



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 230 OF 2017

KENYA UNION OF COMMERCIAL

FOOD & ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

GAKUYU FARMERS CO-OPERATIVE

SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant union sued on behalf of the Grievants Geoffrey Gichuki and Peter Nyaga. It was averred that they served the Respondent as watchmen though employed at different times. The 1st Grievant was employed on 7th September 2004 while the 2nd Grievant was employed on 2nd October 2003. On the night of 26th September 2015 during the night, robbers attacked the premises they were guarding and stole coffee. The Grievants were taken to record statements at 5.00am on 27th September and on 28th September 2015 when they were released, they went to the Respondent's offices where they were advised to go home and wait for communication from the Management. They had been asked to report to the Police every fortnight after release and they did so about 2 times and they were no longer required to do so. They were receiving half salary during the period. On 20th January 2016 the interdiction was lifted and they were required to show cause. They worked till 8th February 2016 when they were suspended again and this time they did not receive any salary or receive any further communication since. They were earning Kshs. 9,800/- plus house allowance of Kshs. 2,450/-. The Claimant reported the dispute to the Minister and the Conciliator Mrs. F. N. Gikui of the Nyeri Labour Office was appointed. She convened a joint conciliation meeting which the Respondent sought to defer and the second meeting was set for 7th December 2016 and the parties met, deliberated but were not able to agree. Despite several meetings thereafter the parties did not agree and on 23rd February 2017 the Conciliator issued the conciliation report indicating the matter was unresolved prompting the Claimant to file the suit. The Claimant thus sought a declaration that the suspension of the Grievants was unfair and unlawful, an order directing the Respondent to lift the suspension and allow the Grievants to continue working and treat them in all respects as if there was no suspension, an order directing the half salaries withheld for October, November, December and the full Salary from January to date, salary arrears per the 2014/2016 CBA making a total of Kshs. 94,080/-, 12 months wages for each as compensation, and costs of the suit.

2. The Respondent did not enter appearance nor file defence despite being served as admitted by the Respondent's Chairman while seeking to set aside the hearing that had taken place on 11th April 2018. The motion was dismissed as being devoid of merit since the Respondent was dutifully served as acknowledged in the motion.

3. The Claimant filed final submissions in which the Grievants reiterated their evidence which was to the effect that they were arrested after the robbery on the premises of the Respondent and after investigations were cleared, resumed work only to be suspended again. The Claimant submitted the action meted upon the Grievants was unfair and unlawful. The Claimant sought the payment of the arrears, the salary withheld and the unpaid salaries for January 2016 to date. The Claimant also sought the lifting of the suspension and the return to employment of the Grievants.

4. The Grievants' contracts of service were terminated through what is know as constructive dismissal. The Grievants were dismissed because from the date of suspension on 8th February 2016 to date they have not been assigned any work, recalled from suspension or paid any salary. The Grievants were employees of the Respondent and were initially suspected of having participated or contributed to the theft of the coffee from the Respondent's stores which they were guarding on the material night. They are now cleared of the same. In the suit they sought various reliefs but chief among them is underpayment. The CBA had not taken effect at the time of the payments made to the Grievants and because they are no longer staff of the Respondent they are not covered by the CBA for the period 2014/2016 which was implemented after their dismissal. They are entitled to have received notice before termination. The fact that they were not heard before their constructive dismissal on 8th February 2016 or thereabout is proof that the Respondent did not abide by the dictates of the provisions of

Section 41 of the Employment Act. As held by Ndolo J. in **Donald Odeke v Fidelity Security Limited [2012] eKLR** where the learned judge held that *an employee facing disciplinary action must be given adequate opportunity to respond to any charges before any action is taken against them*. The learned judge went on to add that *it does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair*.

5. The dismissal of the Claimant's members, the two Grievants was unfair and unlawful. They therefore they are entitled to recover for the failure to abide by the law. In the final analysis I enter judgment for the Grievants against the Respondent as follows:-

(a) Geoffrey Gichuki

1. Salary in lieu of notice Kshs. 12,250/-
2. Compensation in terms of Section 49 Employment Act for 6 months Kshs. 73,500/-
3. Certificate of service

(b) Peter Nyaga

1. Salary in lieu of notice Kshs. 12,250/-
2. Compensation in terms of Section 49 Employment Act for 6 months Kshs. 73,500/-
3. Certificate of service

The Grievants will also have costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 21st day of September 2018

Nzioki wa Makau

JUDGE