



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 399 OF 2013

TRANSPORT WORKERS UNION (K).....CLAIMANT

v

KIMILILI HAULIERS LIMITED.....RESPONDENT

JUDGMENT

1. Transport Workers Union (K) hereinafter (the Union) commenced legal proceedings against Kimilili Hauliers Ltd (Respondent) on 14 November 2013. The issue in dispute was stated as *failure and refusal to comply with the Wages General Amendment Order 2010*.
2. According to the Memorandum of Claim, the Respondent had underpaid some of its employees (Grievants) between 1 May 2010 and 30 April 2011).
3. After several appearances before Ongaya J, the Court directed on 12 May 2014 that the Union's case be closed after the Union informed him that it would rely on the record. The Court directed that the Respondent's case be taken on 13 November 2014.
4. The Respondent filed its Reply on 4 September 2014 and a replying affidavit on 9 December 2014.
5. When the Cause was mentioned before me on 13 November 2014, the parties informed me that they were negotiating and that they needed 2 more weeks.
6. I directed that the Cause proceed to hearing on 9 December 2014 if the parties did not reach an agreement.
7. On 9 December 2014, the Court directed the County Labour Officer, Uasin Gishu to examine and inspect the employment records in respect of the Grievants to confirm if there were underpayments and to file a report with the Court. This was after the Union addressed the Court on the dispute.
8. The Claimant filed what it called *Claimants Further Response to the Respondent's Defense in the Affidavit of 9 December 2014*, on 29 January 2015.
9. The County Labour Officer filed a report with the Court on 29 January 2015. The report found that only 1 employee out of 18 had been underpaid during the period in contention. The said employee was paid the underpayments through a cheque dated 17 March 2015.
10. The Cause was mentioned on 20 March 2015 and the Union indicated that it did not accept the

findings of the County Labour Officer and therefore it intended to proceed with the Cause.

11. Towards this end, the Court directed the Union to file a schedule of underpayments and that the Respondent be at liberty to respond to the schedule.

12. On 10 April 2015, the Union filed a motion seeking an order directing the Respondent to recognise it as a Union representing 90 of its employees. The Respondent filed grounds of opposition and a replying affidavit to the motion on 20 April 2015.

13. The motion was placed before Court on 24 April 2015 but after hearing from the Union, the Court decided to reject it. Hearing of the main Cause was then fixed for 6 July 2015.

14. The Union opted to make submissions while the Respondent called its Human Resources Manager.

15. In its submissions, the Union urged that despite serving the Respondent with a schedule indicating underpayments, the Respondent had declined to make payment.

16. According to the Union, the Respondent had failed to pay wages in compliance with the minimum rates set out in Legal Notice No. 98 of 2010.

17. It was also submitted that the Respondent had contravened sections 48 and 53 of the Labour Relations Act and sections 10, 13 and 20 of the Employment Act, 2007.

18. The Union further contended that the names in the County Labour Officer's report were not the true Grievants and that the genuine names were those listed in the motion filed on 10 April 2015 which was rejected by the Court.

19. For the Respondent, its witness stated that during the material period, it had only 18 employees and that it was not true that the Respondent had about 90 employees.

20. It was also stated that the County Labour Officer examined and inspected the employment records and thereafter made his report indicating only one driver had been underpaid.

21. In cross examination, the witness stated that the Respondent had sister companies called *Rift Valley Petroleum Ltd* and *FIMS Ltd* which operated from the same premises and that the Respondent issued pay slips to its employees.

22. After the close of the Respondent's case, the Court directed the parties to file written submissions. The Union filed its submissions on 24 July 2015 while the Respondent's submissions were filed on 31 August 2015.

23. The Union filed several documents with its submissions. Some of the documents are properly evidence/exhibits which should have been introduced earlier. For this reason, the Court will disregard the documents.

24. And Unions must be put on notice that despite and inspite of the simplified rules of this Court, there are some basics of procedure which must be adhered to by all parties on production of evidence/documents to ensure equality of arms and to give the other side advance notice and opportunity to address itself to all pieces of evidence relied on.

25. The Court has otherwise considered the pleadings, evidence and submissions. The County Labour Officer's report has also been considered.

26. The Memorandum of Claim filed on 14 November 2013 did not set out the names and designations/occupations of the Grievants on whose behalf the Union was agitating.

27. The Memorandum of Claim did also not set out the amounts of underpayments in respect of each of the Grievant and the remuneration they were earning during the relevant time.

28. If indeed the Union was agitating for genuine members, these are details which it ought to have and the same should have been pleaded. That was not done. The pleading was wanting and did not meet the threshold/standard of setting out clearly the facts forming the cause of action.

29. The Union further opted not to lead any testimony to shore up its wanting pleadings.

30. The attempt to introduce names of employees who had allegedly signed Form S (check-off forms) through the motion filed on 10 April 2015 was a belated and insufficient afterthought.

31. I say so because the purpose and objective of Form S is geared towards a Union satisfying the conditions for seeking recognition under section 54 of the Labour Relations Act. Form S is not and cannot be used as a basis for claiming underpayments.

32. Further, the Respondent had in the Further Affidavit of Francis Osoro filed on 9 December 2014 listed all its employees during the period in contention. The information was not rebutted in any way.

33. For the foregoing reasons, the Union's Claim is destined to fail. But there is one more reason.

34. The Court directed the County Labour Officer to examine and inspect the employment records of the Respondent. The Labour Officer has been given extensive powers under the Labour Institutions Act, 2007 to carry out such an exercise.

35. The Union did not give any convincing reasons why it refused to accept the report of the County Labour Officer. The officer was carrying out a statutory albeit Court ordered mandate and *prima facie* a report from such an exercise must not be easily dismissed without convincing and sufficient grounds/reasons.

36. In the event, the Court orders that the Memorandum of Claim filed in Court herein on 14 November 2013 and encompassing the Union's case be dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

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

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

Court Assistant Nixon