



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 93 OF 2015

1. CHARLES NDERITU NJOYA

2. FRANCIS GATHAYU NDIRANGU.....CLAIMANTS

VERSUS

MUTHEKA FARMERS CO-OPERATIVE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants were employees of the Respondent and they have sued the Respondent for unlawful, unfair and wrongful dismissal. The Claimants assert that they employed as watchmen by the Respondent earning an all inclusive sum of Kshs. 3,948/- a month from February 2001 up to 27th July 2012 when they aver that they were summarily dismissed on allegations of theft. The Claimants aver they worked everyday from 6.00 a.m to 6.00p.m without leave or off days. The Claimants in their amended statement of claim pray for a declaration that their dismissal was unlawful, unfair and wrongful thus seek general damages for wrongful dismissal equivalent to 12 months gross monthly salary at the time of dismissal for each claimant, terminal dues as pleaded and costs and interest of the suit.

2. The Respondent avers that the Claimants were on duty on the 13th July 2012, when coffee weighing 40kgs valued at Kshs. 14,000/- was stolen. The Respondent thus reported the matter to Police and the Claimants were arrested and charged with the offence of theft in Nyeri Chief Magistrate's Criminal Case No. 729 of 2012. Vide the a Court ruling on 20th January 2014, the court found that there was no basis for holding the Claimants liable for the alleged theft and consequently acquitted them under S. 210 of the Criminal Procedure Code. The Respondent denied that it ever dismissed the Claimants but rather suspended the Claimants' salaries. The Respondent further denied that the Claimants worked all days without leave or off days. The Respondent asserts that the Claimants deserted their duty stations from 21st July 2012 and have never thereafter communicated with the Respondent.

3. Both Claimants and one witness from the Respondent gave their testimony. Francis Gathayu Ndirangu relied on his written statement and told the court that they were told to stop working on 29th July 2012, and at that time, the criminal case was ongoing. He further testified that they were supposed to resume on duty after acquittal but they have not been called back. He also stated that his salary had not been reinstated. On cross examination, he confirmed that they were never issued with a letter of dismissal nor were they issued with a letter of suspension of salary. He further denied that they ran away from work as contended by the Respondent. In re-examination he stated that they did not write to inform the Respondent that they wanted to go back to work after they were acquitted but he added that Securicor officers were employed to take over their work after their unlawful dismissal. Charles Nderitu Njoya in his testimony stated that they were told to leave but they were not issued with any letter. He also denied having absconded work and stated that they were chased away and Securicor officers were brought in their place.

4. The Respondent's witness Ephantus Kihia Thimbara testified that he worked for the Respondent as a secretary manager. He stated in his testimony that there was theft of coffee at Kiamunyu coffee factory and the Claimants were present during the theft. He stated that they suspended the salaries of the Claimants on 13th July 2012, after which they issued them with letters of suspension of salary on the same day but did not tell them not to report to work. He further testified that upon giving them the letter of suspension the Claimants never came back and they opted to engage another company. He contended that the Claimants absconded duty and that they were not sent away by the Respondent. On cross-examination he confirmed that the suspension of salary was indefinite and that they did not call the Claimants back even after the case was decided in January 2014.

5. Parties were to file submissions and both parties failed to file their submissions. The following issues fall for determination from an analysis of the pleadings and testimony

- i. Whether the Claimants were dismissed from employment and if so, was the dismissal unlawful, unfair and/or wrongful?

ii. Whether the Claimants are entitled to the remedies sought.

On the first issues, it was the Claimants testimony that they were dismissed from work on 29th July 2012 upon being suspected to have stolen coffee from their employer. They stated that they were never issued with any letter of dismissal or that of stoppage of salary. The Respondent on the other hand contended that it did not dismiss the Claimants but rather suspended their salaries and gave them letters in respect to the suspension of salary. Respondent further stated that the suspension was indefinite. The Claimants testified that Securicor officers were employed to take their place immediately after they were told not to report to work. The Respondent did not dispute the fact that it hired the services of another company after the Claimants were arrested. From the foregoing, the Claimants had a reason to believe that they have been dismissed. Even though the Respondent maintains that it did not dismiss the Claimants, my view is that no employee can report to work without payment and the actions of the Respondent amounted to constructive dismissal. It is not denied that an employer has the statutory right to dismiss an employee summarily under Section 44 of the Employment Act. Such summary dismissal should follow a fundamental breach of the contract of employment or on account of gross misconduct. The employer is however required to abide by the procedural requirements of the law set out under Section 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to present a defence. In the case of **Titus Musau Ndivau & Another v Waridi Limited [2012] eKLR** Ongaya J. held that upon a misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing under the provisions of section 41 of the Act. The Claimants herein were not issued with any notice and neither were they taken through any disciplinary hearing. Similarly, in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, Mbaru J. observed thus:-

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets. (underline mine)

6. The Claimants are entitled to the declaration that their dismissal was wrongful and unfair and order that they be paid their respective terminal benefits. The Claimants sought compensation for wrongful and unlawful dismissal at equivalent of 12 months salary. Considering the unfair manner of the termination of the Claimants' employment, I would awarding each of them 6 months gross salary as compensation. They will also have costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 26th day of February 2019

Nzioki wa Makau

JUDGE