



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 254 OF 2018

KENYA UNION OF COMMERCIAL,

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

MARS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Gerald Mutahi Njoroge. The Respondent is said to be a distributor of various products including Valon Petroleum Jelly a product of Cannon Chemicals. The Claimant averred that the Grievant was employed as a regional marketer on 3rd October 2014 earning a monthly salary of Kshs. 3,500/- a month and a night out allowance of Kshs. 2,000/-. The Claimant averred that the Grievant initially worked in two regions namely Nyeri and Meru region and he was issued with a motor vehicle registration No. KBU 881F due to the nature of his work. The Claimant averred that the employment was verbal since after the interview the Grievant was not issued with a letter of employment. The Grievant, it was averred, was issued with a one month notice to terminate employment on 27th October 2015 and after one month of service the contract was terminated on 27th November 2015. The Grievant had served the Respondent for one year and a month at the time of termination of service. The Grievant was accused of presenting fake receipts for night out compensation hence the notice of termination issued to him. The Claimant averred that the Grievant went to the managing director of the Respondent Amit Shah and pleaded for his job but his plea fell on deaf ears. The Claimant submitted that the Grievant went to the union on 9th December 2015 and reported the matter after which the Claimant attempted to meet the Respondent but the effort bore no fruit. The Claimant averred that he reported the dispute to the Cabinet Secretary for Labour who appointed a conciliator on 6th February 2016. The Claimant averred that the conciliation did not materialise as the Respondent never attended any meeting called by the Conciliator prompting the issuance of a referral certificate on 25th July 2017 after the third attempt at conciliation. The Claimant averred that the receipts issued by the Grievant for night out were valid and that there was no valid reason to terminate. The Claimant averred that the Respondent did not take any action to prove if the receipts were fake by visiting any of the hotels where the receipts originated. The Claimant thus sought terminal dues for the Grievant being annual leave for one year – Kshs. 28,269.20, house allowance for 1 year – Kshs. 68,250/-, service gratuity – Kshs. 20,192.30, compensation for unlawful dismissal for 12 months – Kshs. 483,000/- and costs of the suit.

2. The cause which was filed on 5th September 2018 proceeded as an undefended cause as the Respondent failed to appear or file a defence despite service of the summons and claim on 7th September 2018. The Grievant testified that he was employed on 3rd October 2014 as a marketer for East and Central Meru region and operated in Meru, Machakos, Nyeri, Isiolo and Karatina. He stated that he took products for the Respondent to these towns and was paid Kshs. 35,000/- as a salary but no house allowance was paid. He testified that no payslips were issued and that the Respondent only issued him with the termination notice. He said that he was terminated on account of receipts the Respondent termed as fake and that despite the notice stating that he was given one month notice he was terminated on the same day his letter of termination was given to him. He thus sought reinstatement and payment of salaries, annual leave and accrued allowances, house allowance, gratuity and compensation.

3. The Claimant filed submissions in which it stated that the Grievant was terminated by notice on 27th October 2015 but was not allowed to serve the one month notice as the Grievant was told not to go to work and the vehicle taken from him. The Claimant submitted that the Grievant was entitled to payment of house allowance equivalent to 15% of the basic salary as provided for in the Employment Act and that the house allowance was not paid. The Claimant submitted that the dismissal of the Grievant was unfair as the allegations against him were baseless and no evidence had been placed before the court by the Respondent to prove these allegations. The Claimant submitted that the cause was undefended which was an indication that the Respondent had no case against the Grievant. The Claimant thus sought the payment of the sums sought in the claim.

4. The letter of termination issued to the Grievant is dated 27th October 2015 and states that as an employee of the company, the Grievant as an employee of the company was expected to maintain a certain level of trust but due to his own action had chosen to break that trust by presenting it with fake receipts for compensation which is against company policy. The Grievant annexed his statement in support of his

claim. In the statement, the Grievant stated that he was interviewed for the position by Amit and Dinesh and they discussed his salary and agreed on Kshs. 35,000/- plus allowances of Kshs. 2,000/- per night out. He said the NHIF card he presented to the accountant Faisal Hirjan was rejected because the portrait on the case was his wife's. He said that in March 2015 he noticed that his salary had not been deposited and he went to check at the head office. He stated that he was accused of using the Probox as a cab when he had sought to have the worn out tyres changed two weeks before the non-payment of the March salary. The Grievant stated that Dinesh had sought to deduct the sum of Kshs. 14,800/- used for the replacement of the worn out tyres but this was not done. He stated that this action caused him to almost resign but he persevered due to the children and his wife who was not working. He stated that he was a member of the union which encouraged unity, peace and justice and so he continued working despite the challenges. The Grievant presented the letters issued by the Labour Officer to the Respondent. None of them indicated they were served on the Respondent. Be that as it may, the Claimant did not produce the receipts alleged to be fake or indicate in respect of which nights the Grievant presented the fake receipts. In the claim before the court, it is not clear whether proper basis was laid before the Grievant was dismissed for his alleged misconduct. In dismissing an employee for gross misconduct, the employer must have regard to Section 41 of the Employment Act. Section 41 provides as follows:-

41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

5. These provisions of Section 41 of the Employment Act are not discretionary. It is clear there was no hearing that preceded the dismissal of the Grievant as required under the law and the dismissal was thus unfair and unlawful within the meaning of Section 41. The Claimant did not seek reinstatement to employment but instead sought compensation inter alia. The Claimant sought house allowance but failed to prove that the sum of Kshs. 35,000/- was not inclusive of house allowance. As indicated in the statement the Grievant negotiated his salary and if indeed the same was below the required amount the Claimant would have attached the relevant wages orders to prove the underpayment. The Claimant did not provide any proof that the Grievant did not go on annual leave. The Claimant is therefore only entitled to the following reliefs on behalf of the Grievant, compensation for 3 months of service. In the final analysis I enter judgment for the Grievant against the Respondent for:-

i. 3 month's compensation for unlawful dismissal – Kshs. 105,000/-

ii. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 21st day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar