



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1900 OF 2014

CONSOLIDATED WITH CAUSE NO 1901 OF 2014

EZEKIEL MAGETO OBURE.....1ST CLAIMANT

DANIEL ISIKA MULEI.....2ND CLAIMANT

VS

MALPLAST INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by Ezekiel Mageto Obure as the 1st Claimant and Daniel Isika Mulei as the 2nd Claimant, against their former employer, Malplast Industries Limited. The claim is contained in Memoranda of Claim dated 26th September 2014. The Respondent filed separate Statements of Defence on 4th December 2014.

2. At the trial, the Claimants testified on their own behalf and the Respondent called its Director, Dhurpun Shah and Corporal Jeremy Ajuoga.

The Claimants' Case

3. The 1st Claimant, Ezekiel Mageto Obure was employed by the Respondent as a general labourer from 2009 until 23rd May 2014, when he was dismissed on allegations of theft of 25 kilograms of plastic materials. He states that the said allegations were untrue and baseless.

4. The 1st Claimant maintains that his dismissal was unlawful and unfair. He claims the following:

- a) Salary in lieu of notice;
- b) Salary from the month of June 2014 @ Kshs. 24,149 until end of his contract;
- c) Damages for unlawful dismissal;
- d) Certificate of service.

5. The 2nd Claimant, Daniel Isika Mulei was also employed by the Respondent sometime in 2009. He

worked until 23rd May 2014, when he was dismissed on similar allegations as the 1st Claimant. The 2nd Claimant denies the said allegations. He terms his dismissal as unlawful and unfair and claims the following:

- a) Salary in lieu of notice;
- b) Salary from the month of June 2014 @ Kshs. 24,149 until end of his contract;
- c) Damages for unlawful dismissal;
- d) Certificate of service.

The Respondent's Case

6. In its Statements of Defence dated 3rd December 2014 and filed in court on 4th December 2014, the Respondent admits having employed the Claimants as general labourers in 2009, which employment was formalised by six (6) months' employment contracts running from 1st March 2010 to 30th August 2010.

7. The Claimants' employment was thereafter renewed through periodic contracts of 6 months each, over the period between 1st March 2011 and 31st August 2014. The Respondent avers that each contract terminated upon the issuance of a fresh one with the new terms and conditions of employment superseding the previous ones.

8. The Respondent states that the 1st and 2nd Claimants, each earned a net salary of Kshs. 11,086 and a house allowance of Kshs. 1,663, during the contractual period of 1st March 2014 to 31st August 2014.

9. The Respondent further states that on 22nd May 2014, the 1st and 2nd Claimants were suspected of attempting to commit the offence of stealing by servant contrary to Section 281 of the Penal Code. Particulars were that the Claimants had attempted to steal five (5) bags each weighing approximately 25 Kilograms, of plastic material and thereafter attempted to sell them to a customer of the Respondent.

10. Upon receiving a tip-off from the said customer, the Respondent lodged a complaint at Embakasi Police Station. On 22nd May 2014 at 11.30 hours, the Claimants were arrested and booked at the Police Station under OB No. 23/22/05/2014.

11. The Respondent further states that at 11.35 hours on the same day the claimants confessed having committed the said offence which entry was recorded as OB No. 31/22/05/2014. Upon the Claimants confessing, the Respondent agreed to withdraw the criminal complaint on the understating the Claimants would be dealt with in a more appropriate manner.

12. The Respondent states that the Claimants were given every opportunity to explain their conduct to the Respondent's Directors and to the Investigating Officer at Embakasi Police Station and upon their confession, the Respondent was left with no other option but to dismiss them. The Claimants were issued with dismissal letters dated 22nd May 2014, setting out in full, the reasons for the dismissal. They were also paid their terminal dues and were issued with certificates of service.

13. The Respondent maintains that the Claimants' dismissal was lawful and fair.

Findings and Determination

14. There are two (2) issues for determination in this case:

- a) Whether the Claimants' dismissal was lawful and fair;

b) Whether the Claimants are entitled to the remedies sought.

The Dismissal

15. The Claimants' state that they were dismissed verbally but the Respondent produced dismissal letters stating as follows:

"THEFT OF COMPANY PROPERTY

It is my duty to inform you that as of today, 22nd May 2014, your employment with Malplast Industries Ltd is terminated due to your misconduct in being involved in theft from the company. On 22nd May 2014, the management was informed that you were colluding to sell the company products which you had already stolen from the company premises.

As you know company theft is a serious offense. This offense is covered in detail in the Employment Act section 44(g). Our investigation has indeed confirmed that you stole the company products and you yourself have confessed to the criminal offense.

The management has decided as per your request not to press any charges against the offense committed (sic) but rather dismiss you from rendering your services to the company with effect from today, 22nd May 2014.

We wish you all the best in your endeavors.

Yours faithfully

FOR: MALPLAST INDUSTRIES LTD

(Signed)

Dhrupun Shah

DIRECTOR

16. The reason for the Claimants' dismissal, as stated in the dismissal letters produced by the Respondent and reiterated by its Director, Dhrupun Shah in his testimony, was theft of the employer's property. This is one of the grounds categorised as gross misconduct which may render an employee liable to summary dismissal. Like all other grounds however, it must be established at the shop floor.

17. From the evidence on record, it would appear that the Respondent relied on an alleged confession by the Claimants, to dismiss them. The Claimants however denied making any such confession and there was no record of any placed before the Court.

18. The Respondent's 2nd witness, Corporal Jeremy Ajuoga produced copies of two OB entries made at an Administration Police Station in Embakasi Division on 22nd May 2014. The first entry is No. 23 made at 11.30 HRS and confirms the Claimants' arrest. The second entry is NO. 31 made at 13.15 HRS and confirms the Respondent's decision not to press charges against the Claimants after their confession. Assuming that the OB entries are correct, they do not constitute a confession as defined in law.

19. The Respondent's decision not to pursue criminal charges against the Claimants was not a licence to dismiss them without giving them an opportunity to respond to those same charges administratively. What the Respondent should have done was to serve the Claimants with administrative charges to elicit their response. This is the whole essence of the mandatory provisions of Section 41 of the Employment Act, 2007.

20. In light of the Respondent's failure to comply with Section 41 of the Act, any charge remained untested and unproved and could not therefore be the basis for dismissal.

Remedies

21. Consequently, I find the Claimants' dismissal substantively and procedurally unfair and award each of the Claimants eight (8) month's salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's conduct in the termination transaction, with specific focus on its failure to present any charges to the Claimants (see *United States International University v Eric Rading Outa [2016] eKLR.*) I also award each Claimant one (1) month's salary in lieu of notice.

23. Regarding the claim for salary from the month of June 2014 until the end of contract, I agree with the submission by the Respondent that such a claim has no basis in law and therefore dismiss it.

24. Finally I enter judgment in favour of the Claimants as follows:

1st Claimant: Ezekiel Mageto Obure

- a) 8 months' salary in compensation.....Kshs. 101,992
- b) 1 month's salary in lieu of notice.....12,749
- Total.....114,741**

2nd Claimant: Daniel Isika Mulei

- c) 8 months' salary in compensation.....Kshs. 101,992
- d) 1 month's salary in lieu of notice.....12,749
- Total.....114,741**

25. These amounts, which are subject to statutory deductions, will attract interest at court rates from the date of delivery of this judgment until payment in full.

26. The Claimants will have the costs of the case.

27. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF APRIL 2018

ONESMUS MAKAU

JUDGE

Appearance:

Miss Kabita for the Claimants

Mr. Shah for the Respondent