



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.570 of 2014**

**JOHN NDUNGU MUKORA.....CLAIMANT**

**VERSUS**

**H. YOUNG & COMPANY (EA) LTD.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 19<sup>th</sup> February, 2009 and dismissed vide letter dated 27<sup>th</sup> June, 2014 for allegedly absenting himself from duty without authority from 23<sup>rd</sup> June, 2014. Prior to the summary dismissal the claimant was not issued with notice or allowed to give his defence. The claimant was not able to report to work as the work site was closed from 19<sup>th</sup> June, 2014 to 27<sup>th</sup> June 2014.

The claimant is seeking to be paid for days worked in June, 2014, he be reinstated back to his employment and in the alternative a notice pay for 3 months and general damages.

The claimant testified that in the year 2014 he was an employee with the respondent as a driver and truck mixer. There was a strike and all employees left the work place at Hell's Gate Naivasha. The strike was on 19<sup>th</sup> June 2014 and every morning all employees would converge at the Ol Karia gate until 27<sup>th</sup> June, 2014 when they were allowed back to work. All employees including the claimant participated in the strike.

On 27<sup>th</sup> June, 2014 the claimant was at work the whole day. In the evening before entering the bus on his way home, about 5 employees were called to the office and issued with letters of summary dismissal. The next day they were not allowed back into the premises. There was no hearing or a chance to give any defence.

The claimant also testified that he was paid Ksh.6, 000.00 whereas his salary was ksh.31, 400.00 per month.

The defence is that the claimant was absent from work from 19<sup>th</sup> June, 2014 and the summary dismissal that issued was procedural and lawful as allowed under the provisions of section 44 of the Employment Act, 2007. Under clauses 24 and 18 of the collective agreement (CBA) absence from work for 7 days was a justifiable ground for summary dismissal.

The defence is also that on 19<sup>th</sup> June, 2014 the claimant participated in an illegal strike which necessitated the issuance of a memo advising employees that Olkaria 1 site was closed until further notice. On 23<sup>rd</sup> and 24<sup>th</sup> June, 2014 the respondent issued memos advising the employees to resume work but the claimant did not heed which led to his summary dismissal. The place of work remained open during the illegal strike and other employees were able to attend work.

Agnes Mutua for the respondent and Human Resource Assistant testified that the claimant was dismissed from his employment with the respondent following an illegal strike from 19<sup>th</sup> June, 2014. All employees left their work stations. On 23<sup>rd</sup> June, 2014 a memo was issued and posted at the gates and the employees returned to work but the claimant refused to comply until 27<sup>th</sup> June. There was an attendance record taken and the claimant was absent. He worked for the full day on 27<sup>th</sup> and it was only noted in the evening that he had been at work. This was an oversight and the letter of summary dismissal ought to have issued as he was away for over 7 days contrary to the terms of the CBA. The claimant was paid his terminal dues through his back account used to effect payments.

The claimant was unionised under the Kenya Building Engineering and Construction Workers Union. A letter was sent to the union following the strike and the union was invited to resolve the matter but there was no response.

Both parties filed written submissions.

It is common cause that on 19<sup>th</sup> June, 2014 all the employees of the respondent went on strike. There was closure stoppage of work and a notice of site closure was issued by the respondent. The strike was illegal.

The defence is that the employees were recalled back by memo of 23<sup>rd</sup> June, 2014 and such memo has been filed. The claimant on his part testified that from 19<sup>th</sup> to 27<sup>th</sup> June, 2014 following the strike he would report every day at the Olkraia gate.

Where there was a memo on 23<sup>rd</sup> June, 2014 recalling the employees back to work and the claimant was at the gage daily he should have seen such memo.

The defence that other employees reported back to work after 23<sup>rd</sup> June, 2014 would have been easily supported by a record of the employees who reported back to work noting that both parties are agreed there was an illegal strike involving all the employees and there was general stoppage of work.

The respondent's application of the CBA with the Kenya Building, Construction, Timber and Furniture Industries Employees Union with regard to clause 24 which relates to absence from work for 7 days where an employee has a reasonable ground for absence should have been put into account. Where the recalled back to work was on 23<sup>rd</sup> and 24<sup>th</sup> June, 2014 and noting the notice stopping work on 19<sup>th</sup> June, giving the claimant the benefit of the general notice, he only lost 3 days, 25<sup>th</sup> and 26<sup>th</sup> inclusive and was at work the whole day on 27<sup>th</sup> June, 2014.

Further the application by the respondent of clause 18 of the CBA is not sufficient defence as such requires the issuance of notice to the employees. Even in an appropriate case of summary dismissal, a notice and hearing of the employee is imperative.

The respondent has relied on the provisions of section 44 of the Employment Act, 2007 and the case of **KUDHEIHA versus Pwani University [2015] eKLR** but the facts therein are foundationally different from herein as under the law, the claimant was entitled to notice and hearing however short and under the cited authority, the union was involved and the employees were allowed to lodge an appeal.

In this case the claimant remained at work on 27<sup>th</sup> June, 2014 the whole day. Where he had failed to report back to work on the notice of 23<sup>rd</sup> June, 2014 he ought to have been called and put to account. The defence that by allowing the claimant to be at work on 27<sup>th</sup> June was an oversight, such oversight ought to have been applied for the benefit of the employer by inviting the claimant to give his defence and where his defence and whereabouts were found unsatisfactory, the sanction of summary dismissal would have issued procedurally and upon the due process.

The resulting dismissal of the claimant from his employment by the respondent was procedurally unfair. With the admission of participating in an illegal strike and keeping off work for a period of over 7 days, for such time the claimant should not be paid.

The claimant is seeking to be paid for days worked which he confirmed he was paid ksh.6, 000.00. There is however the payment statement for July, 2014 where the claimant was paid Ksh.33, 360.00 through his account at Equity Bank 02 0019 17481.

For the 20 days the claimant was at work in June, 2014, he was entitled to ksh.23, 786.00 and on the paid amount he is entitled to ksh.17, 786.00. The respondent opted to pay for the full month.

On 7<sup>th</sup> July, 2014 the respondent paid a full salary plus benefits. These payments included basic pay of ksh.31, 215.00 and house allowance of Ksh.6, 243.00, leave encashment at ksh.34, 877.00. Taking all the due deductions, there was a remittance of Ksh.33, 360.00.

Such pay is generous in the circumstances.

He is also seeking reinstatement which has since been overtaken in time putting into account the provisions of section 12(3) of the Employment and Labour Relations Court Act, 2011. It is over three (3) years since and to award reinstatement would not be a fair remedy. The claimant was also not keen and emphatic about such a remedy.

In the alternative the claimant is seeking payment of 3 months' notice and general damages.

The claimant was employed by the respondent from 9<sup>th</sup> February 2009. He was dismissed from such employment on 27<sup>th</sup> June, 2014 after serving for a period of over 5 years. Under the CBA clause 18(iii) provides for termination notice of two months or payment in lieu thereof. The claimant is entitled to the gross pay for two months all at Ksh.75, 116.00.

The claim for general damages in an employment and labour relations claim must be given context and the special circumstances for the award of such general damages as against the remedies made available under section 49 of the Employment Act, 2007 be established. In this case, the court finds no sufficient material to award general damages.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of notice pay at ksh.75, 116.00 and such pay shall be subject to the provisions of section 49(2) of the Employment Act, 2007. Each party shall bear own costs.**

Delivered at Nakuru this 28<sup>th</sup> day of February, 2019.

**M. MBARU JUDGE**

In the presence of:.....