



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 221 OF 2015**

**GORDON OMONDI.....CLAIMANT**

**VERSUS**

**UNITED MILLERS LIMITED.....RESPONDENT**

**CONSOLIDATED WITH**

**CAUSE NO. 222 OF 2015**

**KOLALO JOTHAM ODUNDO.....CLAIMANT**

**VERSUS**

**UNITED MILLERS LIMITED.....RESPONDENT**

**TOGETHER WITH**

**CAUSE NO. 230 OF 2015**

**STEPHEN WILLIS OTIENO.....CLAIMANT**

**VERSUS**

**UNITED MILLERS LIMITED.....RESPONDENT**

**(Before Hon. Lady Justice Maureen Onyango)**

**JUDGMENT**

The claimants each filed a claim against the respondent, a limited liability company registered in Kenya and operating in Kisumu and other parts of the country, alleging unfair termination of employment and seeking payment of terminal dues and damages for loss of employment.

The respondent filed memorandum of defence in each of the claims. It denies unfairly terminating the employment of the claimants and avers that the claimants were dismissed for failure to work on 2<sup>nd</sup> December 2014. That they were suspended on 3<sup>rd</sup> December 2014, issued with show cause letters which they responded to and were summarily dismissed on 13<sup>th</sup> January 2015 after being subjected to a disciplinary hearing on 2<sup>nd</sup> January 2015. The respondent further avers that the claimants were paid their terminal dues and issued with certificates of service. That they therefore have no valid claim against the respondent and their claims ought to be dismissed.

At the hearing all the claimants testified. The respondent called two witnesses, one KEVIN ONYANGO OKAKA, a Production Manager and FELIX DAWO, a Human Resource Officer. The parties thereafter filed written submissions.

**Claimant's Case**

CW1, GORDON OMONDI OKWIRI testified that he started working with the respondent on 15<sup>th</sup> November 2011 as a packer. His last salary was Kshs.532 per day. He worked until December 2014 and was dismissed in January 2015.

He testified that on 2<sup>nd</sup> December 2014 he was supposed to work on night shift. When he reached the gate he met JOTHAM, CW2 with other workers namely Steve, Kennedy Odhiambo and others who told him that work will not go on as there was a challenge. Jotham informed him the distance to the place for stacking was long and there was other work going on in the same direction so they needed to be added more people. That there was also a shortage of pallets as some were broken and they had to search for them from the basement. He testified that there was a lot of stock that had been produced.

He testified that he went to the supervisor who had called him while he was in the company bus to inform him not to go on night duty. The supervisor by the name Kevin Onyango Kaka told him to go back home.

He testified that his next shift was the following day at 3 pm. When he arrived he was told to report at the Human Resource Office where he was issued with a disciplinary letter and told to report after two weeks. He was thereafter issued with a show cause letter which he responded to.

He testified that on the hearing date, the hearing was postponed and he was given another date in January 2015. He testified that at the hearing he was asked questions but was never given an opportunity to be heard. That the Human Resource Manager stated that he must dismiss some people.

He testified that he was terminated in January 2015. It was his testimony that the termination was unfair. He prayed for payment of his terminal dues.

CW2 JOTHAM ODUNDO testified that he was employed by the respondent as a packer on November 2011 and worked until 13<sup>th</sup> January 2015 when his employment was terminated. His last wage was Kshs.532/= day.

The claimant testified that on 2<sup>nd</sup> December 2014, he was on night shift and reported to work at 10 pm. He testified that they were supposed to work in a team of 12 but one of them was absent. They were added two people because of the distance they were to cover while packing but the supervisor told them to go home and come back the following day.

He denied that he and his workmates absconded duty on 2<sup>nd</sup> December 2014 and insisted he had permission from the supervisor to go home.

He testified that on 3<sup>rd</sup> December 2014 he was issued with a disciplinary letter to attend a disciplinary hearing. After the disciplinary hearing he was issued with a letter of suspension. He was eventually terminated on 13<sup>th</sup> January 2015.

CW3, STEPHEN WILLIS OTIENO testified that he was employed by the respondent on 8<sup>th</sup> January 2012 as a machine packer. His daily wage at the time of recruitment was Kshs.467 per day and his last wage was Kshs.532 per day.

He testified that he was suspended on 3<sup>rd</sup> December 2014 on grounds that he refused to work on 2<sup>nd</sup> December 2014. He was called for a disciplinary hearing and was eventually terminated on 13<sup>th</sup> January 2015.

He testified that on 2<sup>nd</sup> December 2014 he reported to work around 10 pm and found that there were some challenges which did not permit him and his colleagues to work. That one of their colleagues did not report to work. They were supposed to work in a team of 10. On the same day the place where they were stacking was further than normal and they needed at least another two people. They informed the supervisor, Kevin Okaka that it will not be possible for them to work unless he added them another 2 people. They came to an agreement that it was not possible to work on that day and they would report for work the following day. After the discussion the supervisor allowed them to go home.

### **Respondent's Case**

RW1 KEVIN ONYANGO OKAKA testified that his duty as Production Supervisor was to ensure that production runs as required by assigning people duties and making sure standards are met.

He testified that he knew the claimants who were his colleagues at United Millers. They were engaged to pack flour. They were terminated for refusing to work on 2<sup>nd</sup> December 2014.

He testified that on that day he reported to work at 7 pm and was taken through the program for the day. There was a shift which had started at 3 pm and was supposed to end at 10 pm. He organised with a shift to start at 10 pm. The new shift was supposed to stack a different place at roller stand. He added two people on the shift to make them 12 which was also the number for the shift before them.

When the new shift arrived, they called him and told him there were challenges that would cause them not to work. That one of them was not there. He told them he would get them one person from mixing section as production was prioritised.

They told him they were still not able to work because pallets were in the basement and the passage they were supposed to use was narrow. He testified that he tried pleading with them to work as he would be the one to explain why the target for the shift was not met but they did not agree. That since he had no authority to cancel the shift he asked them to wait while he called his supervisor. He did not manage to get the supervisor. While trying to get a different supervisor some of the shift members left for home. Those who left were Jotham Odundo, Stephen Odhiambo, Kennedy Odhaimbo and Peter Nyagacha. Those who remained at work were four. His supervisor told him to allow the four to go home as they could not work on their own.

RW1 denied giving permission to Gordon Omondi whom he stated he did not see on that day.

RW2 FELIX DAWO testified that he worked for the respondent as Human Resource Officer. He testified that the claimants were suspended from work for refusing to work on 2<sup>nd</sup> December 2014. They were given a chance to explain themselves at a disciplinary hearing at which they were present and were represented by the union. He referred to the minutes of the disciplinary hearing at appendix 7 of Memorandum of defence.

He testified that the claimants were paid upon termination.

Under both cross examination and re-examination, RW2 conceded that the complaints by the claimants were genuine and there was nothing wrong with them complaining about safety or shortage of manpower, or refusing to work if there were challenges.

### **Determination**

I have considered the pleadings and evidence on record. I have further considered the submissions filed by the parties. The issues for determination are whether the claimants were unfairly terminated and if they are entitled to the prayers sought.

### **Fair Termination**

Termination of employment has two elements; fair procedure and validity of reasons.

In the present case the claimants were suspended from duty by letters dated 3<sup>rd</sup> December 2014 which also required them to show cause why disciplinary action should not be taken against them. All of them responded to the show cause letters.

They were further subjected to disciplinary hearing at which they were represented by their union officials. The procedure was thus largely in compliance with Section 41 of the Employment Act with the exception of suspension which is not provided for in the Act and which the respondent did not produce any terms and conditions of employment to justify.

On grounds of dismissal, the letters of suspension gave the reasons as “*alleged claim of failing to follow lawful instructions and absenting themselves from designated work place on 2<sup>nd</sup> December 2014 without lawful cause.*”

The facts as presented by both the claimants are not contested save for some minor discrepancies. The claimants reported to work on 2<sup>nd</sup> December 2014 in readiness to start their shift that was to commence at 10.00 pm. However, only 9 of the 10 expected to man the shift were present, the 10<sup>th</sup> persons having sought permission to be away. They were on that date supposed to work with a workforce of 12 in order to meet the target as they were stacking the flour that they were packing in a different place which was further away than usual. Only 10 persons were available. There was also a shortage of pallets which they were to fetch from the basement, some of which were broken and were to be repaired. In addition the passage that they were to pass through was narrow as the shift before them had stored some of the goods in the passage. Further the respondent had set a target which they had to meet failing which they would not be paid.

All these reasons are contained in the responses to the notice to show cause as well as the testimony of the claimants and RW1.

At the disciplinary hearing the grounds of misconduct the claimants were defending themselves against was that they failed to follow lawful instructions from their supervisor Mr. Kevin Okaka and thereby absconded themselves from duty causing loss of production.

In the letters of dismissal, the grounds were that they neglected to perform their duties and knowingly failed to obey lawful instructions. That they were therefore guilty of negligence and insubordination.

From the facts of the case as narrated by the witnesses, the claimants did not abscond duty as they reported to work on 2<sup>nd</sup> December 2014. It was the respondent who did not provide them with what they needed to enable them work on that day and achieve the target set by the respondent. Failure to meet the target would lead to non-payment for the shift.

As for Gordon Omondi, he met the others leaving as he had been picked late by the respondent’s bus and was not present when the decision was made that they should not work on 2<sup>nd</sup> December 2014.

I find that there was no valid reason for termination of the employment of the claimants. Their summary dismissal was therefore unfair for want of valid reason. I hold and declare accordingly.

### **Remedies**

Each of the claimants prayed for the following –

- a) One month’s pay in lieu of notice Kshs.15,960
- b) Payment in lieu of untaken leave 15,960 x 3 years Kshs.47,880
- c) Damages for unlawful, wrongful termination of employment

15,960 x 12 months Kshs.191,520

d) Damages for loss of employment 15,960 x 12 months Kshs.191,520

**Total Kshs.446,880**

e) Exemplary damages

f) Costs of the claim

g) Interest on a) – d) above

h) Any other relief that the court may deem just and fit to grant.

The claimants are entitled to pay in lieu of notice. They are also entitled to leave for 2013 and 2014 as the respondent's appendix 13 is for leave up to 2012 only. They are also entitled to compensation for unfair termination which I award each of them based on length of service and the circumstances under which they lost employment.

All claimants had worked for three years. I therefore award each of them three months' salary as compensation.

#### **Conclusion**

In sum, I declare the dismissal of the claimants unfair and award each of the claimant the following –

Notice	532 x 30	Kshs.15,960.00
Leave	21 x 2 x 532	Kshs.22,344.00
Compensation	3 x 12 x 532	<u>Kshs.19,152.00</u>

**Kshs.57,456.00**

Total award for all the claimants (57,456 x 3) = **Kshs.172,368.00**

The respondent shall also pay claimants costs for the claim as consolidated.

Interest shall accrue at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF APRIL 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 14<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**