



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE. NO. 198 OF 2013
TRANSPORT WORKERS UNION.....CLAIMANT
VERSUS
HELTZ DRIVING SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on behalf of Joan W. Githuki and Juliet N. Makokha (herein after called the grievants) on 12.1.2012. The claimant alleged that the grievants were unfairly terminated on 14.1.2012 and 2.10.2012 respectively and prayed for salary in lieu of Notice, unpaid salary, underpaid salary in arrears, accrued leave, service pay, acting allowance and compensation for unfair termination of the grievant's services.

2. The respondent filed her defence and counterclaim on 20.5.2013 denying the alleged unfair termination of the grievants services. She averred that the grievants committed acts of fraud and theft of money from her and when they were suspended to pave way for investigations, they deserted employment and never came back for hearing of their respective cases when she called them. She therefore counterclaimed for Kshs.1,440,000 and Kshs.71,000 against the first and second grievant respectively as the amount of loss they caused to her through theft and extortion.

3. The suit was heard on 10.5.2018 when the grievants testified as Cw1 and Cw2 but the respondent never called any witness.

Claimant's Case

4. The first grievant testified as Cw1. She stated that she was employed by the respondent on 7.9.2009 as a Sales Lady/Receptionist earning Kshs.6,000. On 29.10.2009 she was promoted to Branch Manager and her salary increased to Kshs.10,000 per month. She worked well until 14.1.2012 when she was terminated on ground that a customer was not issued with any receipt after payment.

5. Cw1 denied the alleged offence and maintained that she issued the customer with receipt after payment she contended that her work performance was perfect because she was never served with any warning letter before the termination.

6. The second grievant testified as Cw2. She stated that she was employed by the respondent on 6.6.2011 as a Receptionist earning Kshs.6,000 per month. She worked well until 6.10.2012 when she was terminated on ground that she colluded to swindle company money. She denied the alleged offence and contended that her performance was perfect she was never served with any warning letter before the

dismissal.

Analysis and Determination

7. There is no dispute that the grievants were employed by the respondent until 14.1.2012 and 2.10.2012. The issues for determination are:

- (a) Whether they were unfairly terminated by the respondent;
- (b) Whether the reliefs sought by the suit and the counterclaim should be granted.

Unfair termination

8. In this case the claimant alleged that the grievants were terminated unfairly for alleged misconduct which they denied in evidence. The respondent denied in her defence that she terminated the grievants' services and averred that she merely suspended them to pave the way for investigation. She further averred that after suspending the grievants, they disappeared and never reported back for disciplinary hearing.

9. The foregoing pleadings by the respondent have not been substantiated by evidence since the respondent did not tender any evidence. It follows therefore that the evidence by the claimant that the grievants were terminated on 14.1.2012 and 2.10.2012 respectively has not been rebutted. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

10. The valid and fair reason is one which relates to the employees conduct, capacity and compatibility or the employer's operational requirement. Fair procedure on the other hand involves explaining to employee the reason for which termination is being considered, the explanation to be done in a language of the employee's understanding and in the presence of another employee or shop floor union representative of his choice, and thereafter the employee and his chosen companion must be given a chance to air their representations for considerations before termination is decided. In this case, as already observed herein above, the respondent never tendered any evidence, and as such she has not discharged her burden of proving both substantive and procedural fairness in terminating the services of the grievants and consequently proceed to hold that the termination was unfair within the meaning of section 45 of the Act.

Reliefs

11. Under section 49 of the Act, I award each grievant one month salary in lieu of notice plus 4 months salary compensation for the unfair termination. In making the said award, I have considered the fact that the grievants served the respondent for fairly short period and also the fact that they had not been involved in any proven misconduct or served with warning letters before the termination.

12. In addition, the grievants are awarded the salary for days worked in January 2012 and October 2012 respectively. They are also awarded salary underpayment, accrued leave and service pay as prayed. The claim for acting allowance is dismissed for lack of evidence to prove their exact entitlement. Specifically the Court was not told how the figure of Kshs.10,000 per month was arrived at.

Conclusion and Disposition

13. For the reasons that the grievants were unfairly terminated by the respondent, I enter Judgment for each grievant in the following terms:

Notice				Kshs.	17,118.00
14	days	salary	(January	2012)	Kshs. 9,217.40
Leave	(2	years)		Kshs.	24,579.70
Service	pay	(2	years)	Kshs.	17,118.00
Underpayment				Kshs. <u>167,456.00</u>	
Total				Kshs. 235,489.10	

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Juliet N. Makokha

Notice				Kshs.	13,214.60
2	days	salary	(October	2012)	Kshs. 1,217.40
Leave	(1	years)		Kshs.	10,673.35
Underpayment				Kshs. <u>105,472.00</u>	
Total				Kshs.	130,630.95

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14. The awards given above will attract interest at Court rates from the date of filing till payment in full which payment shall be subject to the relevant statutory deductions. The grievants will also be issued with certificate of service as required under section 51 of the Employment Act. No order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE