



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 98 OF 2015

AMALGAMATED UNION OF KENYA METAL WORKERS..... CLAIMANT

VERSUS

KENYA VEHICLE MANUFACTURERS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th October, 2015)

JUDGMENT

The claimant filed a memorandum of claim on 9.06.2015 through its General Secretary, Justus Maina Otakwa. The claimant prayed for judgment against the respondent for the following orders:

- a. That the honourable court deem fit to find the actions of the respondent herein to be in violation of the parties' CBA, Article 41 of the Constitution, the provisions of the Labour Relations Act, 2007 Section 4 Part II and 48 and section 4 of the Employment Act, 2007 and declare the respondent's actions null and void.
- b. That the honourable court to order the respondent to forthwith comply with section 48 of the Labour Relations Act, 2007 by way of deducting and remitting union dues to the claimant from her members.
- c. That the honourable court to order the respondent, servants or respondent's agents to stop harassing and victimization of the claimant members on grounds of trade union activities or affiliation.
- d. That the respondent is ordered to issue the foresaid members of the claimant with letters of confirmation effective the date of being engaged by the respondent.
- e. That in alternative, the respondent is ordered that in event of termination all workers be paid their terminal dues as per the period commencing from the date of the engagement.
- f. That all employees listed in exhibit 5 of the claim bundle be paid the difference in remuneration for the period they have been in employment for their current earning and the parties' CBA.
- g. The respondent to pay the claimant's costs of the suit.
- h. Any other order the honourable court may deem fit to grant.

The respondent filed on 16.07.2015 the replying affidavit of Ezra Mereng, the respondent's human resource manager, to oppose the application which had been filed together with the claimant's memorandum of claim.

On 16.07.2015 and by consent of the parties, the court directed that the suit be determined on the basis of the pleadings, affidavits and documents on record. Lorraine Oyombe Advocate for the Federation of Kenya Employers filed on 27.10.2015 the final submissions for the respondent and the claimant filed its final submissions on 12.08.2015.

The only issue for determination in this suit is whether the claimant is entitled to the prayers as made in the memorandum of claim. The court makes findings as follows:

First, the claimant has prayed that the honourable court deem fit to find the actions of the respondent herein to be in violation of the parties' CBA, Article 41 of the Constitution, the provisions of the Labour Relations Act, 2007 Section 4 Part II and 48 and section 4 of the Employment Act, 2007 and declare the respondent's actions null and void. The actions in issue subject of the prayer are that the respondent has employed about 200 employees on piece rate contracts out of possible unionisable workforce of 300 employees which constitute 67% of the total workforce of whom the respondent does not want to join the union so that the recognition agreement between the parties may become a nullity.

Under section 2 of the Employment Act, 2007 **"piece work"** means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. In view of that definition, it was the respondent's case that it was lawful to engage staff on piece rate or piece work terms of service. It was further submitted for the respondent that due to the nature of the respondent's business, it engaged workers on piece rate or piece work basis. In particular, the respondent's business of motor vehicle assembly had declined because the respondent had capacity to assemble 3300 vehicles per annum but in 2015 had assembled 96 vehicles. Thus the respondent found it necessary, upon receiving an order, to negotiate with employees and conclude a piece rate (meaning piece work) contract specifying the amount of work. In the circumstances, the workers on piece work terms negotiated their terms of service individually and were not covered under the prevailing CBA. However, the respondent was open and willing to negotiate and include terms for workers on piece work in the CBA and in line with the conciliator's recommendations.

The court has considered the submissions made for the parties and particularly by the respondent and finds that the parties are entitled to a declaration that the workers on the piece work terms of service are entitled to join the claimant union and through the union to negotiate their terms of service and to have such terms included in the collective agreement between the parties; so that such terms to be included in the next collective agreement between the parties.

While making that finding, the court has considered that "piece work" as used in the Employment Act, 2007 is facilitative of the unique payment system as defined in the Act and as further amplified in section 18 of the Act thus, **"18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled?(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier."** It is the opinion of the court that piece work arrangements are pay arrangements between the employer and the employee, such terms are capable of inclusion in the collective agreement, such terms do not bar the affected employee from union activities and such arrangements do not make the other minimum terms of service in the Act inapplicable. The arrangements only serve a pay for labour system within the provisions of the Act.

Accordingly, it is the opinion of the court that parties in the present suit are entitled to negotiate and include in the collective agreement the terms of service of the employees on piece work service. As the respondent is willing to engage in such negotiations, for the time being, the court finds that the respondent has not breached any of the constitutional or statutory rights of the workers on piece work terms as has been urged for the respondent. Needless to state, owing to the nature of piece work pay arrangements, the parties will have to negotiate innovatively to come up with novel terms and conditions of service to meet the employer's and the employees' needs where the piece work terms apply. As already pointed out, such workers would be entitled to minimum terms and conditions of service under the Employment Act, 2007. The only variance is the pay system which is based on piece work arrangements and for which the Act has set out in section 18 the minimal principles guiding that pay system.

Second, the claimant has prayed that the honourable court to order the respondent to forthwith comply with section 48 of the Labour Relations Act, 2007 by way of deducting and remitting union dues to the claimant from her members. The claimant has exhibited in Appendix 2 on the claim bundle the relevant notice to the respondent for deduction of union dues with forms duly signed by the workers authorising the deduction. The court finds that the claimant has established that it is entitled to the union dues and the respondent should deduct and pay the dues starting end of November 2015.

Third, the claimant has prayed that the honourable court to order the respondent, servants or respondent's agents to stop harassing and victimization of the claimant members on grounds of trade union activities or affiliation. Such is a declaration and entitlement of the workers under the relevant constitutional and statutory provisions and the court finds that the claimant is entitled as the respondent is not opposed to the same and the respondent is bound by the law.

Fourth, the claimant prayed that the respondent is ordered to issue the foresaid members of the claimant with letters of confirmation effective the date of being engaged by the respondent. The court considers that the prayer is fully covered with the relief found due under prayer one and parties are entitled to negotiate and cover the claimant's concern in the CBA.

Fifth, the claimant prayed that in alternative, the respondent is ordered that in event of termination all workers be paid their terminal dues as per the period commencing from the date of the engagement. This appears to be a futuristic prayer whose basis of fears and mischief to be covered has not been established to the court. Disputes about future workers' termination would, in the opinion of this court, constitute a new cause of action to be filed if such disputes will come to pass. Thus, the prayer will fail.

Sixth, the claimant prayed that all employees listed in exhibit 5 of the claim bundle be paid the difference in remuneration for the period they have been in employment for their current earning and the parties' CBA. The respondent has submitted and the claimant agrees that the prevailing circumstances are that terms for the workers on piece work pay system have not been negotiated between the parties so that the pay is not included in the prevailing CBA. To the extent that the prevailing CBA does not apply to the workers on piece work terms, the court finds that the terms of pay therein would not apply to the workers in the exhibit, the workers being those on piece work terms of service. However, suffice it to repeat here, the piece work terms will be negotiated and included in the next CBA between the parties so that the affected workers are fully protected in the days to come and under the provisions of the next CBA.

In conclusion, judgment is entered for the claimant against the respondent for orders as follows:

1. The declaration that the parties shall negotiate terms and conditions of service for the respondent's employees being on piece work pay arrangements and shall include such terms and conditions of service in the next collective agreement between the parties.
2. A declaration that workers on the piece work pay arrangements as provided for in the Employment Act, 2007 are nevertheless, subject to such pay arrangements, entitled to the minimum terms and conditions of service as provided in the Act.
3. The respondent to forthwith comply with section 48 of the Labour Relations Act, 2007 by way of deducting and remitting union dues to the claimant as deducted from the claimant's members and with effect from end of November, 2015.
4. The declaration that the respondent, by itself or by its servants or agents shall not harass or victimize its workers being members of the claimant on grounds of trade union activities or affiliation or participation or association as per the relevant constitutional and statutory provisions.
5. Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 30th October, 2015.**

BYRAM ONGAYA

JUDGE

