



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1383 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT**

**-Versus-**

**H. R. STRATEGIC PARTNERS LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant is a trade union registered in Kenya to represent workers engaged in organisations engaged in the work of tanning of hides and skins, all kinds of leather suitcases, shoes, cushion making, making of shoelaces and in shops selling leather goods.

The respondent operates within the premises of Bata Shoe Company (K) Limited in Limuru. The claimant does not have a recognition agreement with the respondent but was pursuing the same at the time of filing this suit.

**The Grievant**

The grievant was employed by the respondent on 7<sup>th</sup> September 2009 as a Machine Operator. His employment was terminated on 31<sup>st</sup> October 2011. According to the claimant union the termination was unlawful while according to the respondent the termination was lawful and was on grounds of gross misconduct after the claimant was severally warned verbally and in writing. The grievant's last pay was Kshs.8,710 per month inclusive of house allowance.

**Claimant's Case**

It is the claimant's case that the grievant was not given an opportunity to be heard, was not asked to show cause or taken through any disciplinary process for the alleged misconduct. It is the claimant's case that the termination was unfair in terms of Section 43(1) and 45(2) (a) as the grievant was not given reasons for termination. It is further the claimant's case that the grievant was not paid his terminal benefits upon termination.

The claimant prays for reinstatement of the grievant or his reengagement in the previous employment without loss of benefits. In the alternative the claimant prays for payment of terminal benefits to the grievant as follows: -

- a. One month notice in lieu = Ksh.8,710.00/=.
- b. Annual/prorata leave of 2 years = 42 years x Kshs.335 = Kshs.14,070.00
- c. Severance pay of 2 years = 2 x 335 x 15 = Kshs.10,050.00
- d. 12 months' compensation for loss of employment  
= Kshs.8,710.00 x 12 = Kshs.261,310.00

**Total Kshs.294,140.00**

- e. To be issued with a certificate of service

The claimant further prays for costs.

### **Respondent's Case**

It is the respondent's case that the grievant was engaged on temporary terms of employment and was lawfully terminated after being warned severally both verbally and in writing as is evident from appendix 1 and 2 of the respondent's exhibits. It is the respondent's case that the grievant failed to remedy his behaviour leaving the respondent with no alternative but to terminate his employment.

The respondent avers that the grievant was fully paid and compensated for all the services he rendered to the respondent up to 1<sup>st</sup> November 2011 when his employment was terminated. The respondent prays that the claim be dismissed with costs.

### **The Evidence**

The grievant CW1 testified that he was employed by the respondent as a Machine Operator on 7<sup>th</sup> September 2009 and was paid fortnightly between Kshs.4,200 and Kshs.5,000. He testified that his employment was terminated from interchanging shifts with a colleague in another shift because he had a class to attend. He testified that he explained the reason for the shift change to his Supervisor, Key Operator, one Zephania Omani and also talked to the Key Operator in the other shift, that both Supervisors called the colleague he was to interchange shifts with, who confirmed that he had no problem with the change.

The grievant testified that he was not given a show cause letter or given a hearing. Upon termination he was only paid for days worked. He stated that the termination was unfair. He prayed for compensation, notice of Kshs.8,710, leave for two years at Kshs.14,070, service pay for two years in the sum of Kshs.10,050 and a certificate of service.

Under cross-examination, the grievant stated that he was warned on 21<sup>st</sup> May 2010 for absenteeism but never saw a second warning alleged to have been issued in November 2010. He stated that in August there were holiday breaks called leave for company maintenance but Thongs Department where he worked did not go on leave during the maintenance break. He stated he committed no offence by changing shifts.

For the respondent JAMES NDUNGU MBUGUA RW1 testified that the claimant was employed to work at the respondent's client's premises at Bata Limuru in September 2009 as Machine Operator, that the grievant left employment in November 2011. He testified that the grievant was disrupting work by absconding duty, failing to take authority from the Supervisor and changing shifts without notice. He referred to a warning letter at appendix 1 of the memorandum of reply for absenteeism dated 31<sup>st</sup> May 2010. He further referred to Appendix 2 of the memorandum of reply which is a letter asking the Thongs Factory Manager to replace the claimant who had not reported for work from 22<sup>nd</sup> November 2010 to ensure continuity of work.

RW1 referred to the statement of the Supervisor at appendix 3 of the memorandum of reply. He testified that the termination of the grievant's employment was justified as he had verbal and written warnings and his indiscipline was causing losses in production.

RW1 stated that the grievant's salary was 8,710 per month. He referred to the claimant's payslip in the respondent's further list of documents.

He testified that the grievant was paid fortnightly and was paid his November salary through the bank. He testified that the claimant's prayer for reinstatement was not possible due to the period of time that has lapsed since the grievant's employment was terminated. That the prayer for leave was not due as the grievant took leave during the period when the factory was closed for annual maintenance in August every year. He stated that the respondent did not pay NSSF for its employees.

On cross examination RW1 stated that the letter at appendix 2 of the memorandum of reply was not copied to the grievant as he was not available, that the respondent did not issue a show cause letter to the grievant and did not call the grievant to inform him of the termination of his employment because he has absconded duty.

He testified that the respondent did not report to the Labour Officer that the grievant absconded duty.

He stated there was no document showing the grievant was paid terminal dues, as the only documents the respondent had were bank documents. He testified that he did not have any documents showing the grievant was given leave. He stated the grievant was in continuous employment.

### **Determination**

I have considered the pleadings and evidence. I have further considered the written submissions of the respondent. The claimant indicated it would rely on the submissions filed with the memorandum of claim.

The issues for determination are whether the termination of the grievant's employment was lawful and whether he is entitled to the prayer sought.

It was submitted for the claimant that there was no proof of the allegations against the grievant and that he was condemned unheard, that the termination was thus in breach of Section 34(1) and 45(2)(a).

For the respondent it is submitted that the grievant was dismissed under Section 44(3) for fundamental breach of the employment contract.

The respondent relied on the case of **LINUS BARASA ODHIAMBO -V- WELLS FARGO LIMITED [2012] eKLR**. In the case the court found the termination of the claimant unfair for failure to comply with Section 41 and 43.

In the present case the grievant was neither subjected to a hearing nor was he given any reason for the termination. Although the respondent has referred to summary dismissal, there is no proof of the summary dismissal in the absence of a letter of summary dismissal, which was not issued to the grievant.

The termination of the grievant's employment having been without a hearing and without a letter assigning a reason thereto was unfair both substantively and procedurally in terms of Section 45(2) of the Employment Act and I find accordingly.

### **Remedies**

The grievant having been unfairly terminated is entitled to notice which I award him at Kshs.8,710. The grievant is further entitled to service pay as RW1 admitted that the respondent did not pay NSSF. I award him Kshs.8,710 being 15 days' pay for two years. He is further entitled to annual leave as the respondent did not prove that the grievant ever took leave for the period of 29 months that he worked for the respondent. He is thus entitled to 50.75 days, which translates to Kshs.17,001.25/=, I award him the same.

Taking into account the circumstances under which the grievant was terminated, his length of service and all other relevant factors, I award him compensation equivalent to three months' salary in the sum of Kshs.26,130.

### **Orders**

In the final analysis I make the following orders –

1. I find and declare the termination of the grievant's employment unfair.

2. I award the grievant the following –

(i.) Notice Kshs.8,710.00

(ii.) Service pay Kshs.8,710.00

(iii.) Annual leave Kshs.17,001.25

(iv.) Compensation Kshs.26,130.00

**TOTAL      KSHS.60,551.25**

3. Certificate of service

4. I award costs in the sum of Kshs.30,000 all inclusive to the claimant.

5. Interest at court rates from date of judgment to date of payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**