



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 756 OF 2010

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

BRITISH AMERICAN TOBACCO (K) LIMITED.....RESPONDENT

J U D G E M E N T

1. The suit was brought by the Claimant Union on behalf of three (3) named grievants who were also shop stewards of the Claimant Union. The Claimant Union and the Respondent has a Recognition Agreement and Collective Bargaining Agreement (CBA) which spelt out the terms and conditions of all unionisable employees including the Respondents.

Facts of the Claim

2. The grievants are Peter Musyimi, employed by the Respondent on 1st November, 1994 as a Technical Operator Trainee and at the time of termination he worked as a quality facilitator at a monthly salary of Kshs.118,841 and a house allowance of Kshs.8,362.

3. The 2nd grievant Nixon Wasike was employed by the Respondent on 1st September, 1994 as an electrical technician and at the time of termination of employment he worked in the same position but was earning a monthly salary of Kshs.136,216 and a house allowance of Kshs.8,699.

4. The 3rd grievant Charles Misati was employed by the Respondent on 7th November 1994 as a Technical Operator Trainee and at the time of termination he was a Technical Operator earning a monthly salary of Kshs.114,841 and house allowance of Kshs.8,362.

5. On 8th March 2010, the grievants went together with the Respondent's Human Resource Executive Ms. Matilda Ocha and Mr. Julius Mutiso a shop steward on official travel to the Respondent's Leaf growing areas in their capacity as members of the Respondent's joint consultative council. They returned from the trip on 13th March, 2010.

6. On 8th March 2010, the joint consultative council members were accommodated in the Respondent's guest house at Malakisi in Western Kenya on full board which included breakfast, lunch and dinner.

7. The members were not billed for the accommodation and food. The bill was to be footed by the Respondent.

8. On 16th March, 2010 Mr. Nixon Wasike presented expense claims on behalf of the grievants and one Mr. Mutiso to the Head of Human Resources Operations Mr. Chege.

9. Mr. Nixon Wasike was immediately informed to amend the claim as it included a night out at Malakisi guest house on 8th March 2010 in the sum of Kshs.4,200 for each grievant in respect of which the grievants had been accommodated on full board. He was informed that the claim should be reduced to Kshs.1,050 for each grievant to cover, Day Safari Allowance that the grievants were entitled to under clause 37 of the Collective Bargaining Agreement.

10. A dispute arose between the grievant and the Human Resource Department, the grievants insisting that they were entitled to the claim in terms of the Collective Bargaining Agreement, whereas the Human Resource Department was of a contrary view.

11. Instead of the Respondent simply rejecting the excess claim and pay what in their opinion was due, they escalated the dispute to a disciplinary matter, charged the grievants for fraud, issued them with show cause letters, inviting them to a disciplinary hearing where they defended themselves but were found guilty under section 44(4)(g) of the Employment Act, 2007 which allows for summary dismissal if –

“(g) an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property”

12. These facts are not in dispute and are admitted by the Respondent in its statement of response and viva voce evidence adduced before court.

Determination

13. The issues for determination are:-

- (i) Whether the grievants’ employment was terminated for a valid reason and in terms of a fair procedure.
- (ii) Whether the grievants’ are entitled to the reliefs sought.

Issue i

14. It is common cause that there arose a disagreement between the grievants and the Respondent as to whether in terms of the CBA, the three members of the Respondent’s joint consultative council were entitled to per diem in respect of one night out on 8th March, 2010, when the council was accommodated at the Respondent’s guest house at Malakisi in Western Kenya.

15. The grievants were advised by the Human Resource Department that since, the Respondent housed them at the guest house on full board, they were only entitled to payment of Kshs.1,050 for the day safari allowance in terms of clause 37 of the Collective Bargaining Agreement and not to the full per diem in the sum of Kshs.4,200.

16. When the grievants insisted on the validity of their claim in terms of the Collective Bargaining Agreement, instead of the Respondent exercising its managerial authority to pay what, in their opinion was due, the Respondent accused the grievants of fraud, charged them, issued them with show cause letters which were responded to by the Respondents invited them to a disciplinary hearing where they appeared and were represented by a union official, but the Respondent found them guilty and terminated their employment.

17. Conciliation process followed but was not successful and the matter was brought to court.

18. This matter must be viewed in the context that the grievants were the shop floor union leaders and were constantly engaged with the Human Resource Department of the Respondent in negotiating terms and conditions of service of all unionisable employees and in dispute resolution within the frame work of the Parties Recognition Agreement and the Collective Bargaining Agreement.

19. Clause 4.1 of the Recognition Agreement between the parties titled –

“Procedure for Grievance Claims and other matters” provides:-

“4.1 “Grievance” shall mean any grievance arising from breach real or alleged of existing terms of service in the matters specified in clause 2(a) of the Agreement which may affect any employee, a group of employees of the company at a certain centre. Within the grievance procedure outlined below, the matters on which decisions have been made by management at any level will not be referred back to that level but will be referred to the next higher level. Any matter or grievance raised shall be dealt with within four working days ...”

20. Clearly, a dispute had arisen between shop floor officials of the Union and the Human Resource Department regarding whether or not the officials were entitled to a full per diem or to a day allowance in respect of one night out. This was a matter of different opinion on the applicable Collective Bargaining Agreement provisions between the employees and the Human Resource Department. This was a clear grievance within the meaning of clause 4.1 of the Recognition Agreement between the parties. The Human Resource Department, if unable to resolve the grievance ought to have escalated it to higher management for a decision to be made whether or not the claim was payable.

21. It was unprocedural, malicious and unlawful to term this grievance which was in the open and for debate, a fraud. It was within the mandate of management to make a determination on the matter as to whether to pay or not pay the per diem claimed by the employees.

22. The grievants were long standing employees of the Respondent in technical capacities for a period of years. The grievants had grown to be the leaders of the workforce at the enterprise and were used to constant engagement with management on terms and conditions of service.

23. The court appreciating this context, has found without hesitation that the Respondent had no valid reason in the context of sections 43 and 44 of the Employment Act, 2007, to terminate the employment of the grievants. This was malice at its best against very long standing employees of the Respondent. The conduct by the Respondent is indefensible and the court condemns the same as a very bad management practice. It matters not that the Respondent hide in a façade of legality and procedure to purify a most tainted process.

24. The charges were unlawful and unfair and could not constitute lawfully, a subject of a fair hearing within the meaning of section 41 of

the Employment Act.

25. The court finds that the termination was in violation of section 41, 43 and 45 of the Employment Act, 2007.

26. The court relies on the persuasive authority in **E & LRC, at Mombasa, Cause No. 567 of 2015, between Christian Samba**

Obath and Fossil Fuels Limited, where Rika J held:-

“28. The court is satisfied the accusations against the Claimant, contained in the letter to show cause, assuming these were the same accusations the claimant was faced with on disciplinary hearing, were not established. They were not valid termination grounds. Termination was not based on valid reason as required under section 43 and 45 of the Employment Act 2007.

27. This situation applies *mutatis mutadis* to the present case. The accusations made by the Respondent against the grievants could not possibly be valid reasons to terminate the employment of the grievants and the court has already so found.

Issue ii

28. The grievants pray for maximum compensation of equivalent to twelve (12) months salary for the wrongful, unlawful and unfair termination of employment on 26th April, 2010.

29. From the finding on liability by the court above, the grievants are entitled to compensation in terms of section 49(1)(c) and read with subsection 49(4) of the Employment Act, 2007.

30. This was a most unfortunate, and callous termination of employment of grievants who had served the Respondent from 1994 upto the year 2010. The grievants had therefore served the Respondent for an approximate period of sixteen (16) years in technical positions.

31. The grievants had also helped to sustain a healthy employment and labour relationship at the enterprise in their capacity as shop stewards and members of the Respondent's joint consultative council. It is surprising that the Respondent could treat the grievants so casually and carelessly to their loss and detriment.

32. The grievants had a clean record for most of the period they worked for the Respondent. No previous adverse record was produced by the Respondent against them.

33. The grievants lost wrongfully, unlawfully and maliciously career prospects to retirement age in an enterprise which they had served for so long. The grievants did not in the court's view contribute to the termination of their employment. This was simply a misadventure by the Respondent who ought to have known better.

34. The grievants did not receive any substantial terminal benefits upon separation. They suffered loss, anguish, emotional torture and damage. The value of the compensation was diminished in value, since the grievants lost their jobs seven (7) years ago.

35. They have not obtained jobs that could pay them the equivalent salaries they earned at the time of dismissal and would have continued to earn till retirement.

36. The court considers awards in similar cases as follows:-

(i) Industrial Court at Mombasa Cause No. 222 'A' of 2013, Kenya Union of Commercial, Food and Allied Workers and Mombasa water supply and Sanitation Co. Limited & Another, in which Rika J awarded three (3) grievants equivalent of 10 months gross salary in compensation for unfair termination.

(ii) E & LRC at Mombasa Cause No. 567 of 2015 (supra) in which Rika J awarded the Claimant the equivalent of 12 months salary in compensation for unfair termination.

37. Considering all the above, the court awards the three (3) grievant as against the Respondent equivalent of twelve (12) months salary in compensation for the wrongful, unlawful and unfair termination of employment as against the Respondent as follows:-

i. Peter Musyimi

Kshs.1,426,090 (118,841 x 12) in compensation.

ii. Nixon Wasike

Ksh.1,634,592 (136,216 x 12) in compensation.

iii. Charles Misati

Kshs.1,378,092 in compensation

Total Award 4,438,774.

iv. The award is payable with interest at court rates from date of judgement till payment in full.

v. The Respondent to pay costs of this suit.

Dated and Signed in Kisumu this 21st day of March, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 6th day of April, 2018

Maureen Onyango

Judge

Appearances

Mr. Atela Claimant

M/s. Oyombe for Respondent

Anne Njung'e – Court Clerk