



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 99 OF 2017 CONSOLIDATED WITH CAUSE 101 OF 2017

DAMARIS WANGARI KURIA.....1ST CLAIMANT

AND

ESTHER NJERI WACHIRA.....2ND CLAIMANT

VERSUS

HOMAGE SERVICES STORE LTD.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

JUDGMENT

The 1st claimant filed the statement of claim on 05.04.2017 and the 2nd claimant on 05.04.2017 through Waweru Macharia & Company Advocates. The 1st claimant prayed for underpayment Kshs.120,470.00, house allowance Kshs.73,690.00, pay for 3 holidays Kshs.5,028.00, unpaid leave of 3 days per year for 3 years Kshs.5,902.00, 12 months' pay compensation at Kshs.15,692.96 making Kshs.188, 315.00, making a sum of Kshs.394,280.00. The 2nd claimant prayed for underpayment Kshs.41, 540.00, house allowance Kshs.62,390.00, pay for 3 holidays Kshs.5,028.00, unpaid leave of 3 days per year for 3 years Kshs.5,028.00, 12 months' pay compensation Kshs.159,442.00, making a sum of Kshs.273,429.00.

The claimants also prayed for judgment against the respondent for:

- a) Issuance of a certificate of service.
- b) General damages against the 2nd respondent for breach of duty of representation.
- c) Costs of the suit with interest.
- d) Any other or further relief as the court may deem fit to grant.

The claimants' case is that the respondent employed the 1st claimant as a shop assistant and the 2nd claimant as an assistant tailor. Their services were terminated on 31.08.2016. They were members of the 2nd respondent trade union which they say failed to pursue their grievances through representation in the

conciliation process. They filed the suit.

The 2nd respondent filed the memorandum of response on 23.04.2017. The 2nd respondent stated that it has a valid recognition agreement with the 1st respondent signed on 03.10.2014 but they had not concluded their first collective agreement. The claimants are members of the union and they were terminated from employment of the respondent together with 3 other employees effective 31.08.2016. As per the letter of termination that was undated the claimants were terminated from employment for alleged reason of disrespect towards their employer, failure to perform well in the work as assigned, use of abusive language towards the employer, and , disobeying their supervisor. Prior to the conclusion of the conciliation proceedings that the 2nd respondent had initiated in that regard, the claimants wrote and demanded that the 2nd respondent files suit in court.

The conciliator found that the claimants were employed as general workers and had demanded extra pay when assigned duties such as sweeping and general cleaning. The conciliator had also found that the claimants had not been unfairly terminated because the union representatives had been called by the 1st respondent's management to discuss the claimants' cases of disobedience to perform duties as assigned. It was also found at conciliation that the claimants had been paid one month in lieu of notice, salary for August 2016, and 2016 annual leave days due but not taken. However, it was found that the claimants had not been paid certain leave days and they had been underpaid in view of legal notice No. 117 of 2015. The conciliator then computed the sums due to 1st claimant as Kshs.33,185.00 and the 2nd claimant Kshs.32,345.00. The report was dated 24.02.2017. The 2nd respondent stated that in such circumstances it had acted in the best interests of the claimants and the suit as against it should be dismissed with costs.

The 1st respondent filed statements of response in the two suits through M.K. Kiminda & Company Advocates and prayed that the suits be dismissed especially in view of the conciliator's report.

The claimants filed a reply to the 2nd respondent's response stating that the conciliator had not issued the certificate of dispute and the 2nd respondent had not acted in anticipation that the suit would become time barred and thereby rest the claimants in permanent prejudice. The claimants further replied to the 1st respondent's response stating that they each wrote to the conciliator disagreeing with the conciliator's findings. Further, the claimants urged that the respondents colluded to defeat their respective claims.

The claimants and the 1st respondent testified to support their respective cases. The 2nd respondent opted to rely on pleadings and the documents on record. The court has considered the pleadings, the evidence including documents on record and the parties' submissions and makes the following findings.

- a) There is no dispute that the 1st and 2nd respondents are in a binding recognition agreement and there is no dispute that the claimants are members of the 2nd respondent trade union.
- b) After the termination and the claimants having reported the dispute to the trade union, the 2nd respondent, the 2nd respondent was entitled to report the dispute to the Minister in accordance with section 62 of the Labour Relations Act, 2007. The court returns that the 2nd respondent acted in the best interests of the claimants by initiating the conciliation proceedings.
- c) The record of the conciliation process has been filed and the proceedings were clearly open and transparent. The particulars of alleged collusion between the respondents during the conciliation as alleged and claimed by the claimants were not pleaded or established by way of evidence. The claimants might have harboured some dissatisfaction with the outcome of the conciliation proceedings but from the evidence, it is clear that the claimants initiated the court action in total disregard of the conciliation proceedings which they knew, at all material times, had been initiated by their trade union, the 2nd respondent. Throughout the conciliation proceedings, the claimants did not file any papers as interested parties as envisaged in section 64 of the Act. Their allegations that the union failed to act in their best interest are therefore belated afterthoughts that have no basis at

all.

d) The record and evidence shows that the conciliation proceedings concluded in an agreement between the 1st and 2nd respondent. The conciliator did not issue a certificate that the dispute remained unresolved and the conciliator's report was express that the parties had agreed that the dispute had been resolved. The parties are bound accordingly and the claimants cannot go round the conciliator's report to continue the present suits.

e) The court returns that there was no unresolved trade dispute and even if the trade dispute had been unresolved, the claimants would not have had the standing to refer the same to the court because they had not been parties to the dispute in terms of section 64 of the Act. The court returns that the claimants' suit was an abuse of the court process because once they joined the union they were bound with the provisions of the Labour Relations Act, 2007 as far as their union had opted to report the dispute for conciliation and in line with the claimants' instructions. The court returns that the suit was therefore not tenable.

f) The court has considered the evidence that the union representative had met the 1st respondent's management and discussed the claimants' behaviour of refusal to perform as assigned. The court returns that such amounted to due process and in absence of any other material and the claimants being general workers, the procedure for termination and the reason for termination was not unfair.

In conclusion judgment is hereby entered for the parties for:

a) The respondent to comply with the findings and recommendations of the conciliator as conveyed in the conciliator's report and to pay by 31.12.2017 failing interest at court rates to run from the date of the conciliator's report till full payment.

b) The respondent to deliver a certificate of service to the claimants by 31.12.2017.

c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 15th December, 2017.

BYRAM ONGAYA

JUDGE