

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 217 OF 2016

KENYA UNION OF COMMERCIAL FOOD &

ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

RWAMA FARMERS CO-OP SOCIETY LIMITED....RESPONDENT

JUDGMENT

1. The Claimant filed suit on behalf of the Grievant David Mugo who was a night watchman employed by the Respondent on 1st June 1997 until 22nd August 2014 when the Grievant was dismissed. The Claimant isolated the issues for determination by the court as the unfair dismissal of the Grievant and the refusal by the Respondent to sign the Recognition Agreement. The dispute was reported to the Cabinet Secretary for Labour on 29th April 2015 and the conciliator appointed by the Minister issued the parties with a referral certificate on 23rd September 2015 hence the suit. The Claimant therefore sought payment of the Grievant's notice pay of Kshs. 7,341/-, salary arrears for 18 months – Kshs. 63,000/-, service/gratuity of Kshs. 67,773/-, compensation for the dismissal – Kshs. 88,092/- and costs of the suit.

2. The Respondent filed a defence in which it averred that the Grievant was dismissed for breaching the terms of his employment. The Respondent averred that the Grievant was lawfully dismissed after being given an opportunity to defend himself before the management committee whereat he admitted the issues raised against him which included theft. The Respondent avers the Grievant is not entitled to service gratuity as he was a contributor to NSSF and that the claims in the memo of claim were not due. The Respondent sought that the suit be dismissed with costs.

3. The Claimant presented the Grievant who testified that he was unfairly dismissed by the Respondent. He denied being summoned to a meeting to discuss his conduct. In cross-examination he stated that he was transferred from night watchman to day worker and that he was not given a letter to that effect. He denied stealing from the Respondent. He thus sought the sums as claimed in his memorandum of claim. The Respondent called its Chairman Julius Waweru Njoka who testified that the Grievant was a former employee of the Respondent. He stated that it was discovered that the Grievant was no longer working as a night watchman and the Grievant was also found stealing arrow roots from another farm. He stated that a meeting was called where the Grievant was required to explain but he did not show up and he was called to the management committee meeting where he defended himself leading to his dismissal. He was cross-examined by the Claimant's representative and he stated that the correct sums were paid to the Grievant and that the Respondent applied the provisions of the law in the dismissal of the Grievant. He stated there was no recognition agreement in place at the time and that the Grievant did not inform the Respondent of his involvement with the union.

4. The parties filed written submissions and the Claimant in their submissions asserted that the dismissal of the Grievant was unlawful and unfair. The Claimant exhibited the Regulation of Wages orders for various years and submitted that the Grievant was underpaid. The Claimant sought the payment of the sums the Grievant was not paid during his service to the Respondent. The Claimant thus sought the grant of the prayers in the memorandum of claim in addition to the underpayment. The Respondent submitted that the Grievant was lawfully dismissed and therefore was not entitled to the prayers sought. The case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** was cited for the proposition that parties are bound by their pleadings and that evidence led by the parties which is at variance with the averments in the pleadings does not support the averments must be disregarded. The Respondent submitted that the suit was ripe for dismissal with costs to the Respondent.

5. The Claimant filed suit on behalf of the Grievant and tried to rope in a matter of recognition. No evidence however was led on that and in the final submissions the issue of underpayments was raised. In the suit, he was stated to have been dismissed for misconduct and having been given a hearing was dismissed. From the evidence adduced by both the Respondent and the Claimant, there was no basis to find the dismissal as unfair. The Grievant was accorded a chance to explain and upon defending himself was dismissed as his explanation was wanting. I find the dismissal did not abridge the labour rights of the Grievant and therefore the suit is for dismissal. Each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of December 2018

Nzioki wa Makau

JUDGE