Kenya Engineering Workers Union v Farm Engineering Industries Ltd (Cause 47 of 2019) [2022] KEELRC 4005 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4005 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE 47 OF 2019

S RADIDO, J

SEPTEMBER 28, 2022

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... CLAIMANT

AND

FARM ENGINEERING INDUSTRIES LTD ..... RESPONDENT

JUDGMENT

1. The Kenya Engineering Workers Union (the Union) sued Farm Engineering Industries Ltd (the Respondent), and it stated the Issue in the Dispute as follows:

   Unprocedural, unlawful and unlawful dismissal of Mr Evans Nyakundi.

2. The Respondent filed a Response on 13 September 2019, and the Union filed an amended Memorandum of Claim on 6 December 2021, and this prompted the Respondent to file another Response on 17 March 2022.

3. The Cause was heard on 4 April 2022 and 19 May 2022 (the Grievant and a Service Manager with the Respondent testified).

4. The Union's submissions were not on record by 15 July 2022 as directed, and the Respondent on 29 August 2022.

5. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

6. The Respondent employed Mr Evans Nyakundi (the Grievant) as a mechanic in 1998. He was later deployed as a driver.

7. The Respondent suspended the Grievant around 19 November 2018, and the letter indicated that investigations had established his involvement in the theft of the Respondent's assets.

8. The suspension was followed by summary dismissal on 27 November 2018 (the Union reported a trade dispute, but the Respondent disagreed with the findings and recommendations).

9. Section 35(1)(c) of the *Employment Act*, 2007, requires an employer to issue a written notice at least 28 days in advance of termination. The Respondent did not issue such a letter.

10. Similarly, section 41(2) of the Act makes it mandatory for an employer to conduct an oral hearing in cases warranting an employee's summary dismissal before deciding to dismiss.

11. The Respondent did not place before the Court any evidence that it called the Grievant to an oral hearing to respond to the allegations of involvement in the alleged theft.

12. The Court finds that the summary dismissal of the Grievant was unfair.

Compensation and Pay in lieu of notice

13. The Grievant served the Respondent for nearly 20 years, and in consideration of the length of service, the Court is of the view that the equivalent of 6 months' gross salary as compensation would be fair (gross salary was Kshs 23,897/- in May 2018).

14. The Respondent did not issue an advance written notice of termination as contemplated by section 35(1)(c) of the *Employment Act*, 2007. The Court will allow the equivalent of 1 month's salary in lieu of notice in the sum of Kshs 22,368/-.

Service Gratuity

15. The Grievant contributed to the National Social Security Fund and, by dint of section 35(5) & (6) of the *Employment Act*, 2007, is not entitled to service pay.

Accrued leave

16. The Union sought Kshs 25,728/- said to be accrued leave. No evidential foundation to this head of the claim was put before the Court, and relief is declined.

Leave travelling allowance

17. The Union did not present an evidential foundation to this head of the claim, and relief is declined.

Earned salary

18. Again, no evidential foundation to this head of the claim was placed before the Court and relief is declined.

Certificate of Service

19. A Certificate of Service is a statutory right, and the Respondent should issue one to the Grievant.

Conclusion and Orders

20. The Court finds and declares that the dismissal of the Grievant was unfair, and he is awarded:

    i. Compensation Kshs 143,382/-

    ii. Pay in lieu of notice Kshs 22,368/-

    TOTAL Kshs 165,750/-

21. Respondent to issue a Certificate of Service to the Grievant within 21 days.

22. The parties are social partners. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 28TH DAY OF SEPTEMBER 2022.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For Union Mr. Makale, industrial Relations Officer

For Respondent M.M. Gitonga & Co. Advocates

Court Assistant Chrispo Aura