



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 37 OF 2012

BAKERY, CONFECTIONERY, FOOD MANUFACTURING

AND ALLIED WORKERS UNION .....CLAIMANTS

VERSUS

FAYAZ BAKERS & CONFECTIONERS LIMITED .....RESPONDENTS

### **J U D G M E N T**

The claimant has brought suit on behalf of her 39 members (grievants) who were formerly employed by the respondent at Likoni branch. According to the claimants, the grievants were victimized and wrongfully terminated on redundancy on 4/8/2008 and 10/9/2009. That the reason for the victimization and redundancy was calculated to defeat the grievants claim for their employment rights under a duly registered Collective Bargaining Agreement (CBA).

The respondent has denied the claimants allegations and instead contended that she dismissed the claimants for participating in an illegal strike that occasioned her great financial loss. The suit was heard on 26/6/2013 when a consent was recorded by the parties to allow only 2 of the 39 grievants to testify on behalf of all the grievants. Harrison Ongweno and Juma Suleiman testified for the claimant as CW1 and 2 while Sharif Omar Ajilan and Hassan Hussein testified for the defence as RW1 and 2 respectively.

CW1 was employed by the respondent in 2005 as an oven Attendant and was later elected as the shopsteward for the branch. He participated in the negotiation of the CBA which took effect on 1/5/2006. His salary was payable monthly while the other grievants were paid daily. That clause 24(2) of the CBA provided that an employee who worked for more than 2 months automatically become permanent employee without probation. That the grievants worked for over 2 months but they continued to be treated as casuals. Under the CBA the pay per day for an Oven attendant was Ksh.341 but he was being paid Ksh.321. That the CBA also provided for night shift allowance but it was never paid to the grievants. That they were also not paid for overtime worked. That all the other grievants like him were not being paid as provided for under the CBA of 2006.

That as the shop steward he persued the matter with the respondent and raised complaint with the claimants branch office at Mombasa. That the respondent held a meeting with the claimant and agreed to pay the correct wages and convert the casuals workers to permanent basis. That only 2 casuals were given permanent employment but all other promises were never fulfilled by the respondent. The grievants continued to be underpaid and were denied medical allowance in breach of the CBA.

That by a letter dated 4/8/2008 the respondent dismissed all the workers except Khamis Alawi and

Abdalla Daktari who were reinstated because they had no unpaid dues. That all those who had unpaid dues to claim were dismissed. That all the grievants brought their complaints to him as their shop steward and they are as per the annexure 12 a(i) & (ii).

On cross examination he confirmed that on 18/7/2008 he was given a normal transfer to the head office of the respondent. That it was changed to normal after resisting a previous transfer which was in breach of the CBA. That the transfer was calculated to kill the union at the union branch. He also admitted that on 3/8/2008 there was a strike about grievants on salary arrears and underpayment. That there was a strike notice dated 10/7/2008 addressed to the claimants and copied to respondent but he did not have a copy of it in the court. That the strike occurred while he was on leave. He denied inciting workers to go on strike. He also denied that the strike was about his transfer and that of CW2, but about earlier grievances.

He confirmed that CW2 attended work on 3/8/2008. He confirmed that he was permanent employee but the respondent was not converting the other 38 grievants into permanent staff. He maintained that the respondent's sales were always good and production was made on order. That the respondent abused his discretion by wrongfully engaging the grievants as casuals for a long period. He maintained that the grievants worked overtime by being directed to work alongside the next shift until one cleared his allocated duty. That such an arrangement brought about grievance over whether the work was piece rate or shift duty.

Referring to the photographs of damaged loaves of bread, he maintained that the bread was not in the oven and that there was no proof that it was for the respondent. He admitted that on 3/8/2008 he went to the factory after he was called because the workers were protesting the transfer of the CW2, from the Likoni branch.

CW2 was also employed by the respondent in 2005 as a scaler at Likoni factory. He was also the secretary of the workers committee. He was paid daily. That he was conversant with the terms of service under the CBA upon which he claimed underpayment. That he was also not paid for overtime worked during the 30 minutes break. He was also not paid night shift allowance.

That as the secretary he knew that the 39 grievants were not paid their dues as indicated in appendix 12A(i). That he claims a reasonable sum of ksh.90,137. That while he was supposed to earn ksh.280 per day, he was always paid ksh.236.20 less by ksh.49.80 just like his colleagues. That he received a transfer letter directing him to relocate immediately but after protesting that it was in breach of the CBA he was served with a second transfer letter dated 18/7/2008 giving him 14 days to relocate. That the intention of the transfer was to frustrate the demand for better pay and defeat the grievants' labour rights.

On cross examination he confirmed that the underpayment was from 2005 to August 2008. That he did not go on transfer to the Head office because he was yet to be paid transfer allowance. That he never refused to go on transfer. That according to him there was no strike on 3/8/2008. That as they were waiting outside the gate to report for 2 pm shift, the police drove into the factory and confirmed that there was no damage on the presence of the manager and workers leaders. That there was no camera and no pictures were taken. That he was on duty lawfully waiting to go on transfer on 4/8/2008. That the entry by the 2pm shift to the factory was blocked by security guards until the police came. That he did not know whether the earlier shift was involved in any strike because he was not present.

RW1 was the Branch Manager at the Likoni factory. He confirmed that the main branch is at Kilifi Town. That at Likoni branch there were 41 employees of which 3 were permanent. That they operated on 3 shifts from 6.00am to 2pm, 2pm to 10pm and 10pm to 6.00 am. That workers arrived 15 minutes before time for taking over. That there was possibility of overtime. He confirmed that CW1 was Oven Attendant and also the Shopsteward for the factory. That on 26/11/2007 there was a strike and in a return to work formula the grievants agreed to be sacked if they repeated the strike. That on 18/7/2008 he delivered a transfer letter to CW1 and CW2 requiring them to move to the main branch at Kilifi in 14 days time. That the transfer was a normal one but they refused to go.

That on 3/8/2008 the 2pm shift refused to come into factory to take over after the morning shift left. They refused to work protesting the transfer of the CW1 and 2 and demanding that it be stopped. That he called in police after RW2 was harassed and threatened with death. That after police came in there was calm but there was no work for 3 days as the workers demanded for the directors to come and address their grievances. That production was paralysed and bread in the process of production damaged. That the 2pm shift was to blame for the damage caused but all the workers were dismissed for the reason of holding an illegal strike on 3/8/2008. That their union was notified of the loss and she never responded. That the strike was not preceded by any strike notice and the demands for underpayment and overtime were strange and new to him.

On cross examination he admitted that the correct number of damaged bread was 1450 pieces. He also admitted that there was a CBA in force but he never paid the grievants according to the rates thereunder. He also admitted that the CBA provided that after a casual employee worked for more than 2 months he automatically became permanent staff and was entitled to a monthly payment. He however admitted that the respondent never complied with the CBA in converting the casuals to permanent staff.

He further admitted that clause 25 of the CBA provided for Ksh.40 per day for night shift allowance but the respondent never paid it to the grievants except the 3 permanent staff. He also admitted after serving the CW1 and 2 with transfer letters, he never paid them a transfer allowance as per clause 30 of the CBA. He also agreed that there was an initial transfer which was to take effect immediately but after they protested they were given the normal transfer. He admitted that the initial transfer was not normal according to the CBA. He admitted that an employee has a right to challenge the employer if he fails to comply with the CBA on matters of transfer. That the 2pm shift did not get to work but he admitted that the police found them inside the factory compound. He denied that he closed the door to the factory.

He did not know whether the 6am-2pm and 10pm to 6am shift reported to work. He however admitted that the claimants demands were contained in the CBA but insisted that he used to pay workers as per the instructions from the head office. RW2 was the assistant to the RW1.

He told the court that on 3/8/2008 there was strike without notice at the work place after CW1 and 2 refused to go on transfer. That the said was present at the factory on the said date and he incited the workers of the 2pm shift not to get in. That the CW1 was however absent because he was on leave.

That the mix in the process of production was damaged and the company suffered loss. That the workers were then dismissed from work.

After the close of the hearing the parties agreed to file written submissions but only the claimant filed her. I am satisfied that under Section 12 of the Industrial Court Act and Article 162(2) (a) the court is well siezed of the jurisdiction to entertain the dispute before it relates to employment and labour relations.

The issues for determination are:

- a. **whether the grievants dismissal by the respondent on 4/8/2008 amounted to victimization and wrongful redundancy.**
- b. **Whether the grievants are entitled to the remedy sought by the suit.**

To answer to the first issue, the court has considered the two dismissal letters dated 4/8/2008 and 10/9/2008 for the 1st to 38th and the 39th grievants respectively. The two letters are clearly for dismissal and the reason cited for the said dismissal is the grievants holding of an illegal strike on 3/8/2008. The court has not been told clearly who participated and who did not participate in the alleged illegal strike. The burden of proof was on the claimant to prove that grievants of particular shift never went on strike and therefore they were dismissed wrongfully.

It is possible that all the grievants participate even those who had left the morning shift and those who were to attend work in the 10pm shift. Going by the words of the CW1, he came to the factory after

he was called and told that there we a strike going on. The evidence of the Rw1 was to the effect that the grievants refused to work for 3 days demanding cancellation of the transfer of the CW1 and 2 and asking for the directors to come and address their grievances. Consequently the court finds that all the grievants participated in the strike.

The question that arises is whether or not the strike was illegal. Section 76 of the Labour Relations Act (LRA) provides that employees have a right to go on strike after fulfilling certain prerequisites including whether the trade disputes concerns terms and conditions of service, secondly whether the dispute was not resolved after conciliation under the LRA or otherwise, and finally if a 7 days written notice has been given to the employer and the Minister for Labour.

In the present case, all the aforesaid statutory prerequisites were not satisfied save one which is the existence of a trade dispute concerning the terms and conditions of service for the striking grievants. The claimant did not prove that before the strike, the trade dispute had been the subject of any conciliation proceedings and was not resolved. Likewise the claimant did not prove that a seven days written notice was served upon the respondent and the Labour Minister prior to the holding of the strike. Consequently therefore the court agrees with the respondent that the strike held by the grievants on 3/8/2008 was illegal and therefore unprotected and the respondent was entitled to take disciplinary action against all the grievants.

In the courts view even if the grievants had a good grievance, they were bound to act responsibly and within the law. Whether any loses resulted from the illegal strike or not, the mere fact of the grievants illegally withdrew their labour amounted to gross misconduct. The courts finding on the first issue for determination is therefore that the grievants were dismissed for a valid reason and they were therefore not victimized and wrongfully declared redundant.

As regards the second issue of the remedies sought the court has dismissed prayer 1,5,6,7 and 8 in view of the findings made on the first issue above. The grievants cannot benefit 12 months salary for their wrong doing. They cannot also get severance pay because they were not terminated through redundancy but dismissal. The court has however granted prayer 2,3 and 4 of the claim. The RW1 admitted that the claim for under-payment was justified and the only reason he did not pay correctly was the instructions he had from the head office. That is what I call impunity. It was a deliberate breach of employment contract contained in the CBA and violation of the labour regulations. The respondent is liable both at civil and criminal law. It is an offence for an employer not to pay his employee all his agreed salary when it falls due. I will not go to that direction for now. Suffice is to say that the court was only moved under the civil jurisdiction.

The court therefore enters judgment for the claimant on behalf of all the 39 grievants for payment of the aggregate sum of ksh.2,315,826.25 which the respondent did not dispute. The said sum is to be shared out according to the respective computations for each grievant as per the schedule marked appendix 12 A(i) and summarized in appendix 12A(ii) in the memorandum of claim.

The claimant will also have costs and interest from 4/8/2008 for grievant number 1-38 and from 10/9/2008 for the grievant number 39.

Orders accordingly.

**Signed, dated and delivered this 30th August 2013.**

**ONESMUS MAKAU**

**JUDGE**

