



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 637 OF 2014

SAMSON OMECHI ONGERA.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 16th April, 2014 the claimant averred in the main that he was on 1st August, 2003 employed by the respondent as a shop assistant. He was issued with a letter of appointment which set out his terms and conditions of service.
2. In the course of his employment he became involved in union activities and in January 2013 he joined KUCFAW and around February, 2013 he was elected as the shop steward for unionisable employees working for the respondent. According to him the respondent became unhappy with his involvement in union activities and on occasion had been called to abandon union activities which he declined. He averred that thereafter he became targeted as an inciter.
3. On 29th November, 2013 while on leave he passed by the respondent's Eldoret branch and met a few unionisable members outside working hours. On the same day he received a notice to show cause letter accusing him of unauthorized staff meeting. On 19th December, 2013 his colleagues became involved in picketing which he also joined as he had resumed work on the same day.
4. According to him the picketing was as a result of failure by the respondent to implement the CBA signed on 14th November, 2013. On 19th December, 2013 the union and the respondent signed a return to work formula. He contended that after the signing of the return to work formula the respondent abandoned the earlier show cause letter and issued him with a new show cause letter over refusal to perform assigned duties. He was subsequently suspended for one week by the respondent and issued with a show cause letter while at home. The respondent reacted to his response by asking him to provide medical documents concerning his condition.
5. On 26th February, 2014 he was yet again issued with another show cause letter regarding negative media reports. His union on 5th March, 2014 protested the second show cause letter and complained that he was being victimized. On 13th March, 2014 a meeting with the union took place at which it was resolved that the show cause letters be withdrawn.
6. According to him on the same day he was further served with a notice to appeal before staff

disciplinary committee on 27th March, 2014 and a further suspension for two weeks. He was further provided with a letter containing the details of what would be expected from him during the panel hearing. On 27th March, 2014 the staff disciplinary committee meeting took place and he attended. On 31st March 2014 he received a letter informing him of his dismissal on grounds of gross misconduct.

7. The respondent on its part denied the claimant's claim averring in the main that the issues raised by the claimant are extraneous, irrelevant and concern cause no. 2043 of 2013 between the respondent and KUCFAW. The respondent further averred that the rest of the issues raised in the statement of claim involved internal disciplinary mechanism and various incidents of infractions involving the claimant as an employee of the respondent.

8. According to the respondent, the claimant was guilty of habitual lateness and acts bordering on insubordination. The respondent denied harassing the claimant because of his involvement in union activities. On the contrary, the respondent recognized the claimant's constitutional rights as a union shop steward and deployed him to less busy outlets. The respondent further averred that it did not harass the claimant nor forced him to work in packing section despite the claimant's health condition.

9. According to the respondent the claimant was diagnosed with lumbago and muscle spasm in September, 2008, treated and put on light duties on doctors' advice while undergoing physiotherapy. On 24th February, 2014 the respondent asked the claimant to show cause within two days why disciplinary action should not be taken against him for refusing to perform duties assigned to him. The claimant gave unsubstantiated response making reference to a medical report well over five years. The earlier medical report did not tally with the one dated 11th March, 2014 which did not recommend any substantial action or shift in work.

10. According to the respondent, while these issues were still pending the claimant was reported in the press to have addressed a press conference and gave views on a matter that was pending conciliation in breach of the respondent's rules which were within the claimant's knowledge. The respondent therefore on 26th February, 2014 required the claimant to show cause within two days why disciplinary action should not be taken against him. The claimants according to the respondent replied in a rather condescending manner.

11. Further, the claimant and his union made reference to disciplinary process and regarded the same as witchhunt and victimization which the respondent denied. The respondent consequently constituted a disciplinary committee and invited the claimant to attend on 27th March, 2014 which he did and was accompanied by two of his colleagues. The respondent considered the claimants representations during the disciplinary committee hearing and found that the claimant had engaged in misconduct and recommended termination of the claimant's services which was done with effect from 31st March, 2014.

12. The claimant herein despite having other pending disciplinary issues was dismissed on account of the alleged press conference he gave concerning a matter which was pending conciliation. According to the respondent, this breached its staff rules and regulations which prohibit any staff member from addressing the press without the authority of the Managing Director. The claimant denied making the press statement and if at all he talked to a journalist claimed, he was quoted out of context. He even wrote to the media house concerned demanding an apology. The respondent nonetheless still went ahead and terminated his services on that account.

13. Whereas in general a staff member or any official of an organization may not speak to the media concerning a matter that affects or concerns the organization unless authorized by the organization, the position of a union official is unique. He or she wears two hats. One as a staff member and the other as a union official. It is therefore not easy to strictly discern at what stage such staff member is speaking on behalf of the organization he is working for or on behalf of the union to which he is a member.

14. In this particular case it was acknowledged by the respondent that the issue upon which the claimant is alleged to have commented on to the press was subject of conciliation between the respondent and the

claimants' union. It was therefore a statement of fact as opposed to falsehood. The court is therefore reluctant to fault the claimant as a union official for commenting on a matter. It is common practice for union officials to engage employers of their members in press wars in order to bring pressure to bear on such employers to negotiate or conclude negotiations on disputes between them and the union concerned.

15. It would therefore be tantamount to restricting union rights as protected by the constitution and international law if a member of staff who doubles as a union official would be victimized or dismissed for commenting on a dispute between his employer and the union he represents. This is not to grant such employee a free license to disparage or make irresponsible or untrue comments about his employer under the guise of furthering union activities.

16. The court has considered the complaint by the respondent which culminated in the claimant's dismissal and is not persuaded by that, it constituted fair and valid reason for the claimant's dismissal. In the circumstances the court awards the claimant nine months salary as compensation for unfair dismissal. This award will be in addition to the claimant's terminal benefits earlier prepared and reduced to a cheque payable to the claimant upon clearing with the respondent. The claimant shall further have costs of the suits.

17. It is so ordered.

Dated at Nairobi this 17th day of February, 2017

Abuodha J. N.

Judge

Delivered this 17th day of February, 2017

In the presence of:-

Claimant in person

No appearance for the Respondent.

Abuodha J. N.

Judge