



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmutut, J.,

J.M. Kilonzo & A.M. Yarrow, Members.)

CAUSE NO.42 OF 2003

KENYA BUILDING, CONSTRUCTION, TIMBER,

FURNITURE & ALLIED INDUSTRIES EMPLOYEES' UNION.....Claimants.

v.

BIASHARA MASTER SAW MILLERS LTD.....Respondents.

Issue in Dispute:-

“Wrongful dismissal of Messrs. Michael Gakiria Mwangi and Ngugi Muchiri (hereinafter called the grievants.)

E.M. Gikunju for the Claimants (hereinafter called the Union).

Ms. Njeri Mucheru, Advocate, of M/S. Gadhia & Mucheru, Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

This dispute was referred to the Court for consideration and determination by the Minister for Labour on 14th May, 2003 under powers vested in him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act). The Minister's reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14(9)(e) and (f) of the Act, were received by the Court on 19th May, 2003. The Union submitted its written memorandum on 14th July, 2003, and the Company filed its reply statement on 25th August, 2003. The dispute was heard on 18th September and 29th October, 2003, and final submissions were made on 14th April, 2004.

According to Mr. Gikunju for the Union, the first grievant was employed by the Company as a sawyer and breakdown machine operator in August, 1990, while the second grievant was also employed by the Company as a lorry driver as well as lift operator in February, 1992. Both grievants, who had clean or unblemished employment records, were verbally and orally dismissed on 1st August, 1998, while earning a consolidated monthly salary of Kshs.2,420/= and Kshs.2,800/= respectively.

On the other hand, the learned counsel for the Company, Ms. Mucheru, stated that the first grievant was employed as a breakdown machine operator in March 1992 and not August 1990 as alleged by the Union, but he absconded from or deserted duty or work after receiving his salary on 31st July, 1998.

She pointed out that the employment record of the first grievant showed that he always absented himself from work whenever he was questioned about frequent burnt fuses in the machine, which was costing the Company a lot of money; but when the machine was operated by someone else, it would run smoothly. As regards the second grievant, the learned counsel submitted that he was employed as a tractor driver, but the same broke down in June 1998 when the engine knocked due to his negligence in having it serviced on time. He was given a new tractor but it also broke down because he neglected to service it. In the circumstances, the second grievant too absconded from, or deserted, duty or work after receiving his salary on 31st July, 2003.

The parties attempted to resolve the matter at their own level but failed; and on 25th August, 1998, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. P.W. Kagiri of Molo Labour Office to act as the Investigator. On 6th June, 2000, the Minister released to the parties the following findings and recommendation:-

“FINDINGS.

..... both parties are in agreement as to the times and nature of the complainants employment. What is in dispute is the cause of their termination in that the management insists that both left employment on their own accord while the Union insists that they were victimised.

..... the two were very active union members with the responsibility of recruiting and organizing fellow employees to be union members the union and the management had a long standing dispute concerning recognition. It cannot be ruled out that the management dismissed the two in a bid to defeat the union’s chances of securing a recognition agreement. This is borne out by the fact that prior to their identification as union members both complainants had clean employment records. The management’s assertion that Mr. Muchiri absconded so that the union can demand his retirement benefits is to say the least beyond credulity. Likewise that Mr. Mwangi absconded because of his alleged poor workmanship is stretching imagination too far.

RECOMMENDATION.

..... I recommend that the dismissals be reduced to normal termination and that the terminal dues be calculated on the basis of the building order prevailing at that time. I further recommend that each be paid four months wages as compensation for wrongful termination and loss of employment.”

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this matter. The Union accepted the recommendation, but the Company rejected it on the ground that the same was biased and unfair because it did not take into account the unsatisfactory employment records of the grievants (Union apps. 2 & 3).

Mr. Gikunju submitted that the dismissal of the grievants caused them unbearable mental torture, and was unlawful and harsh because they were not served with any written warning letters for the alleged offence. In the circumstances, Mr. Gikunju urged the Court to uphold the Minister’s findings and recommendation, and award as follows in accordance with the Regulation of Wages (General Order) 1998:-

1. First Grievant (Aug. 1990 to Aug. 1998 – 8 years).

- (a) Notice pay – 2 months x Kshs.2,420/= = Kshs. 4,840/=.
 - (b) Leave – 8 years x Kshs.2,420/= = “ 19,360/=.
 - (c) Gratuity – 10 days x 8 years x $\frac{\text{Kshs.2,420/=}}{26}$ = “ 7,446/=.
 - (d) Compensation – 4 months x Kshs.2,420/= = “ 9,680/=.
- Total = Kshs.41,326/=.

2. Second grievant (Feb. 1992 to Aug. 1998 – 6 years)

(a) Notice pay – 2 months x Kshs.2,800/= = Kshs. 5,600/=.

(b) Leave – 6 years x Kshs.2,800/= = “ 16,800/=.

(c) Gratuity – 10 days x 8 years x Kshs.2,800/= = “ 8,615/=.

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(d) Compensation – 4 months x Kshs.2,800/= = “ 11,200/=.

Total = Kshs.42,215/=.

The learned counsel, Ms. Mucheru, emphasized that the grievants inconvenienced and caused great loss to the Company by absconding from work or duty from 1st August, 1998 without notice. As regards the demand in respect of leave entitlement, the learned counsel submitted that the grievants took their leave days and are, therefore, not entitled to any payment thereof. Thus, she submitted, the whole demand by the grievants is a sham intended to extort money from the Company when they should in fact compensate the latter for loss it had suffered as a consequence of their absconding.

In his evidence, the Manager of the Company, Mr. Mohammad Hassan Yuraff, R.W.I, vehemently denied that the grievants were dismissed for union activities as alleged by the Union; but, on the contrary, he deponed that after receiving their pay on 31st July, 1998, the grievants failed to turn up at work from 1st August, 1998. He stated that he did not see the second grievant since he left employment but he saw the first grievant when he (first grievant) went to the Company's premises for a letter to enable him claim his benefits from NSSF; and when he (witness) inquired from him (first grievant) why he left employment, the latter simply told him that he was tired of work and had retired. Mr. Yuraff stated further that the first grievant came back for a second letter to enable him furnish a copy to the District Officer and he gave him. On being asked why he did not give the grievants notice for absconding from work, Mr. Yuraff said that he sent messengers to their (grievants) home areas to inquire as to what could have happened to them and he received information that they had moved to Nairobi. He pointed out that upon the sudden departure of the grievants, the Company suffered in its business as there were no persons to replace them, and finding new employees and training them cost time and money.

In the circumstances, the learned counsel prayed that the case be dismissed as baseless.

There is no dispute that the grievants had worked for the Company, with clean employment records, for the said 8 and 6 years respectively, and as such they were permanent employees. The Company strongly maintained that the grievants absconded from or deserted duty after receiving their pay on 31st July, 1998, while the Union argued that they were dismissed for trade Union activities. In my opinion, even if the grievants absconded from or deserted duty as alleged by the Company, its failure to issue notices of termination of their services and to afford them an opportunity to represent their own version rendered the action by the Management of the Company ineffective in law because if a chance was given to them they might have been able to put forward some mitigating circumstances or even grounds of their absence. It is not enough for Mr. Yuraff, R.W.I., to say that he sent messengers to the grievants' home areas to inquire as to what might have happened to them. As stated hereinabove, the grievants were permanent employees and as such they were entitled to notice and the benefit of the rules of natural justice – “the Administrator is not a Judge in the proper sense of the word, but he must give the party an opportunity of being heard and stating their case and their view” (see Constitutional Law by Wade and Phillips, page 274). Therefore, the contention of the Company that the grievants absconded from or deserted work does not appear to me to have any force; and in my humble view, they were verbally summarily dismissed from service for their trade union activities, without any benefits or notice or any good reason though their services were all along satisfactory as nothing adverse was said or proved against them.

Accordingly, and considering the lapse of six years since the grievants were verbally summarily dismissed from service, I am firmly of the view that they are legally entitled to the terminal benefits prayed for by the Union at pages 5 and 6 hereinabove, and I so award.

I have sought, considered and accepted the advice or opinion of the Members of the Court in coming to this decision.

DATED and delivered at Nairobi this 28th day of July, 2004.

Charles P. Chemmutter,

JUDGE.