



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1023 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

TAILORS AND TEXTILES WORKERS UNION...CLAIMANT

VERSUS

PREMIER BAG AND CORDAGE.....RESPONDENT

JUDGMENT

1. The Claim herein was filed by the Claimant vide memorandum of claim dated 17th June 2014 and filed on 19th June 2014 through the firm of Okweh Achiando and Company Advocates. The memorandum of claim was amended vide amended memorandum of claim dated 12th September 2017.

2. In the amended memorandum, the Claimant seeks the following remedies –

- i. A declaration that the grievant suffered unfair wrongful termination in the first instance.
- ii. Three months' pay in lieu of notice
- iii. 12 months' compensation for the loss of employment
- iv. Payment of overtime worked and unpaid (two hours per day)
- v. Payment of unpaid house allowance
- vi. Certificate of service
- vii. Costs of this suit with interest on (iii) and (iv) above

3. The Respondent filed an amended response to the memorandum of claim dated 4th June 2018. The claim was fixed for hearing on numerous occasions but the hearing did not take off for one reason or other. The hearing however took off on 11th October 2016 when the Claimant's case was partially heard. After about 11 further appearances, the Claimant's case was on 18th May 2021 concluded. The Respondent's Counsel Ms Mwangi holding brief for Mr. Wandago for the Respondent informed the Court that the Respondent did not wish to cross examine the Claimant and neither did it have any witness and would be relying on its pleadings and written submissions. The Respondent's case was consequently closed and directions given for filing written submissions. Only the Claimant filed submissions.

4. The facts of this case as detailed in the Claimant's testimony are thus not contested.

5. The Claimant is a trade union registered in Kenya to represent employees in the tailoring and textiles sector. It filed the instant suit on behalf of the Claimant's member Kinyanyui Thairu, the grievant, who was employed by the

Respondent as a security guard.

6. The Respondent is a limited liability company duly incorporated under the Company's Act 486 with its place of business at Nairobi.

7. The grievant was employed by the Respondent as a security guard in 2009. His first salary was Kshs.3,346. At the time of leaving employment, the grievant was earning Kshs.5,725.

8. The Claimant testified that his problems started on 3rd March 2013 when he asked for an off day from his Supervisor Mr. Opiyo to take his Father to hospital. When he reported back on 5th March 2013, a Supervisor by the name Mr. Gichuki told him not to start work and to see the personnel officer, Mr. Ibrahim. Mr. Ibrahim told him to stay away for three days.

9. On reporting back, he was informed that he had been sacked. No reason was given to him for the sacking. Mr. Ibrahim told him that he (Mr. Ibrahim) did not want to talk to the grievant.

10. The grievant testified that he was never given a show cause letter. He was never given a hearing and no charges were presented to him for the same reason.

11. He testified that he was harassed for being a shop steward. That about 10 other guards were sacked after him for the same reason.

12. The grievant testified that he worked from 6 am to 6 pm but was given overtime for two hours per day only instead of four hours.

13. He further testified that his salary was Kshs.8,131 and he was housed. He testified that on the day he was sacked he was chased away from the house and his children were locked inside the house. That the children had to get out of the house through the window.

14. The Claimant further testified that he did not take annual leave during the period he worked for the Respondent.

15. In its submissions, the Claimant posits that the termination of the Grievants employment was unfair as it did not comply with Section 45 of the Employment Act. For emphasis the Claimant relies on the cases of **Judicial Service Commission v Gladys Boss Shollei & Another**, **Caliph O. Ogega v The National Social Security Fund**, **Benedict Mtoto Mwabili v County Public Service Board Taita Taveta County**, **Mary Chemweno Kiptui v Kenya Pipeline Company Limited**, **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited**, **Kenfreight (E.A.) Limited v Benson K. Nguti**, **CMC Aviation Limited v Mohamed Noor** and **Grace Bosibori Nyamongo v Kenya Institute of Administration**.

16. I have considered the pleadings and submissions. The issues for determination are whether the termination of the grievant's employment was unfair and if he is entitled to the remedies sought.

17. The Respondent having not cross examined the grievant or presented a witness to controvert the testimony of the grievant, his evidence to the effect that he was dismissed verbally without being given the reasons for the dismissal and without being taken through a disciplinary hearing remains unrebutted. His further testimony that the Respondent targeted him because he had become a member of the Union and was championing the interests of the employees following his election as shop steward also remains unrebutted.

18. Section 45(2) provides that where an employer fails to prove either or both valid reason and fair procedure, the termination shall be deemed to be unfair. Section 45(1) prohibits unfair termination while Section 45(5) provides for circumstances when termination will be considered unjust and inequitable.

19. Further, Section 46 provides for circumstances when termination will be automatically deemed unfair. Among them are –

- the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
- an employee's membership or proposed membership of a trade union;
- the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
- an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
- an employee's refusal or proposed refusal to join or withdraw from a trade union;

20. The termination of the Claimant's employment was unfair both substantively and procedurally as no reason was given for the termination and he was not subjected to any disciplinary process.

21. The grounds for termination according to the grievant, being participation in trade union activities and taking his Father to hospital were not valid reasons for termination.

Remedies

i. I declare the termination of the grievants employment to be unfair both substantively and procedurally.

ii. The grievant having been unfairly terminated is entitled to pay in lieu of notice which I award him at one month's salary in lieu of notice, there being no proof that the grievant is entitled to three months' salary in lieu of notice as prayed.

iii. The grievant having prayed for 84 days' leave not taken, which is not controverted by the Respondent, I award him pay in lieu

thereof in the sum of Kshs.18,493.

iv. Overtime of two hours per day is awarded to the grievant of the period worked at Kshs.85,860.

v. The grievant having testified that he was housed, is not entitled to house allowance. The prayer is rejected.

vi. In view of the circumstances under which the Grievant's employment was terminated being verbal and without a hearing, further in view of the reason for termination being his participation in union activities and taking a day off with permission to take his sick father to hospital, further taking into account all relevant factors under Section 49(4) of the Employment Act, I award the Grievant maximum compensation equivalent to 12 months' salary at Kshs,68,688.

vii. The Respondent shall issue a certificate of service to the grievant.

viii. The Respondent shall pay the Claimant's costs to this sit and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER, 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE