



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 860 OF 2013

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VERSUS

RUPA COTTON MILLS (EPZ) LIMITED (ATHI RIVER)....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and stated that the Grievants Willy Makau Nthusi and Joseph Mutuku were unlawfully terminated from employment contrary to Section 45 of the Employment Act. The Claimant averred that the two were transferred on 1st January 2008 from the company's premises as general labourers to guard the director's residence at night. They were shocked by the termination as there were no go-downs or offices at the place they were guarding which is 5 kilometers from the offices. The alleged theft was not reported to the Police. They sought reinstatement to work without loss of benefits and in the alternative they be paid one month salary in lieu of notice, salary for days worked, salary arrears for 2 months, compensation for 12 months, annual leave for 2012, leave travelling allowance and gratuity for the years served. The 1st Grievant Nthusi testified on behalf of the two Grievants and he stated that they were not given an opportunity to defend themselves on the issue of the alleged loss of towels and that they reported the matter to the union and the issue was escalated to the Labour office Machakos where the employer was called but no payments were made. He confirmed that the Respondent's representative appeared at the Labour Office and because it remained unresolved the conciliator referred the dispute to court. He sought one month's notice, 3 days worked, unpaid leave dues for leave earned, leave allowance, service, compensation and that he earned a basic of KShs. 8,874/- and a house allowance of 2,500/- a month.

2. The Respondent despite service failed to enter appearance or file a defence. The letters of dismissal written in poor English are dated 25th September 2012. The letters were *verbatim* as follows:-

Dear Sir,

RE: SUMMARY DISMISSAL

The Management has established adequate evidence related to the frequent go down where quite number of towels were stolen under your watch.

As regards the above you are hereby summarily dismissed with immediate effect as per the CBA in force which states clearly sec. 17(vi) if an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or substantial detriment of his/her employers property.

Please prepare to handover any company property on your possession. Thank you for services you rendered for the company.

Thanks

D. A. Mwololo

Employee sign

Human Resource Manager

cc District Labour Officer

Branch Secretary TTWU

The letter was unsigned.

3. The Respondent it seems did not afford the Grievants procedural fairness under Section 41 of the Employment Act which requires that the employer considers the representations of the employee prior to dismissal so as to comply with the rules of natural justice as provided for under Section 41(2) of the Act. The provisions of Section 41 of the Employment Act provide as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make. (underline mine)

4. The tenets of substantive and procedural fairness are only met where the employer affords the employee an open chance to offer a defence in regard to the accusations. Where an employer fails to avail these safeguards, the dismissal is deemed unlawful and unfair. In this case there is no iota of effort made to comply with Section 41 of the Employment Act or the CBA the Respondent cites. The CBA provides under rule 15 for suspension pending investigations in relation to the alleged offence. In the case of the Grievants there is no indication of any suspension and investigation undertaken. In the premises, the dismissal was unfair and unlawful and therefore the Grievants are entitled to recover as follows:-

a. Nthusi Makau Willy

- i. One month notice Kshs. 11,374/-
- ii. 6 month's compensation for unfair termination Kshs. 68,244/-
- iii. Annual leave plus leave allowance for 2012 Kshs. 11,701/-
- iv. Gratuity for period served Kshs. 48,995/-
- v. Certificate of service

b. Joseph Mutuku

- i. One month notice Kshs. 11,374/-
- ii. 6 month's compensation for unfair termination Kshs. 68,244/-
- iii. Annual leave plus leave allowance for 2012 Kshs. 11,701/-
- iv. Gratuity for period served Kshs. 69,994/-
- v. Certificate of service

The Claimant will have costs of the suit as well.

It is so ordered.

Dated and delivered at Nairobi this 19th day of October 2018

Nzioki wa Makau

JUDGE