



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 1078 OF 2010

KENYA BUILDING, CONSTRUCTION, TIMBER,

FURNITURE & ALLIED EMPLOYEES UNION.....CLAIMANT

VERSUS

M/S STEEL STRUCTURES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of 25 Grievants who were employees of the Respondent. They were dismissed on various dates between 13th June 1998 and 26th April 2010. Some were fitters, others were machine operators, others mechanics, welders, labourers and there was a watchman and messenger/motorcycle as well as a steel fixer. The Claimant averred that these Grievants worked without any major problem and that the dismissals by the Respondent were unfounded and uncalled for since the procedure recognized by law or the Collective Bargaining Agreement was not followed. A dispute was reported to the Minister for Labour and the matter remained unresolved by the conciliator who issued a certificate to allow the matter to proceed to court. The Claimant sought terminal dues for each of the Grievants as well as maximum compensation.

2. The Respondent filed a reply in response to the claim in which it averred that the Grievants were daily casuals and were paid at the end of the day. They would report the next day if they so wished and in respect to the majority of the Grievants, they opted not to report to work and so they were not dismissed. In respect of Saleh Islam Mwenge, he was initially working as a machine operator and later was promoted to foreman and ultimately a supervisor. At the time of dismissal he was earning Kshs. 20,833.35 as basic pay and house allowance of Kshs. 4,166.65. He was dismissed when the Respondent found that he was the works manager of a rival company Bomaque Structural & Mechanics Fabricators as the marketing manager of Bomaque Mr. Farooque Low visited Mr. Mwenge at the Respondent leading to the discovery. They were discussing a tender for Kenya Red Cross Society. He was issued with a show cause letter which he declined to respond to thus necessitating his dismissal. In regard to the Grievant Francis Shaikamuli, the Respondent averred he was issued with several warnings and subsequently with a notice to show cause which he refused to reply to. He was dismissed for misconduct. Mr. Bernard Baraza Ouma was dismissed for theft as he was found with a 4 litre can of Sadolin egg shell enamel paint without permission. He was asked to show cause and in his statement admitted to the theft. He was dismissed for misconduct. As for Mr. Julius Nyaga Mburu, the Respondent dismissed him for failing to fabricate 28 sets of bracing correctly leading to poor workmanship. This was the fourth offence of misconduct leading to the dismissal. Mr. George N. Makau was dismissed for misconduct which he was unable to give an explanation for and after hearing the employee he was dismissed in accordance with the CBA. Mr. Asman Makokha Wetuko was dismissed for gross misconduct when he bought a cash sale for extra cash he swindled from the Respondent and again he used an unauthorized route and also caused an accident. He was finally instructed to deliver an invoice which he failed to deliver per order thus sabotaging the Respondent's business. He was also dismissed after a notice to show cause. As for Geoffrey K. Kiamba he was said to have been dismissed for gross misconduct for theft of 190 screws.

3. The claim as against the Respondent was withdrawn in respect of 18 Grievants who could not be traced. Only the claims for 7 Grievants namely George M. Willy, Swaleh Islam, George N. Makau, Dominic Okuny Odawa and John M. Muserwa and Lameck Ongina Ben remained. Each of the 7 Grievants testified as did the Respondent's witness Samuel Njogu Mungai an administrative assistant. He stated that he knew some of the Grievants and others were not on their records such as Dominic Okumu Dawa, John Musewa and Lameck Ogina Ben.

4. The Claimant did not file submissions as at the time of penning the judgment there was no set of submissions by the Claimant. Only the Respondent filed submission. The submissions filed for the Respondent were to the effect that the suit as filed was an abuse of the court process since there was no commonality of action between the Grievants. There was also an objection that the causes of actions were time barred.

5. The disputes raised by the union in respect of some of the Grievants were stale. In respect of Osman Makokha who had given a forged receipt for fish he had bought for a manager at the Respondent, his dismissal was on 2nd December 2002. His suit in 2010 was thus a few years past the limitation period permitted under Section 4(1) of the Limitation of Actions Act. The other claims were filed within 6 years of the occurrence of the matters giving rise to the claims. The law applicable to the dispute being the repealed Employment Act.

6. Before I pen off, there was an issue that was adverted to by the Respondent on commonality of interest in a class action or representative suit. In this claim, the Union brought a claim to court on behalf of 25 Grievants. The claims each had contained different facets and causes of action with the only common thing being the Respondent. Noting that this is a practice some Unions adopt, I wish to state that the filing of such a compound claim is an abuse of the court process. Where numerous persons have the same interest in a matter, a representative suit may be filed but not where the facts are different and the causes of action markedly different. This suit was inherently an abuse of the court process though its failure before me was on account of paucity of evidence that the Respondent had infringed the law in the dismissals.

7. Nevertheless, the Claimant was bound to prove that the dismissals of the 7 Grievants was unfair or unlawful. Each of the Grievants was issued with a letter of dismissal setting out the grounds and prior to dismissal there were warnings and the show cause letters. Explanations where made, were considered and a finding made. The law was therefore complied with before the termination of the employees. The only outcome of the dispute is dismissal but each party to bear their own costs.

It is so ordered.

Dated at Nyeri this 19th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 21st day of February 2019

Radido Stephen

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar