



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 388 of 2012

KENYA UNION OF PRINTING, PUBLISHING,

PAPER MANUFACTURERS & ALLIED WORKERS.....CLAIMANT

VS

ECONOMIC INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

The Claimant, a trade union has sued the respondent seeking the following reliefs on behalf of 31 employees (grievants):-

- (a) reinstatement of the grievants to employment without loss of benefits.
- (b) alternatively the grievants be paid their terminal dues plus compensation for unfair and wrongful termination of 12 months' salary and allowances.
- (c) Injunction to restrain the respondent from further unfair and/or unlawful termination of unionisable employees and issuance of threats to potential union members.

The gist of the claimant's case is that the grievants were dismissed for joining a trade union.

In defence, the respondent has filed a replying affidavit! She denies liability and the allegation that the dismissal was unfair and unlawful. She justifies the dismissal by alleging that the grievants were dismissed from service for gross misconduct beginning with Paul Sila and then followed by the other grievants who staged an unlawful strike demanding the reinstatement of Paul Sila.

The suit was heard on 27-9-2012 and 18-10-2012 when the Claimant called Jane Kalekye and Pau Sila Nzioka as CW1 & CW2 while the Respondent called Mr. Bharesh V. Shah as RW1.

CW1 said that she was employed by the respondent from December, 2009 as a general labourer earning Kshs.275/- per day until she was dismissed on 27th February, 2012 while earning Kshs.365/- per day. That in February, 2010 she was terminated for 2 weeks. The dismissal letter of 27-2-2012 said that the reason for termination was participating in an illegal strike. She however, believed that her termination was because she had joined a Trade Union.

That she was not heard before dismissal. That she had been threatened along with other grievants to chose job or union. That she was told together with the other grievants to write letters to resign from the union or lose their job.

That on 27-2-2012, the respondent told them to leave the union and gave her 6 months to solve the problems which led them to the union. That on the same day, RW1 told the grievants (union members) to wait outside the gate. He had sent the Accountant. That later at 9.00 a.m., RW1 came out and called the grievants into the Company Premises and gave them dismissal letters without saying anything. She then took her letter to the Claimant to seek reinstatement or compensation.

On cross-examination, she confirmed that she was employed in December, 2009 on 6 months' contracts the last one being signed in January, 2012. That the salary was paid on weekly basis. That she never read the contract before signing nor was she given a copy.

She confirmed that on 27-2-2012, a security officer brought a letter which Job Wambua read requesting them to get to work but they refused. Later when she got in, she was given a dismissal letter along with the other union members.

She denied that they went on strike because of Paul Sila who had been dismissed. According to her, Paul Sila was still in his employment because he was present at the work place. That she had arrived for work with other grievants at 8.00 a.m. when the Accountant told them to wait outside the gate. That he told them "if you know you are a union member go out of the gate".

That the union members who wrote letters from 18-2-2012 of resignation from the union are still working for the respondent. Surprisingly, she did not know the name of her trade union or her membership number. She, however insisted that she joined in June, 2011. That the Accountant and the Managing Director, Mr. Shah told her to resign but she rejoined the union.

CW2 was employed in November, 2003 by the respondent and worked continuously as a storekeeper earning a salary of Kshs.11,000/- per month. That he was sacked for joining a Trade Union but the letter only said that the reason for dismissal was poor work performance which he denied. That in February, 2012 he and other union members were called into a meeting by the Managing Director of the Respondent and asked them to resign from the union on his undertaking to resolve all their problems.

That on 24-2-2012, after the said meeting, he was dismissed. That he did not know what happened on 27-2-2012 because he had already been dismissed. That he was never paid any terminal dues except salary for the days worked.

On cross-examination he said that he went to the respondent's offices to get his terminal dues on 27-2-2012. He denied the allegation that he was dismissed for poor performance of work because he had worked for 9 years and nothing was lost in the store. That he never received any warning letter before.

He however confirmed that he saw the grievants outside the respondent's gate at around 10.00 a.m. He denied reading for them any Notice which he said was read by Job Wambua. He confirmed that he used to be the union leader at the workplace and had led many colleagues to join the union.

RW1 confirmed that he was the Managing Director for the Respondent and that all the grievants were his employees at one time. He denied that their employment was unlawfully terminated. He told the court how on 27-2-2012 at about 8.10 a.m. he received a telephone call from his Accounts Controller, a Mr. Grant who told him that the workers were assembled at the gate and had refused to enter the workplace.

That he instructed Mr. Grant to let in those workers who were ready to work and tell the rest to wait outside. That he arrived at the workplace at 9.00 a.m. and after a brief from Mr. Grant, he sent his guard to call the workers into the factory so that they could discuss the problem but they refused.

That he called a Mr. Ringera, a labour officer and reported the matter who advised him to write to the workers to order them to resume duty. He complied and sent notice (BSH-3A) through the Security Guard.

The Notice was returned by a guard with comments that they would not resume duty until Paul Sila was reinstated to his job. The comments were endorsed by Job Wambua. He then called the Labour Officer again to seek more directions and he was advised to dismiss the employees.

Consequently, he wrote termination notices in terms of Appendix 6 of the claim. That the reason for termination was failure to report to work at 8.00 a.m. and engaging in an illegal strike. According to him, the grievants were involved in an illegal strike. That they did not serve any formal Strike Notice.

He further said that Paul Sila had been dismissed on 24-2-2012 for poor performance of work and had come for his dues. That he has since refused to receive the dues as calculated by the respondent.

The RW1 denied that the termination was because of joining a Trade Union. He confirmed receipt of check-off forms and a letter requesting a meeting on 22-2-2012 for signing a Recognition Agreement with the Claimant. That the list of the recruited members was 52 while the total staff was between 180 – 200. That of the 52 members, some had left employment.

The Recognition Agreement was therefore not signed on 22-2-2012 during the meeting. In the said meeting, he gave letters by the employees resigning from the Union. That he did not sign the Recognition Agreement because the Claimant had not recruited a simple majority of the unionisable members of staff. That no union dues were deducted because by the time the month ended, he had dismissed the grievants.

That some employees resigned alleging that they had mistaken the union for SACCO and yet others said they had not signed the check-off forms. He concluded by telling the court that the respondent suffered great loss due to the strike because it happened during the peak season.

On cross-examination, he insisted that between January and May, the Respondent hires 180-200 workers of which 12 are in the management and the rest are for 2 or 3 months' contract workers paid on weekly basis. He confirmed that there is a gate register but he was not sure whether the grievants signed on the 27-2-2012. He also was not sure if some of the grievants had worked for over 2 years as casuals. He denied locking the workers outside because of his meeting with the union on 22-2-2012.

He confirmed that he wrote a letter on 29-8-2011 to the Union saying that it had members in the Respondent's staff. That he denied coercing employees to resign from the Union. He also confirmed that after resigning some workers wrote other letters complaining that they were coerced to resign.

That he confirmed that there were still members of the Union in his staff but he does not deduct any Union dues because he is confused on the correct membership. That he did not know who were on the strike. He gave termination letters and the grievant refused to sign for the receipt.

He confirmed that he dismissed Sila after working for 9 years. He also confirmed that there were problems with workers even before the Union came.

At the close, the parties filed written submissions which I carefully considered alongside the evidence on record. It is not in dispute that the grievants were employees of the Respondent and that they were dismissed on either 24-2-2012 or 27-2-2012. It is also not in dispute there is no Recognition Agreement between the Claimant and the Respondent and no Union dues have ever been deducted from the grievants and remitted to the Claimant.

The issues for determination are:-

- (a) whether the respondent terminated the grievants' services unlawfully and/or unfairly;

(b) whether in view of (a) above the relief sought ought to be granted.

To answer the first issue, I have considered the termination of Paul Sila

separately from the rest of the grievants. Paul Sila was terminated without

notice on 24-2-2012 because the management was not satisfied with his work performance. He was to be paid all his dues plus one month's salary in Lieu of Notice and leave for the year 2012. The termination was by a letter dated 24-2-2012 allegedly served at 5.00 p.m.

There is nothing on record to show that he was given any hearing before the dismissal. The content of the termination letter did not give him any room to say anything because it was delivered at 5.00 p.m. and he was to leave the workplace immediately.

During his testimony, RW1 did not prove the validity of the reason for dismissing Paul Sila. Consequently, I find that the dismissal of the said Paul Sila by the Respondent on 24-2-2012 was unfair within the meaning of Section 45 of the Employment Act. The only reason for his termination is probably because of his joining a trade union and leading the exercise of recruiting the grievants to the said union. The dismissal was meant to deter his other employees from engaging in labour relations.

As regards the rest of the grievants, I am satisfied that whereas they had a good cause to agitate for their labour rights, the procedure they used was not lawful. Whether you call it a strike or picket, the fact is that they refused to enter their workplace and do their job. They acted in sympathy with Paul Sila who had been dismissed for fighting for their right to join a trade union. They had no right to down their tools without a prior formal notice. In the alternative, they should have continued their duties and commence proceedings either in court or before the Minister to agitate for their labour rights. I am satisfied that their activities were illegal and unjustifiable. I believe the testimony of RW1 that he invited the workers for dialogue but they refused. He went further to serve them with a notice to resume duty but they declined and demanded the reinstatement of Paul Sila before resuming duty. This was a fundamental breach of their obligation under their contract of service.

The Claimant did not call Job Wambua to disprove the allegation that he endorsed the grievants' demand on the said Notice to resume duty. Consequently, I find that the termination of services for the striking grievants by the Respondent was lawful and justified in the circumstances. As regards the relief sought, I will not order reinstatement of any of the grievants. Instead, I will consider them for pecuniary compensation.

With respect to Paul Sila, the Respondent will pay him the following as provided for in Section 35, 49 and 50 of the Employment Act:-

(a)	One month's salary in Lieu of Notice	-	Kshs.11,000.00
(b)	Service pay at the rate of 15 days per year of service for 9 years	-	Kshs.49,500.00
(c)	Leave on prorata basis for 2012 (5 days)	-	Kshs. 1,833.30
(d)	12 months' salary for unfair termination	-	<u>Kshs.132,000.00</u>
	TOTAL	=	<u>Kshs.194,333.30</u>
(e)	Costs and Interest		

In light of the fact that all the grievants did not testify and the material before me, I will reserve my final decision on the quantum of terminal dues for the said grievants until I get a report from the

Labour Office.

Consequently, I direct the Labour Officer in charge of the area where the Respondent's factory is situated to visit the office of the Respondent and make a report containing the calculated terminal dues within two (2) weeks from today.

I further direct the respondent to accord the said Labour Officer maximum cooperation during the exercise.

In the meanwhile, the Respondent shall pay terminal dues for Paul Sila or risk execution.

Orders accordingly.