



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1602 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)**

**KENYA BUILDING, CONSTRUCTION,**

**TIMBER AND FURNITURE INDUSTRIES**

**EMPLOYEES UNION.....CLAIMANT**

**-VERSUS-**

**H. YOUNG & COMPANY (E.A) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed his Memorandum of Claim 4/10/2013 through their General Secretary contesting unlawful dismissal and underpayment of wages of the grievants Patrick Muthee Njeru, Michael Odhiambo, Jackson Gichohi, Moses Kamau Kimani, Ronfestus Kioko Kimeu and Pius Gathai Kagori.
2. The Claimant's case is that the 6 grievants were all employees of the Respondent and members of the Claimant Union.
3. The Claimant avers that the grievants joined the services of the Respondent on various dates and under different job descriptions where they all worked until 19.2.2013 when they were all dismissed.
4. The circumstances leading to the dismissal are that on or about the month of February 2013 all the 6 grievants received undated memos from the Respondent demanding written submissions from each grievant explaining their knowledge of an alleged theft (Appendix FKM-11).
5. The 1<sup>st</sup> grievant Michael Odhiambo was to submit on all allegedly missing fuel pump of Generator No. 75 at the workshop while the other 5 grievants were to explain an allegedly missing battery alternator and starter of C5-02 parked at the IP yard area.
6. That the reasons for the demanded written submissions were that the Battery, Alternator and Stater were parts under the auto electrician responsibility while Michael Odhiambo is alleged to have been working on the Generator No. 75.
7. The Claimant avers that Michael Odhiambo made his written submissions explaining all he knew about the missing fuel pump as demanded (Appendix FKM III). The other grievants also made their written submissions as per Appendix FKMIV. The memos served upon the 6 grievants had also contained an advice to the grievants that the Respondent could decide to send them to a polygraph test (lie detector).
8. The Claimant avers that despite the grievants explaining themselves, the Respondent through their Security Manager sent the 6 grievants to a polygraph test (lie detector) on 8/2/2013 as per Appendix FKM (V). The said examination made a conclusion that all the 6 grievants were involved in the theft in question.
9. Based on this finding, the Respondent issued letters to all the grievants summarily dismissing them from work with effect from 19/2/2013.
10. The Claimants took up this matter and reported a dispute to the Minister for Labour. A Conciliator was appointed to conciliate the Parties.
11. After the Conciliation process, the Conciliator recommended that the summary dismissal be reduced to a normal termination and that the grievants be paid their terminal dues. The Respondents declined to pay as advised hence this claim.

12. The Respondents on their part filed their Memorandum of Reply on 6.11.2013 through Wanjiku Muriu and Company Advocates. They contend that the grievants were their employees from various dates until 19<sup>th</sup> February 2013 when they were lawfully terminated from their services for gross misconduct – Section 44(4) (c) and (g) of Employment Act 2007.

13. The Respondents aver that the 6 grievants in their respective capacities knew or ought to have known the whereabouts of all equipment under their charge as they were also under an implied duty to report any and all loss of equipment to the Respondent as failure to do so would have been interpreted as complicity in commission of a crime.

14. The Respondents aver that after considering all the circumstances of the case, they formed the view that the conciliation failed to appreciate their position that as a result of the grievants carelessness and apparent theft a great loss had been incurred by the company. They aver that despite the fact that the grievants were not charged in Court, they were suspected of having committed an offence which in itself was enough reason to warrant a dismissal.

15. The Respondents ask this Court to dismiss the Claimant's case accordingly.

16. The Claimants gave evidence reiterating evidence in their claim.

17. The Respondents also called 1 witness who also gave evidence reiterating their defence.

18. The Parties subsequently filed their submissions. I have considered the evidence and submissions of all the Parties. From the letter dismissing the grievants, they were dismissed vide a letter dated 19.2.2013. The letter did not assign any reason to the dismissal.

19. Section 43 of Employment Act states as follows:-

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

20. It is not clear why the grievants were dismissed without assigning any reason to their dismissal in the dismissal letter and therefore Respondent did not have any valid reason to dismiss the grievants.

21. The grievants were also dismissed without following due process. There is no indication that the grievants were ever taken through any disciplinary hearing before their dismissal. This definitely offends the provisions of Section 41 of Employment Act which states as follows:-

***“(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”.***

22. In view of the fact that the grievants were not informed of the reasons for their dismissal and they were not given any fair hearing before dismissal, I find their dismissal unfair in terms of Section 45(2) of Employment Act 2007 which states as follows:-

***(2) “A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure..”.***

23. In terms of remedies, I find for each grievant and award them as follows:-

***1. Salary in lieu of notice as per the CBA.***

*2. 8 months' salary as compensation for unlawful and unfair termination.*

*3. Wages for days worked in January 2013.*

*4. Accrued leave.*

*5. Service gratuity as per Clause 19 of the Claimant's CBA with the Respondent.*

*These amounts translate as follows: -*

*1. Michael Odhiambo = Kshs.416,060/=*

*2. Patrick Muthee Njeru = Kshs.211,083/=*

*3. James Gichuhi = Kshs.346,322/=*

*4. Moses Kamau Kimani = Kshs.277,672/=*

*5. Ronfestus Kioko Kimeu = Kshs.313,211/=*

*6. Pius Gathai Kagori = Kshs.611,222/=*

*6. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Mutai holding brief Chege for Claimant

Miss Olendo for Respondent