



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.438 OF 2017

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

GILANIS SUPERMARKET LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – unprocedural, unfair and unlawful termination of Ms Jane Gachambi Mwangi, the Grievant.

The claimant is a trade union registered under the provisions of the Labour Relations Act, 2007 and represent employees in the respondent business which is engaged in the wholesale, distribution and supermarket business.

There is recognition between the parties and a collective agreement.

The grievant, Jane Gachambi Mwangi was employed by the respondent on 15th January, 1996 as a general worker and whose employment was terminated in October, 2015. At the time she was earning Ksh.14, 700.00 per month.

On 17th September, 2015 the grievant was issued with a letter suspending her from employment on allegations stated she refused to accept a show cause notice dated 15th September, 2015. The suspension was for 4 days.

On 1st October, 2015 the grievant attended a meeting where present were management staff but the meeting did not proceed as the grievant was required to sign a blank paper which she declined to do. She was then directed to go home.

On 2nd October, 2015 the grievant reported back to work and was given a typed document to sign and when she requested for time to read, this was declined. She reported the matter to the claimant union. The grievant was again served with a show cause notice requiring her to respond within 7 days.

On 19th October, 2015 the claimant wrote to the respondent seeking to have a meeting over the matter as the grievant was not allowed to resume duty. There was no response. The matter was then reported to the Minister and a conciliator was appointed and he made his recommendations and referral to the court.

The claimant's case is that the grievant was not given a fair hearing before her employment was terminated.

In the warning letter issued to the grievant on 1st October, 2015 it was alleged that she failed to tell employees the actual goods kept at the goods counter belonging to staff or non-staff. The respondent did not mention the specific staff or the customers whose goods were kept at the goods counter. Such allegations made against the grievant were without any good cause.

The claimant is seeking the following dues;

- a) Notice pay Ksh.14,700.00;
- b) Payment of 58 days while on suspension Ksh.28,42000;

- c) Pro-rata leave for 6 months Ksh.7,717.00;
- d) Compensation at 12 months;
- e) Certificate of service; and
- f) Costs.

The grievant testified that on 17th September, 2015 she was in her shift and at 11am another employee demanded that his phone was lost or stolen. She had no knowledge of such phone or the details thereof as her shift had started without any such allegations. The grievant was however issued with a show cause notice which she declined to accept on the grounds that she had no knowledge of the phone in issue.

The grievant was suspended when she refused to accept the show cause notice. She was then called for a hearing and insisted that she had no knowledge of the lost phone. She reported the matter to the claimant union and then sent away.

The matter was reported to the labour officer and effort to conciliate did not bear fruits.

Upon cross examination, the grievant testified that after the matter was reported to the labour officer she did not return to work. The letter calling her back to work and dated 19th October, 2015 she did not receive it even though his letter is written to her address sent by registered mail and was not returned to the respondent.

The grievant also testified that as a member of the claimant union, before the labour officer she was represented by Mr Ochola and who was paid ksh.18, 000.00 but said this was too little and she opted not to resume work and did not accept the payment as well. Ochola did not inform her that the respondent had made final payment and thus opted to file suit.

In response, the respondent admit the grievant was in its employment from 1996 to October, 2015 when she absconded work. On 6th October, 2015 the grievant returned to submit her response upon a show cause notice and left her work station without notice, approval or permission. Despite being called back to work, the grievant failed to attend.

The grievant had been suspended from duty for 14 days after she failed to accept a show cause notice and for which she was required to attend disciplinary hearing on 1st October, 2015.

Upon deserting work the matter was reported to the Labour officer where the parties attended and agreed to a settlement and the respondent noting the grievant had refused to report back to work, a matter which justified summary dismissal, opted to resolve the same by offering termination benefits. All such dues were paid and acknowledged by the union on behalf of the grievant. There is nothing outstanding unpaid.

At the close of the hearing, both parties filed written submissions.

During the hearing of the claimant's case it became apparent to the court that the grievant had been paid upon the matter being reported to the labour officer. The union representative Mr Ochola was present and accepted a payment of final dues all at Ksh.18, 569.00 for 15.75 leave days due in the year 2015, 4 days off and one month ex-gratia/notice pay.

The grievant was stepped down to confirm such payment with her union representatives.

Upon return, the claimant's case was that such payment was made save that it failed to take into account the unfair termination and the compensation due. What is acknowledged is partial payment.

On this basis, the only issue outstanding is whether the grievant was unfairly terminated and if so whether there is compensation due.

The grievant confirmed in her evidence that she was suspended from duty vide notice dated 17th September, 2015 following the loss of a phone in her department and when she was issued with a show cause notice she declined to receive it on the grounds that she had no knowledge of such phone. Whether the allegations are true or not, upon show cause, the grievant refused to abode the instructions of the employer.

The grievant confirmed that she was invited to a disciplinary hearing on 1st October, 2015 but her union was not informed or present. From the record and minutes filed by the respondent in this regard, it is not clear as to what positions the two persons present with the grievant, which positions they held.

A disciplinary hearing at the shop floor must meet the procedural requirements of section 41 of the Employment Act, 2007. The grievant as the employee must be notified and allowed to attend together with her union representative as she was unionised under the claimant. This was not adhered to.

Noting the above, the decision taken after this meeting was to issue the grievant with a show cause notice and which was done. This action in itself though based on a flawed procedure was not detrimental to the grievant at all. What she had failed to acknowledge on 17th September, 2015 was done upon the alleged disciplinary meeting.

The notice dated 1st October, 2015 required the grievant to respond within 7 days.

The grievant replied on 6th October, 2015. What is clear from the evidence and pleadings is that after the 1st of October, 2015 the grievant did not return to work.

On 15th October, 2015 the respondent wrote to the Labour officer notifying the office that the claimant had not returned to work. She had deserted.

The issue of desertion of duty is not addressed by the claimant at all.

On 19th October, 2015 a letter was sent to her directing that she had deserted duty and should return to facilitate clearance and return of the respondent's property.

Section 44(3) and (4) of the Employment Act, 2007 allow an employer to dismiss an employee for work desertion. Such action is subject to issuing the employee notice and upon failure to attend, the action of summary dismissal is justified.

In this case, where the claimant reported the matter to the Minister, and a settlement was achieved and payment of terminal dues made, the issue relating to the desertion of duty ought to have been addressed. The grievant had been recalled back to work and failed to. When the grievant was issued with a show cause notice on 1st October, 2015 work attendance did not stop. Upon return to give her response on 6th October, 2015 where in doubt as to the work status, nothing stopped the grievant or through her union to seek this clarification.

The desertion of duty is not justified. The resulting summary dismissal is hereby found valid and justified.

Accordingly, the claim is found without merit and is hereby dismissed. Costs to the respondent. Such costs are assessed at Ksh.20,000.00.

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU

JUDGE.

In the presence of

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