



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 566 OF 2010

PATRICK MAYAMBA, SIMON MUSEMBI,

RICHARD ODUOR & 47 OTHERS.....CLAIMANTS

VERSUS

AFRO PLASTICS KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimants herein averred that they brought the present suit on behalf of 47 other claimants who consented to the filing of the suit on their behalf. They stated that at all material times they were employees of the respondent as permanent and casual employees in various capacities. The claimants further averred that they were all members of the Kenya Chemical Workers Union who negotiated the terms and conditions of service on their behalf through a CBA.
2. The claimants further stated that the casual workers were paid a wage of Kshs 305 per 9 hours of work and Kshs 339 for 10 hours of work during the day and Kshs 494 for 14 hours of work at night while those on permanent terms were subject to terms and conditions of their letters of appointment. The claimants averred that they ceased being the respondent's employees when their services were individually and prematurely terminated for various reasons including failing to sign a new contract of employment, suspension and allegations of sleeping while on night duty.
3. The claimants contended that they were pressured to sign new contracts whose terms were unfavourable to them as workers and at no time were they sleeping while on duty and were thus dismissed for failure to sign the new contracts. The claimants further averred that they were unlawfully dismissed from work without being paid their rightful terminal benefits and without notice for such termination. The claimants therefore sought their rightful dues calculated in accordance with the CBA.
4. The respondent on its part pleaded that the claimants dispute concerned a CBA hence they could not prosecute the dispute without involving the union. The respondent further stated that the claimants were dismissed for different reasons and issues hence the matter could not be tried jointly without any leave or authority. The respondent further pleaded that the combined pleadings by the claimants was vague and ambiguous making it impossible to render a fair adjudication of the issues before the court.
5. The respondent further averred that the Kenya Chemical Workers Union was totally kept in the picture and discussions were held between the union and the respondent and the union was satisfied on all reasons advanced for the stoppage of engagement between the claimants and the respondent. The respondent stated that for various reasons the claimant's services were terminated pursuant to the provisions of the CBA in force.
6. In what the respondent called supplementary memorandum of defence, the respondent further averred that 14 of the claimants were dismissed when they were found sleeping in the premises during the night shift of 5th and 6th December, 2008 and were asked to give written explanation and appear before the disciplinary panel but declined. They instead instigated a general strike in the respondent's factory on 8th December, 2008. On 9th December, 2008 a meeting was called between the Ministry of Labour officials, the claimants and the respondents. Another meeting was planned and agreed that FKE would be in attendance and the meeting took place on 16th December, 2008 at FKE offices. The union subsequently wrote a letter on 17th December, 2008 and the company responded.
7. In oral evidence initially recorded by my brother Justice Rika, the claimants' 1st witness Mr Patrick Mayamba stated that he was employed in 1989 as a casual labourer and worked for 19 years. He left employment on 6th December, 2008. He was then a shift supervisor. He further stated that they were members of Kenya Chemical and Allied Workers Union and that the Union had a CBA and he was a shop

steward. His entire department left employment on 6th December, 2008. According to him on 6th December, 2008 at about 4.00 a.m. the director Mr Akya Shah came to the factory and asked his juniors where he was and they told him they did not know. He later came and told Mr Shah that he was in the shower. Mr Shah then alleged that when he came in he found the employees sleeping. According to him, he told Mr Shah that was not possible because if there were productions they would have been damaged. He further told him work was going on, machines were operating and no item had been damaged. He further told him, it was not possible to sleep in the factory due to the heat.

8. Mr Shah then asked him to remove the printing ink and switch of the machines. The director was not satisfied with his explanation and he said he was preparing their letters. According to the witness, they waited upto to 11:00 a.m when Soubash Shah was sent to call them in. They were called in one by one. He was the first. He found the three Shahs in the office. Ekya Shah asked him how long he had worked and replied him 19 years and was told by Shah that he was sorry those 19 years were wasted which he understood meant he had been dismissed with loss of benefits. He was then given a paper and asked to reapply for his job if I am once again interested. He was then given a dismissal letter. According to him he declined to reapply for his job because he could have lost service pay. All of them agreed to leave and return the following Monday 8th December, 2008. On 8th December, 2008 they were locked out. They were told only those ready to receive the letters given by the respondent would be allowed in.

9. He further stated that the other 200 employees demanded to be told why they were being dismissed. They protested in the entire factory. Ekya Shah came later with Police Officers. The OCS asked him to talk to the employees. Labour Officers and the Secretary General of the Union also came. There was no agreement and Mr Ekya said all the 200 employees had been dismissed. They went to Nyayo house the following day led by the Secretary General of the union, Harrison Okeche from FKE and Mr Ekya represented the respondent.

10. At the meeting Mr Ekya alleged that the employees were refusing to work. The union on its part asked that the parties visit the factory and question the employers, when this was done the employees denied refusing to work. And Mr Bii further said that was not a strike but a protest. Mr Ekya therefore agreed that the 200 employees return to work and there be a further meeting with labour office the following day.

A meeting was set of 16th December, 2008 but did not take place. The union and the respondent exchanged communication. He denied that they tendered any apology to the respondent. He further stated that the union and FKE did not help in getting them a relief. They were not paid for the days worked, no notice was given, no house allowance was paid to others.

11. In cross-examination, he said permanent employees were issued with payslips and that his payslip was like Nyamais attached to their bundle of documents. He further stated that casuals were paid on the master roll. He further stated that as a shop steward he could not take decisions for the union but appraised the union on the going ons at work. He told the union about the dispute over contracts. He further stated that they agreed they would not sign the new contracts until FKE, the union and the Ministry of labour concluded consultations.

He further stated that the Secretary General of the union wrote saying they were asleep and sought forgiveness. He was at the meeting where the Secretary General was asked to write the letter. They disagreed with union over this.

12. The second claimant witness Mr George Ochieng informed the court that he worked from 2003 to 2009. He further stated that he left in 2008 December upon dismissal on allegations that he was sleeping while on duty. On the material date, the director Mr Ekya Shah came around 4:00 a.m. with some guards and one of the managers Mr Harrish. Mr Shah asked the whereabouts of Mr Mayamba and he told him he was just around. Mr Shah then went upstairs to look for Mayamba and when he found him he instructed the operator to stop the machines. He further told Mayamba to remove the ink from the machines and further told the manager to tell their supervisor that their letters were being prepared. He denied they were asleep and stated that targets were reached.

13. In cross examination he stated that at the time of the incident he was a casual and that he had not signed any document. He further stated that when Mr Shah came, everyone was working and all the machines except one, were working. Mr Ochieng further stated that there was protest when they were dismissed and the union became involved. The claimants third witness Mr Maweu stated that he used to work as a production machine operator and at times store keeping assistant. According to him, he was dismissed because he refused to sign a renewal contract. His union had told him not to sign the contract until the terms were agreed with the union. He further stated that they could not sign the contract because they would have lost their years of service. The contract they were to sign was for three months.

14. In cross examination he stated that they used to log in and out of work. He further stated that they never demanded their terminal dues and that the union was negotiating on their behalf. Claimants fourth witness Mr Richard Oduor Omondi stated that on 29th November, 2008 they reported to work. When he checked for his staff card he could not get it. The production manager told him to wait. At around 6:45 p.m. he was called by the production manager to his office, he found him and his supervisor Mr Mulanya and Ekya Shah.

15. He was asked why he wanted to fight Mr Mulanya outside the company but he denied any such thing. He was then asked to go home and bring a letter stating why he wanted to fight. He brought a letter the next day where he stated he had been having a problem with allocation of duties. He was thereafter suspended for four days. He returned thereafter and still was not issued with his staff card. At around 1:00 p.m. I was asked to get in and sign for a warning letter and go to work. When he was shown the letter it was a summary dismissal letter. He was never paid his dues upon dismissal. In cross –examination he denied having any problem with his supervisor and that they had a good working relationship.

16. The respondent's witness Mr Ekya Shah stated that the claimants were the respondent's former employees who were dismissed for various reasons. Fifteen who were working on night shift were dismissed for sleeping while on duty. According to him they received an alarm around 3:45 am and went to the factory to see if there was anything wrong. They found the doors locked an all the fifteen employees were asleep and work had stopped. According to him he sought the head of the group Mr Mayamba and when he found him he said he had gone to shower because the factory was hot. He then asked the employees not to switch on the machines and allowed them to stay until daylight.

17. The claimants were later asked to give written explanation why they were asleep at work but none responded instead they all left without

giving any explanation. The respondent then prepared dismissal letters but none of the claimants collected their letters. On 8th December, 2008 there was a strike and the respondent engaged with the union and the Ministry and the strike and sleeping issue was discussed and the claimants accepted they were sleeping. The union secretary then agreed to write an apology letter on behalf of the claimants. The respondent then asked each individual to apply and request for reinstatement.

18. According to Mr Shah, the 19 claimants were not dismissed. They left before their contract expired and that they collected their dues. He further stated that 12 claimants refused to sign the new contracts. Their contracts expired and were not interested in signing new contracts. The final seven claimant's contracts expired but they continued. According to Mr Shah all dues were paid but some claimants have not collected their dues. In cross –examination he stated that no warning letters were issued to the employees found sleeping and that they were verbally called upon to explain why they were sleeping. The claimant herein were dismissed mainly for sleeping and another for threatening to beat up a colleague. They denied these allegations.

19. Under Section 43(1) of the employment Act, the employer is required to prove the reason for termination and where the employer fails to do so the termination shall be deemed to have been unfair. Further section 47(5) provides that for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that unfair termination or wrongful dismissal has occurred is on the employee while the burden of justifying the grounds for termination shall be on the employer.

20. The respondent herein alleged that the claimant's were sleeping and that affected production yet no evidence was laid before court regarding production levels for the period in issue for the court to ascertain if indeed its true production levels dropped and which could be attributed to the allegation that the claimants were sleeping. Under section 41(1) an employer shall before terminating the employment of an employee on grounds of misconduct, explain to the employee in a language the employee understands, the reason for which the employer was considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice during the explanation.

21. Subsection 2 of the foregoing section further provides that before termination or summary dismissal the employer must hear and consider any representations, which the employee may have on reasons for dismissal or termination. No evidence can be found either in documents filed before court or by oral evidence that the claimants herein were taken through a disciplinary process at which the representations were taken before they were dismissed.

22. The court in conclusion finds and holds that the claimant's services were unfairly terminated and awards each of them as follows:

- a. One month's salary in lieu of notice
- b. Service gratuity at the rate of 15 days salary for each year of service
- c. Eight months salary as compensation for unfair termination
- d. Costs of the suit

23. Items (a) (b) and (c) shall be subject to taxes and statutory deductions. Considering the numbers involved, counsel for the parties shall liaise with their respective clients and compute the actual amount due to each claimant based on the heads of compensation above and report to court for recording of final order.

24. Matter set for mention on 27.9.2018.

25. It is so ordered.

Dated at Nairobi this 29th day of June. 2018

Abuodha J. N.

Judge

Delivered this 29th day of June, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

.....for the Respondent