REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1417 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JONES AMADI JAIKA.....CLAIMANT
VERSUS

GRAPHICS AND ALLIED LIMITED.....RESPONDENT

JUDGMENT

Vide a Statement of Claim filed on 13th August 2015, the Claimant who worked for the Respondent as a Graphic Artist alleges that he was wrongfully dismissed from employment by the respondent on 19th February 2015. He avers that despite working for 5 years, the Respondent disgracefully dismissed him over unfounded and malicious allegations that he was never informed of and he did not defend himself against the said allegations.

He seeks the following prayers:

1. That the court do examine the reasons and merit the termination of the grievant's termination and find that the termination was unlawful.

2. That the court do find that the Respondent's action of continued withholding, failing, refusal and or neglecting to pay the claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.

3. That the Respondent has been in breach of the Employment Act Chapter 226 Laws of Kenya and other relevant labour laws.

4. That the Respondent is under obligation to pay the grievant his unpaid salaries earned but not paid.

5. That the Respondent pay the Applicant his salaries earned but not paid, leave and leave days but not given and/or paid for.

6. That as a result the Court do order that the Respondent to pay the claimant all his terminal benefits and other unpaid dues computed as hereunder;

i. Three months' salary in lieu of notice

3 x 24,270..... Kshs.72,810

ii. Service pay 5 x 24,270..... Kshs.12,350

iii. Salary for 19 days worked in February..... Kshs.17,425

iv. Deducted pay from leave..... Kshs.8,910

v. Damages for unlawful termination

Kshs.24,270 x 12 months..... Kshs.291,240

Total Kshs.511,735

7. Costs of this claim

8. Interest on A and B above at court rates

9. Any other relief as this Court may deem just and fit to give

In its reply to the claim, the Respondent avers that the claimant being unionisable cannot represent himself in Court in the absence of Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp and Packaging Industries (KUPRIPUPA). It contends that the Claimant was found to be an unsuitable employee who caused it to incur losses on account of his unprofessionalism and negligence.

It avers that the Claimant's termination was lawful and valid as due process was carried out as provided by law and in the Collective Bargaining Agreement between the respondent and the Union. It further avers that it offered to pay the Claimant all his dates but he refused to present himself for tabulation.

Claimant's Case

The Claimant testified that he was employed in December 2009 and that his last salary was Kshs.24,270. He testified that after his dismissal, the Union discussed with the Respondent and he was paid some money but he was not satisfied with the settlement.

In cross-examination, he testified that he had been issued with 3 warning letters on absenteeism but was never issued with verbal warnings. He testified that he had been issued with a warning letter in January 2015. That at the time he was unwell and he called the Respondent but no one picked up his calls. He testified that he did not submit treatment notes.

He testified that on 18th February 2015, he was not at work as he was unwell but did not have permission to be away from work. He stated that he was issued with a warning letter dated 18th February 2015 but he did not sign it. He testified that he was forced to sign the warning letter but he later cancelled his signature on the letter.

He testified that there were between the union and discussions with the Respondent. That he was directed on what to do and was asked why he did not submit the sick sheet. He testified that he reported the termination of his employment to the Union but he did not accompany the Union to the meeting with the Respondent. He testified that he was thereafter paid Kshs.39,000.

He testified under cross examination that there were times he reported to work late because the gate was closed. He testified that he responded to the warning letters and gave a reason for absenteeism. He testified that he did not produce any evidence that he was sick.

In re-examination, he reiterated that he was not given an opportunity to be heard. He further stated that clause 12(d) of the CBA provided that he was to be issued with 4 warning letters before termination yet he had only been issued with 3 warning letters.

Respondent's case

LEONARD WESONGA MAKIO, the Respondent's supervisor testified as RW1. He testified that the Claimant would be absent from work without notice. He testified that whenever he reported back to work, the claimant would state he was sick but did not seek medical attention as he was resting.

RW1 testified that the Claimant never submitted any sick sheet despite being asked to do so. He testified that the Claimant was severally called for discussions to give an explanation and he always promised that he would change. He testified that the Claimant did not follow the schedule of duty and instead would do tasks that were different from the schedule.

He testified that the Claimant signed the warning letter dated 18th February 2015 and later cancelled his signature. He testified that the claimant was called for a meeting because customers complained that his section was failing. He testified that the reason for the claimant's dismissal was that he refused to write a response to the letter of 18th February despite being given time to respond by following day. He testified that the claimant was present at the meeting with the Union.

In cross-examination, RW1 testified that every time the claimant absented himself without permission, they had meetings with him.

Parties' Submissions

The Claimant submitted that the allegations cited in the letters dated 30th January 2015 and 18th February 2015 differed thus his dismissal was unjustified. He submitted that the reasons advanced for his dismissal were an afterthought and intended to portray him as incompetent.

He submitted that RW1 failed to produce evidence that the claimant was accorded a fair hearing as contemplated in section 41 of the Employment Act. He further submitted that the Respondent failed to issue a show cause notice notifying him of the intention to dismiss him or to accord him an opportunity to defend himself. He submitted that in **John Rioba Maugo v Riley Falcon Security Services Limited** the court held that a court cannot determine whether the hearing was fair without the production of minutes of the disciplinary hearing.

He submitted that the settlement of Kshs.39,000 was null and void as it was not in agreement with the CBA. He submitted that he is entitled to service pay under Section 35 (5) of the Employment Act. He submitted that he is entitled to 12 months' salary as compensation and costs of the suit.

The Respondent submitted that in the numerous meetings between Union and itself, the Union sought indulgence that the summary dismissal be reduced to a normal termination for purposes of ensuring that the Claimant's dues were paid. It further submitted that the Claimant admitted that he was constantly absent thus his assertions that the termination was unfair false.

It submitted that the Court should find that the Claimant was guilty of absconding duty and that he was not unlawfully terminated. It submitted that the Union having negotiated the termination, the issue of notice does not arise under Clause 12(a) of the CBA which provides for one month's notice.

It submitted that the amount received by the Claimant included his service pay and the days worked in February.

Determination

The undisputed facts are that the Claimant was employed by the

Respondent as a graphic artist until 19th February 2019. The issues for determination are whether the Claimant was wrongfully dismissed and whether the claimant is entitled to the reliefs sought.

In its letter dated 19th February 2015, the Respondent summarily dismissed the Claimant for his continuous gross misconduct. Prior to this, the Respondent issued the Claimant with a warning letter which stated thus:

> *"18th February 2015*
>
> *Dear Jones Amadi,*
>
> *RE: WARNING LETTER*
>
> ...
>
> *Despite several verbal talks with you and the written letter t you dated 30th January 2015, you continue to behave in an irresponsible manner resulting in inefficiency with your work.*
>
> *These are some of the irregularities noted:*
>
> *1. You continue to be absent at your own will without prior notice.*
>
> *2. You spend much of your time idling with little or no attention to your work.*
>
> *3. You work on sensitive examination papers with headphones on your ears listening to music. This is the cause of delays in the work which is always on a tight schedule. This also gives a very bad impression to visiting customers all of who are teachers from distinguished educational institutions all over the country.*
>
> *4. You bring in movies during working hours and have many times infected the computer with viruses. This is not productive for the work environment.*
>
> *5. You work at your own pace and have no regard for our strict deadlines*
>
> *This amounts to gross misconduct and affects all those working with you. Today, Wednesday 18th February you again failed to report to work with any prior notice. Part of the work done by you and which was to be sent for urgent proofreading has to be done by the Director.*
>
> ...
>
> *This calls for your instant dismissal for gross misconduct. However, we are giving you another opportunity to refrain from all this misbehaviour failing which we will have no hesitation in dismissing you from your job with no benefits payable as per*
>
> *KUPRIPUPA CBA."*

The Claimant confirmed having received 3 warning letters. He submitted that the irregularities stated in the warning letter dated 30th January 2015 were not similar to those stated in the letter dated 18th February 2015. In both letters, the Respondent raised the issue of watching movies and listening to music during working hours. The Claimant admitted that he absented himself from work and had no medical records to support his reasons for being away from work. It is evident that the Claimant habitually absented himself from work and each time apologised for his actions as his letters dated 28th March 2014 and 5th June 2014. It is evident that there were constant concerns about the Claimant's conduct. I therefore find that there were valid reasons for the dismissal of the Claimant.

RW1 testified that they gave the Claimant an opportunity to defend himself every time he absented himself. The Respondent however did not

prove that the Claimant was given an opportunity to defend himself before termination. The Union and the Respondent held a meeting to deliberate the Claimant's case. The Union in its letter dated 4th September 2015 stated that the Claimant was present during the negotiation where the management agreed that the summary dismissal be reduced to normal termination and that having been paid his dues, the Claimant did not have any claim against the Respondent.

Section 41(2) of the Employment Act provides:

> **Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

The negotiations between the union and the respondent did not amount to an opportunity to be heard. The letter dated 4th September 2019 from the Union does not indicate that the Claimant was given an opportunity to be heard during that meeting as the deliberations seem to have been aimed at substituting the dismissal with a normal termination and having the termination dues paid. I find that there is no evidence to prove that the Claimant was heard prior to the termination of his employment.

With respect to terminal dues, the Claimant submits that he was forced to receive the sum paid to him as his terminal dues. In the letter dated 4th September 2015, the Union stated that the Claimant did not have any further claim against the respondent having received his terminal dues.

Clause 12 (a) and (b) of the CBA, provides:

> *(a) Established employees of up to five (5) years service shall be subject to not less than one calendar month's pay in lieu. On resignation the employee shall give calendar month's notice or pay one months salary in lieu.*
>
> *Those with more than five (5) years' service shall be subject to two calendar months' notice or two months' pay in lieu and on resignation shall give two calendar months' notice or pay two months' salary in lieu.*
>
> *(b) An employee whose employment has been terminated by the employer shall be paid gratuity as 51 days basic salary for each completed year of service except where such termination is on account of discipline.*
>
> *Provided that:-*
>
> > *An employer who operates a pension scheme or provident fund shall not pay the gratuity instead the employee shall get his/her entitlement under such scheme."*

The Claimant received Kshs.39,630 which was tabulated by the Respondent to constitute service pay. The Claimant's dismissal having been converted to normal termination, he was entitled to one month's salary in lieu of notice under clause 12 (a) of the CBA. This amount was not paid. Thus, he is entitled to **Kshs.24,270**.

With respect to 19 days worked in February 2015, the Respondent stated that the claimant had 13 days carried forward. It did not state which days were referred to. I find that the Claimant having worked for these days, is entitled to the days worked during that period. He is therefore entitled to **Kshs.17,452** being salary for 19 days worked in February 2015.

With respect to deducted pay from leave, I find that this claim fails as the Claimant did not prove any such deduction.

Having found that the Claimant was not given an opportunity to be heard, I award him 2 months' salary as compensation for unfair termination in the sum of (Kshs.24,270 x 2) = **Kshs.48,540**. In so finding, I take into account the Claimant's length of service and inappropriate conduct of constant absenteeism during his employment. I am further guided by Section 49(4)(b) and (k) of the Employment Act.

Conclusion

I thus enter judgment for the claimant against the respondent as follows –

1. Pay in lieu of notice..... Kshs.24,270.00

2. 19 days worked in February 2015..... Kshs.17,452.00

3. 2 months compensation..... Kshs.48,540.00

Total Award **Kshs.90,262.00**

4. Costs of the suit

5. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

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 has 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