

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 94 OF 2014

KENYA PETROLEUM OIL WORKERS UNIONCLAIMANT

VERSUS

SARMAN ENERGY LTD & ENGEN [K] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant is a trade union registered to represent workers in the Petroleum Oil Industry in Kenya. She brings this suit on behalf of her 13 members named in the schedule annexed to the claim amended on 30/9/2014 (herein after called the grievants). It is the claimants case that all the grievants were employed by 2nd respondent until 19/4/2012 when she handed over the petrol station to the 1st respondent under Dealership Agreement. That the grievants worked for the 1st respondent from 20/4/2012 until 30/4/2012 when they were all dismissed via SMS for poor performance, negative attitude and low productivity. It is further claimant's case that the procedure followed to dismiss them was unfair and discriminative as they were dismissed by SMS at night without any prior notice. Finally the claimant avers that both 1st and 2nd respondent terminated the grievants employment without compensating them and prayed for one month salary in lieu of notice, 12 months salary as compensation for wrongful and/or unfair termination plus damages for discrimination against the grievants for their union affiliation. In aggregate, the claimant prays for ksh.1,907,503.

2. The 1st respondent filed her response denying any employment relationship between the grievants and herself. She has also denied that she discriminated against the grievants on ground of their union affiliation and pregnancy. In the alternative, the 1st respondent avers that the termination of the grievants was fair and on notice following the change of proprietorship. It is the 1st respondent's case that she paid the grievants all the dues. Lastly, the 1st respondent avers that it is the 2nd respondent who should be responsible for the payment of any accrued terminal dues.

3. The 2nd respondent on the other hand contends that she employed the grievants from April 2011 to February 2012 when the respondent handed over the Petrol Station to 1st respondent in a Dealership Agreement. It is the 2nd respondent's case that she settled all the grievants accrued dues including public holidays, leave days and salary. She avers that the 1st respondent is not her agent but a separate entity.

4. The suit was heard on 28/10/2014 when the claimant called Abiud Mwarema as CW1 while the 2nd respondent called Kemunto Micheka as RW1. The 1st respondent did not call any witness and did not attend the hearing despite being served with a hearing notice. Before the hearing commenced, the claimant and the 2nd respondent agreed that the written statements filed by the grievants be adopted as evidence and only one of them to testify on behalf of the others. After the hearing the claimants and 2nd respondent filed written submissions.

CLAIMANT'S CASE

5. CW1 told the court that he was employed by the 2nd respondent in 2006. That on 20/4/2012, the 1st respondent was given dealership Licence by the 2nd respondent and both CW1 and the other grievants continued working as Pump attendants in the station as before. However on 30/4/2012 at about 9pm the grievants received SMS from the 1st respondent telling them that their services were no longer required. CW1 explained that all the other workers who received the termination SMS called him as their Chief Shop steward to verify the SMS. He explained that all the 4 union officials including himself were terminated. Some of the workers discharged were in their maternity leave. CW1 explained further that, none of the employees had been given any written contract of employment. According to him his employer was the 2nd respondent.

6. He contended that the respondent did not give the grievants any hearing before the lay off. They were also never given performance appraisal before lay off. They were also never served with any notice in writing before the termination. They were also not given certificate of service. CW1 however admitted that the grievants were paid their full salary in April 2012 by the 1st respondent although they worked for her only for 10 days. He prayed for compensation because the termination was in breach of the law. He prayed for dues for each grievant as particularized in the schedule annexed to the Amended Claim as appendix 'SNB' dated 30/9/32014.

7. on cross examination by the 2nd respondent's counsel, CW1 explained that he was employed as a Pump Attendant in 2006 and was given a written contract. He admitted that the contract stated that at one time the 2nd respondent may handover the station to a dealer. He however contended that the 2nd respondent had assured the grievant and the other workers that no one would lose his employment. He admitted that from 2006 there other dealers running the business but no new written contracts were ever given by the respective dealers.

8. CW1 admitted that on 20/3/2012 the marketing manager for the 2nd respondent Mr. Antony Mbugua served the employees with a written notice terminating their employment effective 19/4/2012. The notice also offered to pay salary, leave days and public holidays. The termination letter came from James Kinyua, the network Manager for the 2nd respondent. CW1 admitted that just like the other grievants, he was paid all the three items in the termination notice by the 2nd respondent before the end of April 2012 as per the list marked EN2 annexed to the 2nd respondent defence. He admitted that from 20/4/2012 he and the other grievants was employed by the 1st respondent until 30/4/2012 when he was unfairly dismissed by SMS.

DEFENCE CASE

9. RW1 is the HR and Legal Manager for the 2nd respondent. She explained that 2nd respondent gives written contract to all her employees which stipulates that the contract will end if a dealer is appointed and the employees are to be hired afresh by the dealer. In the present case, RW1 explained that when 1st respondent was given a dealership contract, the 2nd respondent served termination notice to all her employees including the grievants on 20/3/2012.

10. On cross examination by the claimant RW1 admitted that she did not have copies of the contract of employment issued by the 2nd respondent to the grievants. She clarified that the grievants were never declared redundant but only given a normal termination.

ANALYSIS AND DETERMINATION

11. After carefully considering the pleadings, evidence and submissions the court finds no dispute in the fact that from April 2011 to 19/4/2012, all the grievants were employed by the 2nd respondent. There is no dispute that on 20/3/2012, the said respondent served all the grievants

with notice terminating their services effective 19/4/2012. There is also no dispute that the grievants served through out the notice period and thereafter they were paid all their dues including salary, leave days outstanding and public holidays worked. It is further not disputed that from 20/4/2012 to 30/4/2012 the grievants continued to work for the 1st respondent until they were dismissed by the 1st respondent vide SMS on 30/4/2012.

12. The issues for determination are:

a) whether the court has jurisdiction over the suit

b) whether the termination of the grievants employment by the 2nd respondent on 19/4/2012 was unfair.

c) Whether the termination of the grievants employment by the 1st respondent on 30/4/2012 was unfair

d) whether the grievants are entitled to the reliefs sought in the suit.

Jurisdiction

13. The dispute before the court involves discrimination and retrenchment of employees. The claimant and the 1st respondent admit that the court has jurisdiction but the 2nd respondent has raised objection to the suit on ground that the court lacks jurisdiction to entertain the suit. The court appreciates that an objection based jurisdiction can be raised at any stage of the proceedings but raising it just before judgment makes one wonders if the same is not an after thought. The basis of the objection by the 2nd respondent is that the dispute was not conciliated upon before being referred to this court. She has cited a decision of this court in KUDHEIHA VS PAPILION LAGOON REEF [2014] KLR where the court held that before a union files suit in her name, on behalf of her members under Section 73 of the Labour relations Act, (LRA) the dispute must have undergone conciliation under Section 62 of the said Act. The foregoing position remains correct in this court's opinion. The dispute in the said case however was not jurisdiction *per se*, but one of *locus standi* and the court pronounced itself on the question by holding that Section 73 of the LRA gives *locus standi* to unions to file suit in their own names on behalf of their members only when the matter had been first conciliated under Section 62 *supra*.

14. The foregoing however has to be differentiated from the present objection in that the dispute before the court was brought under the provisions of Section 74(b) (ii) of the LRA. The said Section allows a Trade Union to refer disputes to the Industrial Court as a matter of urgency if the dispute concerns redundancy where the employer has retrenched employees without giving notice. In the present, the case was filed under certificate of urgency and it concerns retrenchment and the claimant alleges that notice was never served before retrenchment. Whether the facts are true or false, the suit qualifies to be filed before this court under Section 74 of the LRA even before undergoing any conciliation under Section 62 *supra*. The parliament in its wisdom must have created that window to avoid prejudice which might be occasioned by the conciliation process. Consequently the court dismisses the objection by the 2nd respondent and proceeds to determine the whole suit on the merits.

Unfair termination by the 2nd Respondent

15. The claimant agree that after respondents sealed dealership agreement, the 2nd respondent served all her staff with a one month termination notice on 20/3/2012 to take effect on 19/3/2012. That the 2nd respondent paid their terminal dues including salary, accrued leave days and public holidays worked. The 2nd respondent did not wish to continue operating her station at Nyali and therefore she terminated the grievants services. The grievants had the reasonable

expectation that they would continue working for the 2nd respondent. The 2nd respondent however transferred the business to the 1st respondent and terminated all her staff. That obviously was a redundancy the because reason for termination of the grievants services alongside the other staff was that the 2nd respondent did not require their services any more after transferring the business to the 1st respondent. As pleaded by the 2nd respondent, she is a Multi-National Corporation meaning that she could have transferred the staff to her other stations. She however chose to lay off the entire staff.

16. The procedure for terminating employees on redundancy is provided for under Section 40 of the Employment Act. The said provision require in mandatory terms that before laying off employees, the employer shall first serve a notice in writing to the labour officer and the employees union if he is a member of any union or to the employee personally if he is not a member of any union. Secondly the employer must conduct a fair selection process of the employees to be laid off. Thereafter the employer must pay the employees to be laid off salary in lieu of notice, accrued employment benefits plus severance pay. That said elaborate procedure was not followed in this case. It has not been denied by the defence that the grievants were members of a trade union and no evidence was tendered to prove that the 2nd respondent served a redundancy notice to both the grievants' union and the labour officer. The only notice mentioned herein was a termination notice to all the staff including the grievants not a redundancy notice. That termination of all the staff for reasons that the employer is closing down his operations and/or handing over the business is nothing else but redundancy. Unless termination of services by redundancy is done in strict compliance with Section 40 of the Employment Act, the exercise becomes unfair termination of the employment like in this case. The answer to the second issue for determination is therefore that the termination of the grievants employment by the 2nd respondent was unfair and unlawful for violating Section 40 of the employment Act.

Unfair termination by 1st Respondent

17. The grievants worked for the 1st respondent for only 10 days. The 1st respondent has denied in her defence that she employed the grievants. She also avers that she was entitled to choose and employ the employees she wanted from among the 2nd respondents staff and not the grievants. The court is however satisfied that the 1st respondent employed the grievants from 20/4/2012. The contract of employment was not express but implied from the conduct of the parties. The 1st respondent did not object to their services and the grievants never protested against being handed over to their new employer. Indeed, although the grievants worked for only 10 days, the 1st respondent is said to have paid them the salary for a whole month. The 1st respondent never adduced any evidence to rebut the claimant's evidence on the above matters. The court is however, satisfied that the employment relationship between the 1st respondent and the grievants existed casual on basis. The period of engagement was less than one month and as such the grievants were not protected by Section 35(1) of the Employment Act. The said provision requires that before termination the employee, a notice shall be given in writing for a period equivalent to the pay interval. Having found that the grievants were casual employees of the 1st respondent, a notice of one day in advance was sufficient. The SMS was better than being stopped at the gate without notice. The law should be interpreted in line with the technological advancement in mind. We can no longer say that SMS is not a method of communication. In this case every employee received notice that their casual employment with the respondent had been terminated. In that regard the court finds that the termination of the grievants employment by the 1st respondent was not unfair.

RELIEFS

18. In view of the findings above, that the 2nd respondent unfairly terminated the grievants employment the court awards damages to the grievants. The award is for one month salary in lieu of notice plus 6 months gross salary for unfair termination

TABULATION FOR TERMINAL DUES

	NAME	ID NO	NOTICE PAY	6 MONTHS COMPENSATION	TOTAL
1	ABIUD MAREMA	8420721	11,287	67,722	79,009
2	VIGINIA NYAMBURA	xxxxxxx	11,287	67,722	79,009
3	ALICE A. ADOYO	xxxxxxxxx	11,287	67,722	79,009
4	MARY MZEE		11287	67,722	79,009
5	DAFTON MWALUGHA	0154691	11,287	67,722	79,009
6	AGNES MSHINGO	23686381	11,287	67,722	79,009
7	VINCENT AMBUKA	2407728	11,287	67,722	79,009
8	GICHUKI JULIUS	13728953	11,287	67,722	79,009
9	SUDI M. IERRI	23828247	11,287	67,722	79,009
10	MARIA MWIKALI	11788971	11,287	67,722	79,009
11	PHILIP ODHIAMBO	22559193	11,287	67,722	79,009
12	EMILLY HARISON	23027086	11,287	67,722	79,009
13	BERTHER ODINGA	8464570	11,287	67,722	79,009
	TOTAL				1,027,117

DISPOSITION

For the reasons above, judgment is entered for the claimant against the 2nd respondent for the aggregate sum of ksh.1,027,117 to be shared to the 13 grievants equally. The 2nd respondent will also pay costs to the claimant.

Signed, dated and delivered this 23rd March 2014

O. N. Makau

Judge