



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NUMBER 14 OF 2018

[Formerly Mombasa E&LRC Cause Number 560 of 2017]

BETWEEN

BAKERY, CONFECTIONERY FOOD MANUFACTURING

AND ALLIED WORKERS UNION [K].....CLAIMANT

VERSUS

MZURI SWEETS LIMITED.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Amalemba Advocate for the Claimant Union*

*Ms. Besatrice Opolo Advocate, instructed by the Federation of Kenya Employers, for the Respondent*

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**JUDGMENT**

1. This Claim is brought by the Claimant Union, on behalf of 14 of its Members [Grievants], former Employees of the Respondent Company. The Grievants are: Japhet Mocha, Timothy Sonje, Issac Charo, Florence Jumwa, James Keah, Rebecca Nakato Martin, Umazi Bora, Wycliffe Odhiambo, Stanley Migalo Misigo, Sidi Charo, Mdoe M. Mwachupa, Patrick Mamboleo, Priscah Muhia and Samuel Makoyo. They were employed on various dates by the Respondent. They worked as Machine Operators, Storekeepers, Machine Attendants, Machine Helpers, Cleaners, Mixers and Helpers. They earned diverse daily wages ranging from Kshs. 265 to Kshs. 483. They aver that they were locked out, and/or their positions declared redundant by the Respondent in the years 2013 and 2014, after they opted to join the Claimant Union. They claim from the Respondent through their Union, terminal benefits and compensation for unfair termination, under the following heads:-

- a) 1 month salary in lieu of notice.
- b) Severance pay.
- c) Unpaid leave.
- d) Compensation.
- e) Declaration that Grievants were regular Employees, and were victimized, illegally locked out and their positions declared redundant.
- f) Costs.
- g) Any other relief.

The total amount claimed under the above heads, is approximately Kshs. 3,195,029.

2. The Respondent filed its Statement of Response, on 19<sup>th</sup> December 2017. Except for 2<sup>nd</sup>, 3<sup>rd</sup> and 14<sup>th</sup> Grievants who were employed on fixed term contracts, the rest were Casual Employees. The dispute was referred to the Labour Office Mombasa. There was conciliation under the stewardship of Labour Officer C.I. Opalakadi. It was the finding of the Labour Officer that most of the Grievants were contracted on daily basis; their employment ceased on diverse dates; some were on term contracts renewable at the discretion of Management; there was no lockout of the Grievants; there was no redundancy; and the issue of victimization had been determined by the Court. Employees on casual employment left employment on their own volition. The Parties met on 26<sup>th</sup> April 2016 and agreed that the Respondent was willing to absorb the Grievants without any conditions; the Grievants would be placed under contract; the Claimant proposed those who were not able to return to work be availed ex-gratia payment; and no Grievant had been victimized. The Respondent prays the Court to dismiss the Claim.

3. Two of the Grievants, Timothy Sonje and Samuel Makoyo gave evidence on behalf of the Grievants. Faith Nduta Kamunya, Human Resource Manager, gave evidence for the Respondent. Hearing took place, and closed, on 20<sup>th</sup> July 2018.

4. Timothy testified he was employed as a Storekeeper. There was no letter of employment. He was issued with a month-long contract in August 2013. There were other such contracts subsequently. He was called by Production Manager on 21<sup>st</sup> November 2013 and told there was no more work. He would be recalled if there was more work. He was never recalled. Cross-examined, he told the Court he was locked out. His position was not declared redundant. He attended a meeting between the Parties on 26<sup>th</sup> April 2016. He did not recall if victimization was discussed at this meeting. Lockout was discussed. There was no conclusive outcome. The Grievants' Representative did not say he would consult the Grievants and revert to the Respondent. The Grievants were aware that the Labour Officer made a Report, concluding there was no lockout or redundancy. He confirmed his testimony was representative of the other Grievants' positions. Redirected, Sonje told the Court too much time has passed since the Grievants left employment, at the time the offer to re-employ them was placed on the table. About 3 years had passed. He was quizzed about joining the Union by the Respondent, and told to withdraw his membership.

5. Samuel worked initially in the Respondent's ball forming section. He later worked in the mixing and candy sections. He lastly worked as a Storekeeper. He was issued a month-long contract in August 2013, and designated as Helper, which was not his proper designation. He continued working as a Storekeeper. He was called by the Production Manager on 30<sup>th</sup> April 2014, and paid his salary. He was told there was no more work. His contract would not be renewed. He was asked by Respondent's Director Sunil, to withdraw from the Union. He was told the Grievants would suffer if they did not quit the Union. Some Employees, whose names Samuel could not recall, opted to quit the Union, and were retained in employment. Those who refused to quit were sacked. The Respondent offered to return the Grievants to work about 2 years after they left. They were not willing to go back. They apprehended they would continue to suffer. Cross-examined, Samuel told the Court termination happened in 2014. The dispute was reported to the Labour Office in January 2015. The meeting between the Parties took place in 2016. The Respondent undertook not to victimize Employees. It was ready to absorb all the Grievants. They would be placed on contract. Samuel joined the Union in 2013 and continued working, even after joining. His pay slip indicated 'leave earned.' He was paid what was indicated in the pay slip. Redirected, Samuel told the Court only 1 Employee, Joshua Wambua, went back to work.

6. Faith Nduta Kamunya told the Court that the Grievants were Respondent's Employees between 2013 and 2014. The Respondent manufactures sweets. Its business is reliant of orders placed by Customers. If the orders are many, the Respondent engages more Employees on month-long contracts. The Grievants' contracts expired. They had alleged that they were victimized. The Labour Office conciliated and found there was neither victimization, nor redundancy. The Grievants were given an offer for unconditional reemployment. There was no mention of the year 2002 as the date of employment, for any Employee, in any of the meetings held between the Parties.

7. On cross-examination, Faith told the Court that there was no document showing any of the Grievants was employed in 2002. Contracts issued depending on the orders made. Joshua Wambua was reabsorbed before conciliation. All Employees on contract were paid their annual leaves. The dates of employment were not disputed at conciliation. Casual Employees left employment on their own volition. Redirected, Faith told the Court Notification of Dispute on 2014 related to 2 Grievants. Others came on board in 2015. Casual Employees were picked randomly from job seekers gathered at Respondent's gates. The Respondent also retained contacts of leaving Employees. There was an offer made to reemploy the Grievants. They declined the offer.

#### **The Court Finds:-**

8. This dispute has been the subject of deliberations between the Parties, with the aid of the Labour Office. From the record of these deliberations; the documents on record; and the oral testimonies of Witnesses from both sides, the Court is satisfied that the Claim must fail, as proposed by the Respondent, for the following reasons:-

§ The Grievants were not locked out, and their positions were never declared redundant.

§ They were not victimized for their association with the Claimant Union. Some of them joined the Union in 2013 and continued working in 2014.

§ Their contracts were not terminated by the Respondent. Some of the Employees were on casual terms, others on definite term contracts. The Casual Employees left on their own volition, while the term contracts expired and were not renewed.

§ The Grievants were, after a period of 3 years during which Parties were involved in conciliation, offered unconditional reemployment by the Respondent.

§ They rejected the offer.

§ Even assuming the Respondent had terminated their contracts, the Respondent offered them, the remedy of reemployment. The

Respondent would be deemed to have corrected any real, or perceived, wrongdoing by this offer. The Grievants rejected this offer, and opted to pursue monetary awards.

9. Issues in dispute were investigated and ventilated in successive non-adjudicatory platforms. The Parties engaged fully, at their own level, and at the Labour Office. The Grievants' contracts were not terminated by the Respondent. They expired and were not renewed. The nature of Respondent's business, sweet-making, is reliant on the number of orders placed by Customers. When there is large number of orders, the Respondent is able to offer contracts to more Employees. Employees were therefore either on term contracts, or casually engaged. The Grievants contracts expired, while those on casual employment left on their own bidding. They do not merit the orders sought.

10. This Claim ought not to have been presented before the Court, considering the background of the matter, as outlined in the preceding paragraphs. There was an offer to reemploy the Grievants at the end of various deliberations. Conciliation process at the Labour Office was thorough. Engagement by the Parties at their own level was constructive. The Claimant insisted on litigation, and pursuit of monetary award. This is a wrong approach to resolving employment and labour relations disputes. Parties must respect the outcome of non-adjudicatory processes, and avoid unnecessary litigation. The Claimant shall therefore meet Respondent's costs.

IT IS ORDERED:-

**a) *The Claim is rejected in its totality.***

**b) *Costs to the Respondent.***

Dated and delivered at Malindi this 30<sup>th</sup> day of November 2018.

James Rika

Judge