



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 183 OF 2017

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

KASSMATT SUPER MARKET.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 10th May 2017 seeking redress for its member, the Grievant herein Mr. Jactone Juma Ochieng, a former employee of the Respondent. It was averred that the Grievant was employed on 1st September 2008 as a shop attendant earning a salary of Kshs. 6,000/- all inclusive. The first posting was Githurai 44 branch after which he was transferred to Jumbo Branch in July 2009 where he was a storekeeper earning 20,600/- by the time of dismissal. It was averred that the Grievant was verbally employed and there was no formal contract of employment. It was averred that the Grievant was a member of the Claimant union from 4th July 2014. The Claimant averred that the Grievant was spotted with a mobile phone by the security officer Ezekiel on 22nd June 2015 at 8.00am some 30 minutes after reporting to work. He was reported to the security manager known as Captain who after questioning the Grievant, asked for the surrender of the phone, a request that the Grievant declined to accede to. The Claimant averred that the Grievant indicated that he was taken to the Managing Director's office where he stated that he had an emergency issue that required him to make a call. It was averred that the Grievant was sent on a one week suspension and upon his return on 29th June 2015 was informed by the Managing Director that he was dismissed. He pleaded with him not to dismiss him as there had been no communication on non-use of phones but the plea fell on deaf ears. The Claimant avers that the Grievant reported the dismissal to them on 13th July 2015 and a letter was dispatched to the Respondent promptly. The letter was ignored and a reminder was sent on 7th August 2015 proposing a joint meeting on 18th August and when this did not yield a response, a final reminder was written on 1st September 2015. On 16th February 2016, a dispute was reported to the Cabinet Secretary per Section 62 of the Labour Relations Act, 2007 and a conciliator was appointed being Mr. B. J. Twanga who failed to convene conciliation meetings prompting the appointment of a new conciliator Ms. C. Otieno who convened meetings and invited memoranda from the parties. The Claimant averred that the Respondent did not attend the conciliation meetings or respond to the invitation to prepare memoranda prompting the referral certificate being issued on 22nd March 2017. The Claimant averred that the Respondent had failed to adhere to the provisions of the law in respect to public holidays and the issue of appointment letters. The Claimant averred that the Grievant was not afforded an opportunity to defend himself as required under Section 41 of the Employment Act, 2007. The Claimant thus claimed unconditional reinstatement of the Grievant, damages for loss of earning from the date of verbal dismissal, one month's salary as compensation for wrongful accusation, interest at 20% on the sums claimed. In the alternative, the Claimant sought for its member terminal benefits being one month's notice – Kshs.20,600/-, accrued annual leave for 7 years Kshs. 113,076.92, payment for salary arrears from July 2015 to date –Kshs. 453,200, overtime for the period worked – Kshs. 998,307-, payment for public holidays – Kshs. 61,007.70, maximum compensation for wrongful loss of employment – Kshs. 247,200/- and costs of the suit.

2. The Respondent filed a statement of defence on 21st November 2017 and in it averred that the Grievant had been employed as its employee at the Githurai 44 Branch. The Respondent averred that the terms of service of the Grievant did not permit the Grievant to use his mobile while at work. It was averred that on 22nd June 2015, the Grievant was found using his mobile phone contrary to the terms and conditions of employment and on being questioned about it by management, the Grievant quit his job. It was the Respondent's position that at the time the Grievant left employment he had no balance on leave days and that the Grievant never worked overtime. The Respondent pleaded that it never breached the Employment Act, 2007 and the Constitution of Kenya with regard to the Grievant herein. The Respondent stated that the claim by the Claimant for Kshs. 1,896,783.70 was unconscionable, unreasonable and unjustifiable. The Respondent sought the dismissal of the Claimant's suit with costs.

3. The Grievant testified on 25th January 2018 and stated that he was employed as a shop attendant by the Respondent for a salary of Kshs. 6,000/- without any house allowance. He stated that he worked as such till his appointment to position of storekeeper in July 2008 when the salary was raised to 8,000/- a month. He testified that he was dismissed on 29th June 2015 because on 22nd June 2015 he had been found using a mobile phone yet they had not been prohibited from using mobile phones. He stated that he was dismissed by the director James Mwangi. He testified that he would report to work at 7.30pm and leave at 9.30pm and never went on annual leave.

4. In cross examination he testified that he was not given the staff rules and regulations of the Respondent. He stated that he knew the do's and don'ts of the Respondent for the 7 years he had worked. He testified that he was searched and a phone found on him and he stated that he was not using the phone and had no idea that the carriage of a phone was prohibited. He was shown the Respondent's bundle and read the mobile phone policy and indicated that he was not aware that the phones were prohibited. He testified that he was paid for the 15 days being half the month. He stated that he worked overtime as the supermarket had unique times and that he worked on public holidays. He stated that he was aware the Respondent had an office telephone for use by staff in emergencies. He testified that he would report at 7.30am and work till 9.30pm and when one deducted 8 hours the extra hours would be 4 hours overtime. He stated that is how he had arrived at the figures in his claim for overtime.

5. He was re-examined and testified that he only saw the rules and regulations in court. He stated that he was dismissed by the director and the Respondent never attended the conciliation meeting.

6. The Respondent called Sammy Musyimi the security manager at the Respondent. He testified that the Grievant was known to him and that the Grievant used to work as a supervisor at the Respondent. He stated that on 22nd June 2015 he found the Grievant using his mobile phone at the workplace which was in contravention of the rules in the employee guide. He testified that the Grievant was caught by a guard who called him and he questioned the Grievant and was not given a satisfactory account by the Grievant. He referred the Grievant to the branch manager Mr. Ndirangu who asked the Grievant to surrender the phone and the Grievant declined to hand in the phone prompting the Grievant to be referred to the director but the Grievant instead opted to walk out and never showed up at the place of work. He stated that the Grievant was acquainted as were all staff with the rules. On emergencies, the staff had access to an office number availed on request for such purpose and that for family emergency one could access the phone. He testified that the Grievant left voluntarily and was fully paid for the days he worked. He stated that the Grievant was not dismissed, was a deserter and that there was no leave pay provision in the Respondent. There were no public holidays in a supermarket as it is open throughout. He stated that there was no money owed to the Grievant.

7. In cross-exam he testified that the Grievant would report at 7.30pm and would leave when the shop closed which varied but was around 9.00pm. He stated that he was present when the Grievant was asked to surrender the phone and the Grievant stated there was an emergency but declined to hand over the phone and left when referred to the director. He did not admit that the Grievant was owed overtime but stated that the staff worked on public holidays and they did not work in shifts. He stated that the Grievant was not suspended and that the Grievant walked out voluntarily. That marked the end of oral testimony.

8. The Claimant filed submissions on 2nd February 2018 while the Respondent filed submissions on 16th February 2018. In his submissions the Grievant submitted that he was found with his mobile phone by a security officer on 22nd June 2015 and was reported to the director who verbally suspended the Grievant for one week. The Grievant submitted that he had never been cautioned for having his mobile phone and on return on 29th June 2015 was verbally dismissed from service by the director Mr. Wilson Mwangi. The Claimant submitted that the Grievant was dismissed without a valid reason and was therefore entitled to the prayers in the claim.

9. The Respondent submitted that the Grievant voluntarily left the employment of the Respondent as he was not dismissed. The Respondent submitted that there was a clear indication on the rules and regulation on the use of mobile phone during working hours. The Respondent submitted that the Grievant was not telling the truth as he could not have worked for the Respondent for 7 years and not know about the telephone policy. The Respondent stated the unfair termination was not proved by the Grievant. The Respondent submitted that it was trite law that when special damages are sought they must be strictly proved. The Respondent relied on the cases of **Shabani v Nairobi City Council (1982-1988) 1 KAR 681**, **Hann v Singh (1982-1988) 1 KAR 738** on the issue of proving damages where the court of appeal held that the damages must be strictly proved. The Respondent submitted that the Grievant wanted to unjustly enrich himself and urged that the suit be dismissed with costs.

10. The Claimant's member was an employee of the Respondent earning Kshs. 20,600/- a month as at the time the contract of service ended. The Claimant averred that there was a verbal dismissal while the Respondent asserted the Grievant walked out voluntarily. Having heard the Grievant and the Respondent's witness it was clear the Grievant misled the court on the manner of termination. He refused to hand over a phone that he was found in possession asserting that he had a family emergency. In the 7 years he worked for the Respondent it was incredible that he could claim that he was not aware of the telephone policy. He did not come across as candid in his testimony. He lied that he did not know of the availability of the office phone for emergencies. He therefore walked out from work and did not therefore trigger the necessity for the application of Section 41 of the Employment Act, 2007. The only aspect of the claim that found traction was the work he performed during public holidays and overtime. He was at work from 7.30am and worked till store closure at 9.00pm. This was over 13^{1/2} hours a day. Taking off the hour for lunch and another half hour for the two coffee (tea) breaks, the Grievant worked for 12 hours a day which is 4 hours each day he worked. He was therefore entitled to overtime. Overtime would be the hourly rate multiplied by the 4 hours worked each day for a 6 day working week. He can only claim the sum for the 1 year preceding the accrual of cause of action. He would be entitled to pay for the full month in June as opposed to the 15 days pay he received from the Respondent. He was also entitled to annual leave at the rate of 21 days. It was common ground that the Grievant never went on leave and would therefore be entitled to leave pay for 3 years. The Grievant is therefore partly successful in this claim and is entitled to:-

a. Kshs. 10,300/- being balance of the June 2015 salary

b. Kshs. 212,544 being overtime for 2015.

c. Kshs. 43,260/- being payment in lieu of leave

d. Costs of the suit

e. Interest on the sums in a), b), c) and d) above at court rates from the date of judgment till payment in full

f. Certificate of service in terms of Section 51 of the Employment Act

It is so ordered.

Dated and delivered at Nyeri this 1st day of March 2018

Nzioki wa Makau

JUDGE