

*“lock-out” means the closing of a place of employment or the suspension of work or refusal by an employer to employ any employees—*

*(a) for the purpose of compelling the employees of the employer to accept any demand in request of a trade dispute; and*

*(b) not for the purpose of finally terminating employment;*

43. To appreciate this definition, it is imperative to give it context.

44. The context of lock-out is set out under part 10 (X) of the Labour Relations Act, 2007. Section 76 of the Act allow for protected lock-out and provides as follows;

76. *Protected strikes and lock-outs*

*A person may participate in a strike or lock-out if—*

*(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;*

*(b) the trade dispute is unresolved after conciliation—*

*(i) under this Act; or*

*(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and ...*

45. My reading of Part 10 of the Labour Relations Act, 2007 is that a lock-out must exist within a trade dispute. Within such a dispute the employer is allowed to lock-out its employees for the purpose of compelling them to accept any demand(s) tabled in the trade dispute and such lock-out should not be with intent to terminate employment. Where such ingredients occur, such is a protected lock-out.

46. The context of the definition of a lock-out under section 2 of the Act is thus lost where the same is given a literal meaning. That the

respondent closed its gates and refused its employees entry. There must be in issue the terms and conditions of employment or the recognition of a trade union and or there must be a trade dispute that remains unresolved despite conciliation and or there is a collective agreement which provides for conciliation of disputes and or there is a notice issued by the employer for a lock-out.

47. The provisions of part 10 of the Labour Relations Act, 2007 with regard to a lock-out by an employer must be read together with the Constitution, 2010 where there is a given right to *Strike* but no corresponding right to a *lock-out*. Article 41 (1) and (2) provides that;

41. (1) *Every person has the right to fair labour practices.*
- (2) *Every worker has the right—*
  - (a) *to fair remuneration;*
  - (b) *to reasonable working conditions;*
  - (c) *to form, join or participate in the activities and programmes of a trade union; and*
  - (d) *to go on strike.***

48. On the one part, every person has the right to fair labour practices but only the employee has the right to go on strike. however, these constitutional rights should not be read in isolation as article 162(3) allow parliament to pass legislation and to determine the jurisdiction of the court. such mandate to address protected or unprotected lock-outs is set out under the Labour Relations Act, 2007.

49. In addressing the questions as to why the constitution failed to address the right to a lock-out in employment as a constitutional right, the Constitutional Court of South Africa in the certification case **Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC)** held as follows;

*...A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.,,*

*...That the two [the lock-out and the strike] should be treated differently is not purely a matter of historical accident or political expediency. Formally they may seem symmetrical, but in practice they play very different roles. When employers want to change terms of employment, they do not reach for the lock-out; provided they negotiate to impasse first, they can implement the changes unilaterally. Then, if the workers refuse to accept the changes, the law gives their employer the right to retrench or dismiss them. If they refuse to leave the premises, the law provides a range of sanctions that range from judicial interdicts to the police baton. The strike in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitation and give teeth to the demands that they make at the bargaining table. For them it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour them at the expense of their employers. Those who believe in the free interplay of market forces would be quick to condemn this as wrong. What they forget, however, is how much employers are favoured by the legal and social institutions of our society*

50. As in our Part 10 of the Labour Relations Act, 2007 the South African Constitutional Court gives us a glimpse of what goes into a strike as against a lock-out. In a lock-out the employer has the remedy available if there is a trade dispute and which remains unresolved and despite conciliation, the same is still unresolved.

51. This is captured aptly by Creamer K in the book ***The meaning and Implications of the Inclusion in the Constitution of a Right to Strike and the Exclusion of a lock-out Right: Towards Asymmetrical Parity in the Regulation of Industrial Action*** ILJ (1998) 19(1) 1-20 and quoted with authority in the case of **PUTCO (PTY) Limited & Transport & Allied Workers of South Africa versus South Africa Passenger Bargaining Council, Labour Appeal Court of South Africa (Johannesburg) JA 106 of 2013** and in the case of **Chemical Workers Industrial Union versus Plascon Decorative (Inland) (Pty) Ltd (CWIU) (1999) 20 ILJ 321 (LAC)**;

*... the inclusion of the right to strike and the exclusion of a right to lock-out in the Constitution amounts to a decisive shift towards an asymmetrical approach to the regulation of industrial action, based on the understanding that treating strikes differently from lockouts would bring greater substantive parity to the collective bargaining relationship.*

52. In this case, the facts presented and the evidence by the parties does not demonstrate a proper 'lock-out' as set out above. On the one part the respondent was faced with cash flow problems and unable to pay its employees including the claimant. From 10<sup>th</sup> November, 2015 the claimant was advised to leave work and resume duty on 17<sup>th</sup> November, 2015.

53. At this point, the union was not involved as there was no recognition by the respondent.

54. The claimant remained a general labourer with the respondent. The records submitted and the evidence from both parties confirm to this extent. The claimant was paid accruing dues as a general labourer and through the bank. The lay off on 10<sup>th</sup> November, 2015 is a fact. Unionisation though a right was not recognised by the employer, which fact is not challenged.

55. Effectively, the conciliation before the CLO was between the union and the respondent despite lack of recognition. Even where such technicalities should not apply to override the good intentions of the agreement achieved between the respondent and the union at the CLO office on 20<sup>th</sup> November, 2015, the import of it was that the terms thereof required the employees to resume work without victimisation, be issued with pay statement and their rights at work be secured.

56. To secure rights at work, an employer is legally bound to issue the employee with a written contract of service/employment. Such statutory requirements though not set out in the agreement of 20<sup>th</sup> November, 2015 in my humble view were implied. That the respondent would secure the claimant's rights at work. A written contract of employment was therefore issued to the claimant setting out the terms and conditions of employment. He failed to accept and or sign in agreement. For the union then to demand that its members and employees of the respondent should not sign the contracts issued to them was to negate the very agreement relied upon at clauses (2) to (5).

57. To secure the right to a pay statement, the right to rest day, public holiday, annual leave and overtime work, the respondent as the employer was duty bound to issue written terms and conditions of work. To keep the claimant and other employees on causal terms and without written contracts of employment would be contrary to the law.

58. Even with the best intentions to resolve a dispute, a Trade Union must move with caution not to advance its interests at the expense of its members on the brink of losing employment by misadvice and peradventure or misadventure. Despite the respondent herein advising the claimant and other employees to resume duty and sign contracts of employment and upon which future engagements and unionisation would have been pursued or negotiated, the claimant and others took the position held by the union and failed to sign the issued contracts and thus remained out of work.

59. The lockout of the claimants was therefore lawful.

60. Efforts by the respondent to have a formal engagement with the claimant and other employees to ensure adherence to the law as under section 10 of the Employment Act, 2007 issued written contracts of employment, however short the contracts may have been perceived, such was a legal requirement the respondent was seeking to comply with. The insistence by the claimant and others through the union that they would not be bound by the formal contract or should be left at large as the union had advised, thus removed them from the shop floor and could not proactively have the basis to engage with the employer for longer term contracts, better terms and conditions of employment and by extension, the union had no basis to seek recognition and engage in negotiations for a collective agreement whereupon the claimant and others' rights would have been further fomented. The resulting loss of employment cannot be defined in any other way. The claimant and other employees invited it upon themselves. Such cannot be an unfair labour practice within the meaning of article 41 of the Constitution, 2010 or the Employment Act, 2007.

61. The Court notes the extensive submissions by the claimant with regard to **Kenya Plantation 7 Agricultural Workers Union versus Maji Mazuri Flowers Ltd [2012] eKLR**. such is persuasive but the facts therein are different from this case. In the cited case, there was recognition between the parties. In this case the union was unknown to the respondent. The respondent's witness confirmed they had no knowledge of the union and no union dues were being deducted from its employees. Mr Lockpapa also confirmed that the employees had just registered with the union and paid union dues directly. Even in a case where there was recognition, which is not so here, where the employees were offered employment on contract terms instead of casual terms, by application of section 10 of the Employment Act, 2007 such was a lawful and appropriate mode of engagement. Section 10 (1) of the Act, requires that;

*10. Employment particulars*

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.*

62. Therefore, where employment commences on oral terms and under section 9 of the Act, the employer is required to issue a written contract of employment to the employee not later than two months after the commencement of the employment. The provisions are set out in mandatory terms.

*10. Employment particulars*

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.*

63. Therefore, where the respondent as the employer kept the claimant in employment for one (1) month and ten (10) days without a contract, such was still within the law. The direction and requirement that the claimant should sign a written contract of employment as from 17<sup>th</sup> November, 2015 and the claimant declined, such cannot be visited upon the respondent as the employer. To go and force the claimant into work that was not wanted would be to subject the claimant into servitude. Such would invite serious implications on the respondent.

64. The upshot of it is that the claimant was duly invited to sign a formal contract of employment pursuant to the law, but declined. Such conduct cannot be visited on the respondent as unlawful lockout. The union cannot justify its involvement in the matter by advising the claimant and other employees not to sign the issued contracts. Such advice as set out above rendered the claimant without employment out of

choice. The only remedy is with the union which gave wrong advice to the claimant. The respondent cannot be held liable.

65. The claim herein is not by the Trade union. The assertions that the claimant was victimised for engaging with his union has no foundation.

66. In the best effort to apply the case cited by the claimant in **Said Ndege versus Steel Makers Ltd [2014] eKLR** this court finds the facts therein different from this case. The agreement between the parties in this case must be put into context. It cannot be applied wholesale and ignore facts leading to the same. Such agreement did not stop the respondent from the due application of the law. My reading of the agreement in its entirety is that the respondent was not estopped from issuing the claimant with a written contract of employment. Such duty exists in law as set out above and under section 10 of the Employment Act, 2007. The provisions of section 10(1) are mandatory. Such cannot be negated by agreement.

67. In this case, even where there was a lock-out, which is not the case as purposively defined, the same was with the purpose to ensure that all employees in the business had written contracts of employment defining terms and conditions of employment. In view of section 76 of the Labour Relations Act, 2007 such action has justification. The purpose and intent was lawful. The lock-out was with the intent of having the claimant sign an employment contract. The purpose was to ensure the respondent did comply with the law.

68. Where the claimant and others were sent away on 10<sup>th</sup> November, 2015 due to a cash flow problem and recalled back to work on 17<sup>th</sup> November, 2015 and directed to sign a written contract, such being a mandatory requirement of the law under section 10 of the Employment Act, 2007 the action taken by the respondent as the employer cannot be faulted.

69. I find no case that justifies a lockout as set out under section 2 read with Part 10 of the Labour Relations Act, 2007. Where the claimant was required as general labourer to sign a contract of service/employment on 17<sup>th</sup> November, 2015 or on any other day and failed to do so, the respondent as the employer met their side of the bargain and cannot be faulted for not allowing the claimant at work without written terms and conditions of engagement. The claimant thus frustrated own employment. Such cannot be unfair termination of employment.

70. There is no remedy in notice or payment in lieu thereof or compensation under section 49 of the Employment Act, 2007.

**Accordingly, the case lack merit and is hereby dismissed. Each party shall bear own costs.**

Delivered in open court at Nakuru this 2<sup>nd</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of:

.....