



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NYERI
CAUSE NO. 121 OF 2015
KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT
-VERSUS-
MAGUNA ANDU WHOLESALERS.....RESPONDENT
(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 15.07.2016 claiming the unfair or unlawful termination of the contract of service for its member Joel Kimani, the grievant. The claimant prayed for a declaration that the termination of the grievant's employment was unfair or unlawful, and, reinstatement of the grievant without any loss of benefits. In alternative to reinstatement the claimant prayed for:

- a. Payment of one month's salary in lieu of the termination notice.
- b. Accrued annual leave for 30 months of employment from 06.06.2011 to 20.02.2014 Kshs.15,152.00.
- c. 12 months' salaries compensation Kshs.110,952.00.
- d. 20 days worked in February 2014 Kshs.6,556.00.
- e. Underpayment being 15% house allowance Kshs.36,180.00.
- f. Service pay for 2 years completed years of service in lieu of NSSF due Kshs. 9,246.00.
- g. Total claim Kshs.186, 126.00.
- h. Any other relief not prayed for.
- i. Costs of the suit to the claimant.

The respondent filed the memorandum of defence on 28.07.2015 through J.N. Mbuthia & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent has admitted that the grievant was employed by the respondent on 06.06.2011 in the position of a turn boy and dismissed from employment on 20.02.2014. The respondent's case is that the

grievant was dismissed on account of gross misconduct namely driving the respondent's motor vehicle while he had no authority to do so. The respondent's further case is that the grievant was not a member of the claimant union at all material times so that the claimant lacks standing. It is the respondent's case that at all material time the grievant was given an opportunity to attend the disciplinary hearing in the company of a representative of his choice and the grievant at all material times never disclosed that he was a member of the claimant union. The grievant being guilty of gross misconduct, the respondent's conclusive case was that the termination was not unfair and the suit be dismissed with costs.

The **1st issue** for determination is whether the grievant was a member of the claimant union at all material time and particularly prior to the date of dismissal on 20.02.2014. The grievant relies on the union membership card dated 19.12.2012. There is no reason to doubt that card and the court returns that the grievant was a member of the union at all material time. Accordingly the union had standing to sue on behalf of the grievant and to make claims on the basis of the contract of service between the respondent and the grievant as well as on the basis of applicable legislation.

The **2nd issue** for determination is whether the respondent had a valid or genuine reason to dismiss the grievant from employment and whether the due procedure was followed. RW testified that he saw the grievant driving the respondent's motor vehicle KBS 359R at Gakonya junction. RW further testified that the reason for the dismissal was that the grievant drove the motor vehicle without authority and was therefore dismissed. The grievant's case was that he only sat on the driver's seat and used the driver's door to disembark from the vehicle. The grievant testified that he had a valid driving licence at all material times and that was his explanation at the disciplinary hearing. The court has considered the evidence and finds that on a balance of probability the respondent has established the reason for the termination as envisaged in section 43 of the Employment Act, 2007. While making that finding the court has considered that the grievant had no reason to make an explanation at the disciplinary hearing that he held a valid driving licence if at all he had not been seen driving the motor vehicle as was levelled against him by the respondent.

The grievant further gave detailed account of the disciplinary hearing involving the respondent's human resource officer. Accordingly the court finds that the respondent substantially complied with section 45 (2) (c) of the Employment Act, 2007 on fair process in view of the detailed account by the grievant on the disciplinary hearing that took place.

Thus, the court returns that taking the findings into account, the grievant's dismissal was not unfair.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. As the termination has been found not to have been unfair, the court finds that claimant is not entitled to the declaration that the dismissal was unfair or unlawful and is not entitled to 12 months' salaries for compensation as prayed for. The prayer for pay in lieu of termination notice will similarly fail.

The respondent has offered to pay Kshs.13, 321.00 for leave and Kshs. 11, 493.00 for underpayment. The respondent has also offered Kshs. 7, 184.00 for days worked but not paid. The respondent offers Kshs. 8, 040.00 for service pay. Accordingly, the court finds that the grievant is entitled per the respondent's submissions and is awarded **Kshs.40, 038.00**.

The court considers that in view of the findings and awards, each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties for:

- a. The respondent to pay the grievant **Kshs. 40,038.00** by 01.05.2017 failing interest to be payable thereon at court rates from the date of the suit 15.07.2015 till full payment.
- b. Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 17th March, 2017**.

BYRAM ONGAYA

JUDGE