



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1611 OF 2013

KENYA SHOE & LEATHER WORKERS UNION.....CLAIMANT

VERSUS

H. R. STRATEGIC PARTNERS LTD.....RESPONDENT

JUDGEMENT

1. The claimant union averred that the grievant Mr Peter Onyango was employed by the respondent on 10th November, 2008 as a machine attendant at a consolidated wage of Kshs 11,580 paid at mid and at the end of the month. On 18th October, 2011 it was alleged during his break time that the grievant exceeded the required scheduled break time contrary to the respondent's and client's rules of operation.
2. The dispute was reported by the claimant to Ministry of Labour who appointed a Mr Litaba of Industrial Area Labour office to act as a conciliator. The respondent declined to attend conciliation meetings citing unsigned recognition agreement between the claimant and the respondent.
3. The respondent on its part averred that the grievants were engaged as seasonal labourers whose daily rate and calculation was done daily but paid fortnightly. According to the respondent, the three grievants were lawfully terminated in line with Section 44 of the Employment Act. The respondent averred that the grievants were first verbally warned and later issued with written warnings and suspensions over their misconduct.
4. According to the respondent the grievant was terminated for unlawfully deserting his work station and had been a habitual offender and on several occasions had been given verbal warnings since his behavior was disrupting productivity of the clients work.
5. The respondent further pleaded that the grievant was accorded an opportunity to explain his whereabouts and he wrote a statement which upon review was found not viable due to his poor record and performance.
6. In his oral evidence in court, the grievant stated further that he was accused of producing dirty shoes and that he exceeded his break time by 30 minutes. He denied ever receiving any prior warning before dismissal and further that he was never issued with a show cause letter.
7. In cross-examination he stated that the machine was not operated by one person and if one person is missing production slows down. He denied missing work. He further denied affecting work. He further stated that every August Bata employees go on leave. He testified that he used to go on leave in August.

8. The respondent on their part called Mr James Ndungu Mbugua who stated he worked for the respondent as an accountant and that he knew the grievant had a habit of not observing time and quality of his work was not up to standard.

9. In cross-examination he stated that the claimant was warned verbally. He further stated that there was evidence the grievant was paid all his dues but there was no document showing the computation.

10. Under section 47(5) of the Employment Act, the burden of proof that a wrongful dismissal has occurred rests on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal is on the employer. Further, section 43 places the burden of proof of reasons for the termination on the employer and failure to do so, the termination shall be deemed to have been unfair.

11. The claimant herein was dismissed on account of absenting himself from his work station presumably to go and sleep. He was further accused of poor work performance and rudeness. The respondent claimed that the claimant was a repeat offender however, no evidence of warning letter was produced to support this fact. It was unbelievable that the claimant could be a repeat offender yet the respondent continued to issue him with verbal warnings without even once documenting such warnings.

12. The court inevitably becomes of the view that the respondent either did not have a valid or justifiable reason for dismissing the claimant or if they had one, they failed to prove the same to the required standards. This matter went through conciliation and Mr Litaba before whom the parties appeared had the benefit of dealing with the same at the first instance. He came up with recommendations which were found acceptable by the claimant union on behalf of the grievant.

13. This court finds no reason to depart from the same except for the claim regarding annual leave which is disallowed since it was not in dispute that in August every year, Bata Shoe Company where the claimant was assigned duties close for the entire month for maintenance of the plant.

14. The court therefore enters judgement against the respondent as follows:

	Kshs
a. One month's salary in lieu of notice	11,580
b. Four months salary as compensation for unfair termination	<u>46,320</u>
c. Costs of the claim	

15. The respondent shall issue the claimant with a certificate of service.

16. It is so ordered.

Dated at Nairobi this 9th day of February, 2018

Abuodha J. N.

Judge

Delivered this 9th day of February, 2018

In the presence of:-

..... for the claimant

..... for the Respondent

Abuodha J. N.

Judge