



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 38 OF 2016

(Before Hon. Justice Mathews N. Nduma)

GODFREY ODUOR ODHIAMBO.....CLAIMANT

VERSUS

UKWALA SUPERMARKET KISUMU LIMITED...RESPONDENT

JUDGMENT

1. The suit initially filed on 11th February 2016 was amended on 11th March 2016 and the claimant prays for the following reliefs:
 - a. One month salary in lieu of notice.
 - b. Underpayments from the period of employment in October 2015 when claimant was paid Kshs. 13,752 instead of Kshs. 17,003.
 - c. Leave allowance and house allowance.
 - d. Severance pay for 5 years.
 - e. Certificate of service
 - f. General damages for unfair termination.
 - g. Interest and costs.
2. CW1, the claimant testified under oath that he was employed by the respondent as a shop assistant in November 2010. That he worked continuously until November 2015. That the claimant was the Chairman of Central Staff Committee at the shop and at the time of his dismissal, the Ukwala shop was in the process of being taken over by Choppies Company.
3. That himself and the Human Resource Officers were attending meetings to discuss the matter and the claimant represented the workers interest in those meetings. That sometimes in September 2015, the claimant attended such meetings at Nairobi and was accompanied by the Human Resource Officer.
4. That the claimant had been permitted by the respondent to travel to Nairobi to attend the meetings and was facilitated by the Branch Supervisor who also attended the meetings.
5. That upon return and on 9th November 2015, the claimant was served with a show cause letter on allegations of absconding work for 7 days. The claimant responded to the notice to show cause explaining that he had authority to attend union meetings at Nairobi and had not absconded work.
6. That Mr. Moses Kirao, the branch supervisor had authorized the claimant who was shop floor representative of workers to attend the meetings. That in the month of November 2015, the claimant who otherwise earned Kshs. 17,003 per month was paid Kshs. 410 Kshs. Only.
7. That upon inquiry, the claimant was added Kshs. 2,000 on condition that he left employment and went home. That no explanation was

given for that action. The claimant was chased verbally. The claimant was later called to attend a meeting but was not allowed into the meeting room because one Mr. Hiteshi said he did not want anything to do with the claimant.

8. In January 2016, the claimant was served with a letter of dismissal dated 18th November 2015.

9. The claimant states that the summary dismissal was unlawful and unfair and that he be awarded as prayed. The claimant produced documents annexed to the statement of claim in support of his case including the notice to show cause, his response and the letter of summary dismissal.

10. The claimant testified that he had worked for 5 years and was not paid terminal benefits upon dismissal. He claims payment accordingly.

11. RW1 testified that he was a manager of the respondent at the material time and knew the claimant. That he had served the respondent for a period of 5 years. That RW1 had a good work understanding with the claimant all along but he became stubborn and stopped obeying instructions from his seniors.

12. That the claimant was dismissed from work for absconding duty. That the claimant was issued a show cause letter to which he responded on 9th November 2015. That a disciplinary hearing was held on 24th November 2015 in which RW1, Human Resource Officer Joshua Were, Barack Shidi a manager, Mr. Hitesh a manager, David Koi, a staff and claimant attended. That there was union representative from Kisumu and Nairobi in attendance being Michael Oranga and John Midui.

13. That after the meeting the respondent decided to dismiss the claimant. That the claimant was paid house allowance of Kshs. 1,791 as shown in the pay slips before court. That the claimant was also paid leave allowance whenever he went on leave.

14. That the respondent had good reason to dismiss the claimant as shown in the documents produced by the respondent and the suit be dismissed with costs. That the letter of dismissal was dated 18th November 2015 and had reasons for the dismissal. RW1 produced minutes dated 24th November 2015.

15. RW1 stated that these related to a subsequent Appeal hearing of the claimant's case. That RW1 did not have minutes of the disciplinary hearing. RW1 insisted however that the disciplinary hearing was held before the claimant was dismissed. RW1 stated that the claimant was initially paid Kshs. 13,732 and at the time of his dismissal he was paid Kshs. 17,003.

16. RW1 prays the suit be dismissed with costs.

Determination

17. The issues for determination are:

- i. Whether the summary dismissal of the claimant was for a valid reason following a fair procedure.
- ii. Whether the claimant is entitled to the reliefs sought.

18. From the evidence adduced before court, the claimant was employed as a shop assistant in November 2010 and worked continuously until 12th November 2015 when he was summarily dismissed from employment.

19. From the exhibits produced by the claimant, the claimant was served with a showcause letter dated 9th November 2015 to which the claimant responded to on the same date explaining his whereabouts on 12th, 13th, 14th, 20th, 23rd, 24th, 28th, 29th and 30th October 2015.

20. Claimant explained that he had obtained permission from Mr. Nil though Mr. Moses Kireho and Mr. Kakai to attend to his sick brother on 12th October 2015. That on the same day he travelled to Nairobi to attend an official meeting which took place on 13th October 2015. That he travelled back on 14th October 2015 but arrived at 8.00 am with a mild headache and did not attend work. That on 20th October 2015, it was Mashujaa day and everybody was on holiday off. That on 23rd October 2015, the claimant had travelled to Nairobi on an official union meeting attended also by Mr. Joshua were, a manager. That he travelled back to Nairobi on the same night but was unable to attend work on 24th October 2015 because he had arrived at Kisumu late after a long journey at night by road.

21. That on 28th October 2015, the claimant had again travelled to Nairobi for the same take over meetings which took place on 29th October 2015 and the meeting ended late and he travelled at night and could therefore not report to work on 30th October 2015.

22. The claimant explained that he had 4 off days and was not supposed to work on Sundays and so it is not true that he had absconded work for seven (7) days as alleged in the show cause letter.

23. That the claimant stated he was in official union meetings with permission on all the days mentioned except the 12th October 2015 when he was attending to his sick brother. The claimant added that since he attended these meetings with management and was facilitated for travel, management should be able to verify those details. The claimant prayed that the charges be dismissed.

24. RW1 did not adduce evidence to contradict the information given by the claimant on the specific dates the claimant testified had a lawful reason to be away from work.

26. RW1 did not produce the show cause letter, the alleged basis of the charges against the claimant nor did RW1 produce minutes of alleged disciplinary hearing which the claimant stated was not allowed to attend despite having been summoned to attend.

26. The claimant produced the letter of summary dismissal dated 18th November 2015 in which the respondent stated that they had no issue with the 20th and 28th November 2015 and that management only received letters for the meeting requesting the Central Committee to be released on specific days being 13th, 23rd, and 29th November 2015 only.

27. It is apt to note that the days referred to in the letter came after the claimant was dismissed on 18th November 2015.

28. RW1 had no answer at all therefore on the explanation given by the claimant regarding his absence with permission on the specified dates except the 20th October 2015 when the claimant rushed to attend to his sick brother but still asked for permission through a third colleague.

29. The court is minded that the claimant was the Chairman of the Central Committee on the shop floor and was bound to be in constant conflicting situations with the employer whilst dealing with worker issues.

30. The court is also aware that this was a critical period when the respondent was being taken over by a foreign company named Choppies and the role of the claimant was critical in protecting the rights of workers in the takeover, which actually happened.

31. It is the court, s finding that the respondent did not discharge the onus placed on it under *section 43(1) and (2) read with sections 41, 45 and 47(5)* to prove that it had a valid reason to summarily dismiss the employment of the shop floor union chairman summarily from his employment.

32. The claimant was to the contrary able to discharge the onus placed on him under *section 47(5)* to show that the summary dismissal was wrongful and therefore unlawful and unfair.

33. It is not easy to be an employee and at the same time represent the workers on matters good and controversial at the workplace. The shop steward walks a tight rope and therefore require protection to be able to discharge his representative duties without fear of victimization.

34. It is the court's considered view that the claimant was victimized for his role in the takeover meetings between Ukwala and Choppies.

35. The claimant is entitled to compensation in terms of *section 49(1) (c) and 4 of the Employment Act, 2007*. In this regard the claimant had served the respondent diligently for a period of 5 years. The claimant had played a higher role of representing workers at the shop floor.

36. The claimant wished to be reinstated initially but was not possible due to changed circumstances hence the amended suit. The claimant was not paid any terminal benefits upon summary dismissal.

37. The claimant in the court's view did not contribute to the summary dismissal but was victimized for his union activities. The claimant was not compensated for the loss of his source of income and suffered loss and damage. The claimant was not given certificate of service to ease his looking for alternative employment.

38. The court relies on the case of ***Ikhra Hussein Noor and Bishar Hussein Nor vs Kadertina Hajee Essak Ltd ELRC (2016) eKLR and Francis Nyongesa Kweya vs Eldoret Water and sanitation company Ltd. E&LRC (2017) eKLR*** and the facts above to award the claimant the equivalent of ten (10) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs. (17,003x10) 170,030.

39. The claimant is also entitled to Kshs. 17,003 in lieu of one month notice.

40. The claimant has not proved the claims for underpayment, house allowance and leave allowance and the same are dismissed for want of proof.

41. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

a. Kshs. 17,030 in lieu of one-month notice.

b. Kshs. 170,030 being compensation for unlawful dismissal.

Total - Kshs. 187,060

c. Interest at court rates from date of judgment till payment in full.

d. Costs of the suit.

e. Respondent to provide certificate of service to the claimant within 30 days of judgment.

Judgment Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Olel for claimant

Mr. Omondi for respondent

Chrispo- Court clerk