



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 396 OF 2015

TRANSPORT WORKERS UNION (K)

CLAIMANT

v

KIMILILI HAULIERS CO. LTD

RESPONDENT

JUDGMENT

1. In a Memorandum of Claim lodged with the Court on 11 December 2015, the Transport Workers Union (K) (Union) stated the issue in dispute as *Unfair termination and underpayment of the terminal benefits*.
2. The Memorandum of Claim was accompanied with a motion under certificate of urgency seeking restraining orders against Kimilili Hauliers Co. Ltd (Respondent) from *executing the intended closure/change of ownership of the companies (Kimilili Hauliers Ltd/Fims Ltd)*.
3. Upon service of the motion, the Respondent filed a Notice of Preliminary Objection, Replying Affidavit and substantive Response on 4 February 2016.
4. The motion was taken on 8 February 2016, and the Court dismissed it through a ruling rendered on 7 March 2016.
5. The Cause was heard on 28 November 2016 and each party called one witness to testify.

Union's case

6. The Union pleaded 2 causes of action and these are one, that the Respondent unfairly terminated the employment of some 6 employees (*John Wanyama, Johana Musungu, Winstone Wafula Murunga, Jason Obegi, Peter Mungai and Francis Erima*) (Grievants) on 14 January 2014 and two, that the Respondent underpaid the Grievants during the course of employment.
7. The only Grievant called to testify, John Wanyama Ndinyo testified (no explanation was offered for failing to call the other Grievants and no directions were sought despite the fact that they filed witness statements) that he was dismissed verbally without being afforded an opportunity to be heard. According to him, he reported to the Union but the Respondent refused to grant audience to the Union representatives.
8. On the cause of action relating to underpayment of wages, the Grievant stated that the Respondent did not implement various Regulation of Wages Orders save for 2013 when the wages were increased by Kshs 1,000/- (from Kshs 25,000/- to Kshs 26,000/-).

9. The Grievant admitted that he was paid final dues of Kshs 83,199/- but asserted he was forced to accept the same.

10. During cross examination, the Grievant denied knowledge of Nakuru Cause No. 399 of 2013, *Transport Workers Union (K) v Kimilili Hauliers Co. Ltd*, in which the Union had sued the Respondent complaining of underpayment of wages/failure to implement various Regulation of Wages Orders.

11. The Grievant also denied that he resigned as indicated in the Final Dues Schedule.

Respondent's case

12. The Respondent's pleaded case was that the cause of action advanced by the Union was *res judicata* as the issues brought for determination had been conclusively addressed in Nakuru Cause No. 399 of 2013, *Transport Workers Union (K) v Kimilili Hauliers Co Ltd* and that it paid wages in conformity with the prescribed minimum wages.

13. Regarding the unfair terminations, the Respondent pleaded that all the 6 Grievants voluntarily resigned and were paid final dues.

14. The Respondent's Human Resources Manager who testified on its behalf denied forcing the Grievants to sign the Final Dues Schedule and also reiterated that the issues in dispute had been determined in Nakuru Cause No. 399 of 2013.

15. While under cross examination, the witness stated that the Grievants were discharged when a project they had been engaged in was completed and that they were informed of the end of the project. On the same breathe, he maintained that the Grievants resigned.

16. He also admitted that the parties went through conciliation but the Conciliator returned a verdict of unresolved dispute.

17. After close of testimonies, the Court directed the filing of submissions and the Union filed its submissions on 19 December 2016 while the Respondent filed its submissions on 20 January 2017.

18. The Court has considered the evidence and submissions and identified the issues arising for determination as, *whether the causes of action advanced are res judicata and if not, whether the Grievants were underpaid, whether the Grievants employments were unfairly terminated and appropriate remedies/orders.*

Res judicata

19. The Court has looked at the record in Nakuru Cause No. 399 of 2013. The causes of action therein included *failure and refusal to comply with the Wages General Amendment Order 2010.*

20. The details of underpayment related to the period 1 May 2010 to 30 April 2011.

21. Before determining that Cause, the Court directed the County Labour Officer to carry out an inspection on payment records and his report found out that only 1 employee had been underpaid.

22. In my view, although the Union is now advancing a claim for underpayments for the entire period of employment, the circumstances were well within its and the Grievants knowledge by the time Cause No.399 of 2013 was being filed and the said cause(s) of action ought to have been included therein instead of taking a piece meal approach.

23. The Court would therefore find that although part of the cause of action on underpayments was not pleaded in the earlier Cause, it is an abuse of the court process to advance the cause of action in the present Cause.

Underpayments

24. With the conclusion that the Union should have presented the complete cause of action on underpayments in Cause No. 399 of 2013 and that therefore advancing such a cause herein is an abuse of the court process, an examination of this issue herein would be an academic exercise.

25. However, were the Court wrong on the conclusion, it would still have dismissed the claim for underpayments because the Union did not establish how much each of the Grievants were earning during the currency of the respective Wages Orders and how much they ought to have been paid (pleading figures is not enough).

26. The Court has also noted that the Union has in its submissions mischievously changed tact by asserting that the claim was not on underpayment of wages but rather underpayment of terminal benefits.

Unfair termination of employment

27. The Grievants were not issued with contracts of employment in terms of sections 9 and 10 of the Employment Act, 2007.

28. Had such contracts been issued, it would have been easier to determine whether their engagement was project based/duration based.

29. The Court would therefore find that the Grievants were on contracts of an indefinite duration and therefore the requirements of section 35, 40, 41, 43 and 45 of the Employment Act, 2007 applied in cases of separation. There was no demonstration that the Respondent complied with the said statutory provisions.

30. This coupled with the contradictory testimony by the Respondent's Human Resources Manager that the Grievants voluntarily resigned and on the same breathe asserting that the project the Grievants were engaged in came to an end lead to the inescapable conclusion that the employment of the Grievants were unfairly terminated (in its submissions the Respondent contended the separation was due to redundancy but tendered no evidence of compliance with the conditions in section 40 of the Employment Act, 2007).

Appropriate remedies

Pay in lieu of notice

31. The testimony that pay in lieu of notice comprised the final dues paid to the Grievants was not challenged and nothing turns on this relief.

Unutilised leave days

32. No evidential foundation to this relief was placed before Court and it stands to be dismissed.

Underpayments

33. With the conclusion on this head of relief above, it is declined.

Severance pay

34. The Respondent's Human Resources Manager testimony that the final dues included an element of severance pay was not controverted.

Compensation

35. The Court would award each of the Grievants the equivalent of 3 months gross wages as

compensation considering the lengths of service averaging 4 years each.

36. Because the gross wages of each Grievant was not proved but was within the knowledge of the parties, the Court directs the Respondent to compute and pay the same.

Certificate of Service

37. This is a statutory right and the Respondent is directed to issue each of the Grievants with one within 21 days (Court notes that the Respondent purported to sneak in copies of the certificates of service through submissions, a practice not known in law or practice as the same are matters of evidence).

38. Before concluding, the Court would be failing in not observing that the pleadings herein were confusing and that the Union representative did not help either by the way he conducted his case and/or convoluted the written submissions.

39. It may also be high time for the Unions to organise basic training courses in drafting pleadings and prosecuting suits for their Industrial Relations Officers.

Conclusion and Orders

40. The Court finds and holds that the Grievants did not resign but were unfairly terminated from employment and orders the Respondent to compute and pay each of them

(i) The equivalent of 3 months gross wages as compensation.

41. The other heads of reliefs save as stated above are dismissed.

42. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 3rd day of March 2017.

Radido Stephen

Judge

Appearances

For Union Mr. Beru, Branch Secretary, Transport Workers Union (K)

For Respondent Mr. Oribó instructed by Omwenga & Co. Advocates

Court Assistants Nixon/Daisy