REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 260 OF 2013

(*Before Hon. Lady Justice Maureen Onyango)*

KENYA SCIENTIFIC RESEARCH

INTERNATIONAL TECHNICAL

AND INSTITUTIONS WORKERS UNION.....CLAIMANT

VERSUS

BLACK AND BEAUTY PRODUCTS.....1ST RESPONDENT

MR. R. K. CHOUDHARY (E/D).....2ND RESPONDENT

JUDGMENT

The case herein was filed by the claimant, a trade union on behalf of its members, the grievants Stephen Miana (1st Grievant), Shem Lisamadi (2nd Grievant) and Kevin Wambua Gatete (3rd Grievant). It is the claimant's evidence that the 1st Grievant was first employed verbally in the year June 2002 as a labourer and later promoted to a position of general worker in 2008. He was then promoted to a position of Triple head Machine Attendant earning a monthly salary of Kshs.10,300.00, a position he held until his termination. The 2nd Grievant was first employed verbally by in August, 2001 as a hair piece (mixing) attendant which contract was later renewed in the year June 2008. He earned a monthly salary of Kshs.8,200.00. The 3rd Grievant was employed by the Respondent in April 2010 as a general worker earning a monthly salary of Kshs.7,900.00.

On or about 3rd October 2012, the Grievants reported on duty as usual but they were prevented from starting work by their supervisor who had instructions from management that their services had been terminated. The Supervisor instructed the security guards to escort the Grievants from their place of work and never to allow them to enter the premises.

The Grievants aver that they were not issued with any termination notice or payment in lieu of notice. Further, that the Respondent terminated their services without any justifiable reasons or giving them a chance to defend themselves. Despite the Claimant union's efforts to settle this matter amicably were unsuccessful hence this suit.

The Grievants claim terminal dues as tabulated herein below.

Particulars of Terminal dues of the 1st Grievant

1. One-month payment in lieu of notice - Kshs.10,300.00

2. Three days worked in October (3 x 343.30) - Kshs.1,029.90

3. Accrued leave (21 x 10 x 343.30) - Kshs.72,093.00

4. Severance pay (15 x 10 x 343.30) - Kshs.51,495.00

5. Full compensation for loss of employment

(10,300 x 12 months) - Kshs.123,600.00

Total Kshs. 258,517.90

Particulars of Terminal dues of the 2nd Grievant

1. One-month payment in lieu of notice - Kshs.8,200.00

2. Three days worked in October (3 x 273.30) - Kshs.819.90

3. Accrued leave (21 x 11 x 273.30) - Kshs.63,132.30

4. Severance pay (15 x 11 x 273.30) - Kshs.45,094.50

5. Full compensation for loss of employment

(8,200 x 12 months)- - Kshs.94.400.00

Total Kshs. 258,517.90

Particulars of Terminal dues of the 3rd Claimant

1. One-month payment in lieu of notice - Kshs.7,900.00

2. 3 days worked in October (3 x 263.30) - Kshs.819.90

3. Accrued leave (21 x 2 x 263.30) - Kshs.11,058.60

4. Severance pay (15 x 2 x 263.30) - Kshs.7,899.00

5. Full compensation for loss of employment

6. (7,900 x 12 months) - Kshs.94,400.00

Total Kshs.122,244.50

The Claimant prays that the Court orders and directs the Respondent to reinstate the three grievants back to their jobs unconditionally or in the alternative, payment of all their terminal benefits as tabulated in the Memorandum of Claim.

The Respondent aver that the 1st Respondent properly terminated the Claimant's members' employment after proper and due compliance with the law. Further, that Stephen Maina was properly dismissed for engaging in activity outside the scope of his employment during working hours after due process. The 1st Respondent avers that the 1st and 2nd grievants' employment was never terminated. Instead, they absconded duty and the 1st Respondent hereby demands one (1) week's salary in lieu of notice as counterclaimed.

The Respondents aver that the Claimant's members are not entitled to the terminal benefits prayed for and pray that the suit be dismissed with costs and judgment entered for the 1st Respondent for 1 week's salary in lieu of notice as against the 2nd and 3rd grievants.

Evidence

CW1, STEPHEN MAINA, testified that the Respondent terminated his employment when it discovered that they had joined the union. He also testified that on 3rd October 2012, the 2nd Respondent called the grievants to his office and informed them that he had heard that the grievants were recommending people to the union and that it was unacceptable. The grievants were told that they could not continue working for the 1st Respondent unless they left the membership of the union. The 2nd Respondent did not call the grievants back to work despite promising to do so.

Upon cross-examination, CW1 admitted that he was a casual worker up until 2008. He denied there being an incident on 2 nd October 2012 and stated that he was not found with any offence that day. The 1st Claimant disclosed that they had joined the union secretly because they were afraid that they would be sacked had this been discovered. He testified that they were sacked because they were leaders in the union namely: Stephen, shop steward, Shem, CW1's deputy and Kevin, the secretary. He stated that he had 6 days leave in 2012, was a member of NHIF and NSSF and he did not know what severance pay was. He stated that he was not told what offence he had been charged with and was never given a letter or an opportunity to defend himself.

CW2, SHEM KEDOGO, reiterated CW1's testimony that his employment was terminated because he joined the union. Upon cross examination, CW2 admitted that he was a casual and worked on rotation for one week and took a break for another one week and was issued with a contract for 2 months but was never stopped from working after expiry of the contract. He further testified that the union issued them

with a letter dated 3rd October to deliver to the 2nd Respondent, which they did. He conceded that other employees who were members of the union were still in employment of the 1st Respondent. CW2 further conceded that his contract stipulated that he would be issued with 1-weeks' notice or 1-week salary in lieu of notice.

For the respondents, RW1, Raj Kumar Choudhary a Shareholder and Director of the 1st Respondent, stated that he wrote to the grievants a show cause letter which was served upon them on 2nd October 2012. He stated that the grievants were given time to go home and come back the following day to explain themselves, which they did, and he interviewed them one by one. Four employees admitted that they had not been working, apologized and no action was taken against them. He stated that the grievants verbally accepted that they had not been at their work stations. They were given a warning letter and told to report to work on 1st November 2012. He further stated that the 1st grievant worked as a permanent employee for 2 years and 2 months and had taken leave. He also testified that the 1st grievant's dues were tabulated but he refused to collect the money.

Upon cross-examination, RW1 stated that he summarily dismissed the the 1st grievant and suspended the others and that he gave them a copy of their suspension letters. He stated that he was not aware that there was a union at the time of termination.

RW2, Peter Nganga an employee of the 1st Respondent, testified that on 2nd October 2012 their supervisor found them on phone and referred them to the Director who suspended them for a day when they failed to explain what it is that they had been caught doing. He stated that they were told to report the following day and explain what they had been doing. RW2 stated that he wrote a letter admitting that they had been looking at photos on the pone during working hours and was allowed back to work.

Upon cross-examination, RW2 admitted that he was not in the union and stated that the Respondent's employees did not have a union to date. He also stated that he was not present when the grievants were being heard. He stated that the 1st grievant was not a shop steward as there was no union, he had never seen a check-off form before and had never been involved in any union activities.

The Claimant's Submissions

The Claimant submits that the Respondents declared the grievants redundant without observing the redundancy procedure outlined in ***section 40 of the Employment Act 2007***. That the grievants were supposed to be paid notice payment, 3 days worked in October, leave, severance pay and full compensation for loss of employment. The Claimant further submitted that at the time of termination the Respondents did not pay terminal dues to the grievants.

The Claimant submitted that the summary dismissal communicated to the other grievants had no meaning as it did not establish which offence the grievants had committed. That the evidence adduced by the Respondent did not specify which offence the grievants committed that could warrant them to be terminated.

The Claimant further submitted that during the disciplinary process, the grievants were not accompanied by one of their colleagues as provided for in ***section 41 (i) of the Employment Act 2007***. Further, the Respondent did not have proof of reason for terminating the grievants' employment and condemned them unheard contrary to the said section.

The Claimant submitted that it forwarded to the Respondent check-off forms for 75 workers who had joined the union. In addition, there was a dispute pending in court, ***Cause No. 1683 of 2014***, where the Claimant is demanding recognition. The Claimant submitted that ***section 4 of the Labour Relations Act of 2007*** and ***Article 41 of the Constitution*** accords the Respondent's workers a right to join a union of their choice.

The Claimant submits that the grievants should be paid their terminal dues.

The Respondents' Submissions

The Respondents submitted that the Claimant withdrew the claim by the 3rd grievant Kevin Wambua Gatete and as such there can be no award for a grievant who has of his own volition, willingly refused to submit himself to the jurisdiction of this Court. The said claim therefore ought to be dismissed as it stands withdrawn and therefore not before this court for adjudication.

On the issue of whether the Claimant has locus standi to institute the present claim, the Respondent submitted that the Claimant does not possess the requisite *locus* to institute the present suit. There is no recognition agreement that exists between the Claimant and the Respondents. Further, there is no evidence of any union dues that were ever remitted by the Respondents to the Claimant. In the absence of the recognition, the grievants themselves ought to have instituted the present claim in their own right and not through the Claimant.

On the issue of whether the Claimants were bonafide permanent and contract employees of the Respondent, the Respondent submitted that the 2nd grievant has never enjoyed continuous employment for a period exceeding three (3) months as outlined by section 37 of the Employment Act for him to be considered as a permanent employee to enable his employment status be converted from contract to permanent.

On the issue of whether the grievants were guilty of absconding duty when faced with allegations of misconduct, the Respondents submitted that the grievants themselves were responsible for their own misfortune and when called upon to explain in writing and apologize the grievants themselves opted to leave their employment.

On the issue of whether the Grievants are entitled to prayers as outlined in their memorandum of claim, the Respondents submitted that the Claimant is not entitled to the prayers it is claiming from the Respondent.

On the issue of whether the grievants were wrongfully terminated by the Respondent, the Respondents submit that the burden of proving the same rests with the Claimant after the Respondents had submitted records as par section 74 of the Employment Act.

The Respondents submitted that the Claimant's claim is premature and its institution of this suit clearly breached the law.

Determination

After perusing the documents presented by the parties in court and considering the evidence adduced and arguments made by them, the following are the issues for determination:

1. Whether the Claimant has *locus standi* to institute the suit herein on behalf of the grievants

2. Whether the 2nd grievant was a casual employee and if so, whether her employment can be converted to regular employment under section 37 of the Employment Act, 2007

3. Whether the 3rd grievant's claim stands withdrawn

4. Whether the Claimants' termination was wrongful and unlawful

5. Whether the Claimants are entitled to the prayers sought

Whether the Claimant has locus standi to institute the suit herein on behalf of the grievants

Section 54(1) of the Labour Relations Act 2007 provides that:

> ***"An employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."***

Further, in the case of ***Directorate of Personnel Management (GOK) vs. Union of Kenya Civil Servants [2005] eKLR*** a recognition agreement was defined as follows:

> ***"…****recognition agreement means an agreement in writing made between a trade union and an employer or organization of employers which provides… for the recognition of the trade union as the body entitled to represent the interests of those of its members who are specified in the agreement and who are or have been employed by the employer or any of the employers comprising that organization."*

The Court further stated that:

> *"The importance of a "recognition agreement" is even contained in the Industrial Relations Charter, and it is an extremely important document because it formally establishes the relationship between a trade union and the employer relating to recognition and negotiating procedure. It sets out matters on which the employer concedes, the right of negotiation to the trade union and affords full recognition to the union as the sole labour organization representing the interests of employees in the employment of that particular employer or group of employers, concerning rates of pay and overtime, hours of work, method of wage payment, paid leave, termination of employment, collection of union dues, retirement benefits, medical benefits, principles of promotion and redundancy … The next important matter in the recognition agreement is that it sets out the negotiating procedure in great detail in respect of individual and collective grievances, collective agreements and the steps to be taken in the event of failure to reach agreement. The parties also stipulate how the recognition agreement may be modified and terminated. Once the relationship between a trade union and an employer or a group of employers is formally established by the signing of the recognition agreement, then the trade union follows it up by submitting its demands or proposals on behalf of all the unionisable employees in the undertaking, whether they are trade union members or not, regarding wages and salaries and other terms and conditions of employment with a view to concluding a collective agreement on their behalf with the employer or a group of employers. The demands or proposals of a first ever collective agreement between the parties, or its modification or amendment where one already exists, is considered by the employer who makes his or its counter -proposals on the various demands or proposals…"*

In the case of ***Kenya Shoe & Workers Union v Modern Soap Factory Ltd [2017] eKLR*** the Court of Appeal held as follows:

> *"After careful consideration of the submissions presented to the court including the decision by Mbaru J, in* ***Communication Workers Union VS Safaricom Ltd [2014] eKLR,*** *I am persuaded that the claimant is a stranger to any employment relationship between the respondent and the grievants. There is no averment in the pleading to the effect that the grievants were members of the claimant union and there is no recognition agreement between the claimant and the respondent. It is therefore not clear what interest the claimants have in the employment relationship between the grievants and the respondent.*
>
> *The mere fact that the claimant is registered and mandated to represent unionisable employees in the shoes and plastic sector does not, in my view entitle the claimant to an automatic locus standi to substitute all the unionisable employee in the sector and institute suits in her own name even on matters that appears personal and not collective.*

A recognition agreement is therefor only necessary or purposes of negotiation of a collective bargaining agreement as stated by the court in

the above cases.

Recognition must of necessity be preceded by workers joining membership of a union, as it is only after a union attains membership of a simple majority that it qualifies for recognition.

The right to representation is acquired by membership and it is not necessary for a union to be recognised in order to represent its members.

In this case the claimant has stated that there is a recognition dispute, Cause No. 1683 of 2014, pending before the court, the claimant has further annexed receipts for union dues and check-off forms signed to prove recruitment of members from among employees of the respondents.

I find that the claimant had *locus standi* to represent the grievants by virtue of membership.

Whether the 2nd grievant was a casual employee and if so, whether her employment can be converted to regular employment under section 37 of the Employment Act, 2007

The Respondents submitted that the 2nd grievant has never enjoyed continuous employment for a period exceeding three (3) months as outlined by ***section 37 of the Employment Act*** for him to be considered as a permanent employee for his employment status be converted from contract to permanent. During trial, RW2 confirmed that despite the fact that his employment was on contract, he was on rotation and would work for one week and then break for another week. In the case of ***Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] eKLR*** the Court of Appeal was of the following opinion:

"With the enactment of the Employment Act 2007, considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37(5) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee. The Employment and Labour Relations Court has not hesitated to infer permanence in erstwhile casual service under the above provision. See **PETER *WAMBUGU KARIUKI AND 16 OTHERS V KENYA AGRICULTURAL RESEARCH INSTITUTE[2013] eKLR*** *and* ***SAMWEL INDA APONGA & ANOTHER V MATCH MASTER LIMITED [2015] eKLR***. *The Employment and Labour Relations court has in the wake of the Employment Act 2007 nevertheless appreciated that failure to pay wages at the end of the day does not by itself remove one from the ambit of a casual worker. For instance, Justice Abuodha in* ***JOSPHAT NJUGUNA V HIGHRISE SELF GROUP [2014] eKLR*** *held that it is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.*

The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.

The learned Judge of the Employment and Labour Relations court went ahead to coin the term "a monthly casual worker" as an exception to the casual worker contemplated under section 2 of the Employment Act. This casual worker "sui generis" therefore enjoys the protection accorded to regular or permanent employees by ***section 35(1)(c)*** *of the Act."*

Section 2 of the Employment Act, 2007 defines a casual employee as

> ***"a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time"***

The 2nd grievant was on contract for a period of 2 months from 2008 up until his employment was terminated. The Respondents cannot argue that the 2nd grievant was a casual employee as his contract subsisted for over 4 years. It is immaterial that the 2nd grievant would work on rotation. ***Section 37 of the Employment Act*** was devised to protect employees from employers who take advantage of their employees' labour services but fail to regulate their employment. As such, the 2nd grievant was a monthly contract employee as provided by ***section 37 of the Employment Act*** who is entitled to the protection accorded to permanent employees under ***section 35 of the Act***.

Whether the 3rd grievant's claim stands withdrawn

The Respondents submitted that the Claimant withdrew the claim by the 3rd grievant and as such he was not entitled to an award as he had willingly refused to submit himself before the jurisdiction of this Honourable Court. However, the Claimant has submitted on the case of the three Claimants and there is no record of such withdrawal. Nevertheless, the Claimant has not adduced any evidence to controverted the allegations made by the Respondents concerning the 3rd Grievant. The Claimant was to examine a witness in court, but the witness failed to appear in court and as such the Claimant closed its case. As it stands, the 3rd Grievant's case has not been proved on a balance of probabilities and as such his claim fails.

Whether the Grievants' termination was wrongful and unlawful

Section 43 of the Employment Act of 2007 provides that the employer is required to give reasons for termination and where the employer

fails to do so, the termination shall be held to be unfair. Section 45(1) of the Employment Act provides that no employer should terminate the services of an employee unfairly. Under section 45 (2) of the Act, where the employer fails to prove the following, then the employment is unfair:

a) That the reason for termination is valid;

b) That the reason for termination is a fair reason relating to employee's conduct, capacity or compatibility or that the employment was terminated in accordance with fair procedure.

In the case of ***Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited Cause No. 74 of 2013*** **the court held** that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal. It stated:

> *"Section 41 (1) subject to section 42 (1) of the Employment Act, states that an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."*

RW2 admitted that the 1st grievant was a permanent employee whose services were terminated because of the offence committed on 2nd October 2012. On the other hand, CW1 testified that the offence for which his employment was terminated was not stated. The reason that was given for summary dismissal was disruption of production. The 1st grievant was not given a hearing to defend himself of the allegations made. As such, the 1st grievant's termination was unfair.

The RW1 testified that he never terminated the 2nd grievant's employment. The 2nd and 3rd grievants were told to go home and report back on a certain day, which they did not. However, this was not proved as CW2 testified that they were told to go home and that the 2nd Respondent would call them to inform them of when to report to work, which he never did. Further, RW1 conceded to the fact that he was not privy to occurrences in the 2nd Respondent's office. As such, the Respondents have failed to prove that the 2nd grievant absconded duty. The employment was thus unfairly terminated.

Whether the Claimants are entitled to the prayers sought

The 1st Grievant

The Respondents testified that the 1st Claimant refused to take his outstanding dues. Further, he had taken leave and was not entitled to payment in lieu of leave. On page 22 of the Respondent's annexures, the 1st Grievant had a balance of 6.5 leave days. At page 11 and 22 of the respondent's bundle it is stated that the 1st grievant had 24.5 leave days. He is further entitled to the 3 days worked in October as his employment was terminated on 3rd October 2012. The Claimant is also entitled to one month's salary in lieu of notice.

The 1st grievant is not entitled to severance pay as it is a remedy reserved for those declared redundant whereas the 1st Grievant's employment was summarily dismissed.

Since the employment was d unfairly terminated, the 1st grievant is entitled to compensation for loss of employment.

The 2nd Grievant

The 2nd grievant is entitled to one month's salary in lieu of notice as the Respondents have failed to prove that he absconded duty. RW1 testified that under the contract, the 2nd grievant was entitled to 1-weeks' notice or salary in lieu of notice. It is irrelevant that his contract stated that he was only entitled to 1-weeks' notice or salary in lieu of notice. He is entitled to the 28 days' notice as stipulated under ***section 35 (1) (c) of the Employment Act***. He is further entitled to salary for the three (3) days worked in October as his employment was terminated on 3rd October 2012.

According to records field by the respondent at page 26 of the bundle of documents, the 2nd grievant had one day leave as at 1st March 2012. He therefore accumulated 7 days to end of September so he had a total of 8 days leave which I award him.

The 2nd grievant is not entitled to severance pay as it is a remedy reserved for those declared redundant which he was not.

He is entitled to compensation for loss of employment since his employment was unfairly terminated.

The 3rd Grievant

The 3rd grievant's case was withdrawn.

Conclusion

I accordingly enter judgment for the 1st and 2nd grievants against the respondent and make the following orders –

1. I declare the termination of employment of the 1st and 2nd grievants unfair.

2. I award the 1st and 2nd grievants the following –

1st Grievant – Stephen Maina Kinyua

(i) One month's salary in lieu of notice Kshs.10,300

(ii) 3 days' worked in October Kshs.1,039.90

(iii) Accrued leave 24.5 days Kshs.9,705.80

Total Kshs.21,045.70

2nd Grievant – Shem Kedogo Lisamadi

(i) One month's salary in lieu of notice Kshs.8,200

(ii) 8 days' worked in October Kshs.2,523.10

(iii) Accrued leave 6 days Kshs.1,776.60

Total Kshs.12,499.70

Compensation

Stephen had worked for the respondent from 2002. As at 2012 he had worked for 10 years. In view of his long service and taking into accent all the circumstances of the case, I award him 10 months' salary as compensation in the sum of Kshs.103,000.

Shem worked for the respondent from 2001 and had done 11 years' service. Again taking into account his long service and all the circumstances of his case including all the relevant factors in Section 49(40 of the Act, especially the circumstances under which he had worked for all the years and the fact that he had no other terminal benefits, I award in 12 months' salary as compensation in the sum of Kshs.98,400.

I further award the claimant costs in the sum of Kshs.50,000 to cater for all disbursements and expenses of the case.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE