



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 142 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

SHEM OTIENO 1ST CLAIMANT

JONATHAN MUDEMBI 2ND CLAIMANT

PETER NJOROGE MUIRURI 3RD CLAIMANT

Versus

MOTOR BOUTIQUE LTD RESPONDENT

JUDGMENT

The Respondent is a shop that deals in both retail and wholesale. Its shops are located within Nakumatt Supermarket. The Claimants were all employees of the Respondent deployed at its Kisumu shop until the shop was closed in around October 2013. A brief history of Claimants' employment is as follows-

1st Claimant Shem Nanga Otieno

He was employed by the Respondent on 24th August 2004 as a shop assistant. His starting salary was Kshs. 5,900 with a house allowance of Kshs. 885 per month. The Claimant received several salary increments and at the time of termination of his employment he was earning basic salary of Kshs. 13,202 and house allowance of Kshs. 1,980. He was stationed at Kisumu from January 2005 to August 2013 when he was transferred to Nairobi by letter dated 18th July 2013. He was dismissed from employment on 3rd December 2013.

2nd Claimant Jonathan Mudembeyi

Jonathan was employed by the respondent on 23rd August 2004 as a driver at a starting salary of Kshs. 5,900 and a house allowance of Kshs. 885. He was later promoted to the position of cashier and transferred to Kisumu. His salary at the time of termination was Kshs. 22,071. He too was dismissed summarily on 3rd December 2013.

3rd Claimant Peter Njoroge Muiruri

Peter Njoroge was employed by the Respondent in November 2003 as a shop assistant at a salary of Kshs. 5,300 and house allowance of Kshs. 600. He was transferred to Kisumu in 2009 where he served as a cashier until October 2013 when he was transferred back to Nairobi. His last salary was Kshs. 23,000 with house allowance of Kshs. 1,980. He was summarily dismissed on 3rd December 2013.

Circumstances Leading to Dismissal of Claimants

In July 2013 the Respondent decided to close the shop in Kisumu. A decision was made that old stock that had Nakumatt codes be retained at Nakumatt Kisumu Branch while new stock which had not been allocated codes was to be transferred to the Respondent's Nairobi Head Office central warehouse.

Shem and Peter were transferred back to Nairobi while Jonathan was transferred to Nakumatt Mega City in Kisumu and deployed as shop Assistant.

Upon completion of the exercise of transferring stock from Kisumu Branch while reconciling the stock the Respondent realised that there was variance between the physical stock prior to and after the transfer of stock to Nakumatt and its Nairobi head office warehouse. The claimants were asked to explain the variance of stock before and after the exercise by Respondent's letter dated 1st November 2013.

Shem and Jonathan responded to the letters while Peter did not. According to the Respondent, Peter tore the letter in the presence of the Respondent's Human Resource Officer.

In the brief response by Shem he stated that he was working as a shop assistant and did not know anything about stock.

Jonathan explained in his response that there was no stock taking when he was transferred to Kisumu in 2010 before handing over, that it was only in the recent stock taking that it was realised that some items were missing and he did not know where the items were. According to him, as a cashier he was not responsible and it was the shop assistants who should know about the missing stock.

All the three claimants were suspended from work from 6th to 13th November 2013 by letters of suspension dated 5th November 2013. The Claimants state that when they reported back to work upon the expiry of the suspension the suspensions were verbally extended for another 2 weeks. On 3rd December 2013 they received letters of dismissal.

The issue in dispute as stated in the Claimants' Statement of Claim herein is the unlawful and unprocedural termination of the Claimants.

In the Statement of Claim filed by Kenya Union of Commercial Food and Allied workers on behalf of the Claimants, the Claimants pray for the following orders-

- (i) Award each claimant terminal benefits as per the parties Collective Bargaining Agreement
- (ii) That the Respondent be ordered to pay the Claimants their accumulated leave
- (iii) That the Claimants be paid full compensation
- (iv) Costs of the suit.

The Statement of Claim was filed together with an affidavit of each Claimant sworn in support of the averments therein.

The Respondent filed a Statement of Defence denying the allegations in the statement of claim.

The case was canvassed by way of written submissions.

Claimants'

Submissions

It was submitted for the Claimants that the Respondent ignored the provisions of sections 15, 16 and 41 of the Employment Act. They pray for payment to the Claimants as follows-

Shem Otieno

Notice	Kshs. 30,364
Gratuity	Kshs.110,361
5 days worked	Kshs.2,919.60
Compensation	Kshs.182,184
Total	Kshs. 325,828.60

Jonathan Mudembeyi

Notice	Kshs. 44,142
Gratuity	Kshs.160,439
5 days worked	Kshs.4,244.40
Compensation	Kshs.264,852
Total	Kshs. 473,677.40

Peter Njoroge

Notice	Kshs. 49,960
Gratuity	Kshs.167,192
5 days worked	Kshs.4,423
Compensation	Kshs.276,000
Total	Kshs. 497,575

Respondent's Submissions

It was submitted for the Respondent that it complied with section 41 of the Employment Act, that it sought explanation from the Claimants and gave them an opportunity to defend themselves on allegations levelled against them.

Determination

Section 12 of the Employment Act (the Act) provides that an employer with more than 50 employees must have a statement of disciplinary rules. The section provides as follows -

12. Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

(2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.

(3) This section shall not apply where as at the date the employee starts work the employer has employed less than fifty employees.

In the present case no reference has been made of any disciplinary rules or procedure established by the employer pursuant to section 12 of the Employment Act. The Court must therefore rely on section 41 of the Act in determining whether the procedure for termination of employment as set out therein was complied with by the Respondent.

Section 41 specifically requires that an employer explains to the employee in the presence of either another employee or a union shop floor official of his choice, the reasons why the employer contemplates to terminate his employment. The employer is then required to hear representations by both the employee and the person accompanying him to the hearing. Thereafter the employer must make a determination which must be communicated to the employee in writing.

The Respondent has in both its defence and in the written submissions stated that the claimants were given a hearing. No evidence has been provided as to the dates or form of the hearing. There is no letter inviting the claimants for a disciplinary hearing or minutes of such hearing.

It is the claimants case that they were issued with show cause letters, then suspended and thereafter summarily dismissed without a hearing. A show cause letter is not a hearing as envisaged in section 41 which specifically provides that:-

41. Notification and hearing before termination on grounds of misconduct

(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.

It is evident from the facts before the court that no hearing as envisaged in Section 41 was given to the Claimants. Section 44(2) expressly states that the employer must comply therewith before summarily dismissing an employee under section 44(3) or (4).

The Act further provides for proof of grounds for termination in section 43 as follows-

43. Proof of reason for termination

(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.

The letters of summary dismissal issued to the claimants do not refer to proof of summary dismissal but rather shifts the burden of proof to the claimants. The letter states that-

"Kindly refer to our letter dated 5th November 2013, in which you were suspended from employment pending thorough investigation on your participation in the loss of stock from the company's branch at Kisumu.

You were required to give an explanation exonerating yourself from the allegations made against you, unfortunately you did not provide a satisfactory explanation on the same, for this reason it has been considered appropriate to summarily dismiss you from employment with immediate effect in conformity with section 44(4)(g) of the Employment Act No. 11 of 2007."

The letter does not state at what point the claimants were required to give an explanation, whether after or before the thorough investigations alluded to in the letters of dismissal. The letters do not state exactly what the claimants' acts or omissions were. The letters of suspension did not require them to give any explanation. The letters of suspension state as follows-

*This is to communicate to you that the management has come into conclusion to suspend you for **two weeks** beginning from **November 6th, 2013 to November 21, 2013** pending investigations after receiving your letter of explanation as earlier required, on the issue of stock variance after the closure and transfer of stocks from Kisumu Branch.*

The wording of the letter of suspension refer to investigations yet to be undertaken while the letter of dismissal does not make any reference to the findings of the investigations and a hearing thereafter to enable the claimants responded to any matters that may have been unearthed by the investigations. This therefore means that there was no proof of the reasons for the dismissal. No copy of the report of investigations was availed to the claimants or to the court.

Section 45 provides that where the procedure and or the reasons for termination are wanting the termination is unfair. The section is reproduced below-

45. Unfair termination

(1)

(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.

The burden of proof is provided for under section 47(5) as follows -

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

In the present case I find that the procedure for termination was wanting and there was no proof of reasons for termination. The summary dismissal of the claimants was therefore unfair in terms of section 45(2) of the Employment Act.

Remedies

The claimants prayed for remedies as set out in the Statement of Claim and particularised in the Submissions. The Respondent did not make any reference to the prayers in its submissions. According to the Collective Bargaining Agreement between Kenya Union of Commercial Food and Allied Workers and the Respondent, the Claimants are entitled to two months notice (Clause 17(b) of CBA). The court having come to the conclusion that the summary dismissal was unfair the claimants are entitled to notice. They are also entitled to gratuity under Clause 23 of the CBA at 20 days per year worked. As stated in the letters of dismissal the Claimants are further entitled to salary up to 5th November 2013, including salary during suspension and leave balance.

Having found the summary dismissal to be unfair and taking into account the long service of the claimants of about 10 years I am of the opinion that full compensation is reasonable in the circumstances and award each of the claimants 12 months' salary as compensation.

Although no prayer was made in respect thereof, the claimants are also entitled to a certificate of service as provided in section 51 of the Employment Act.

Conclusion

In conclusion, I enter judgement in favour of the claimants against the Respondent and award each of the claimants the following-

Shem Otieno

Notice	Kshs. 30,364
Gratuity	Kshs.110,361
5 days worked	Kshs.2,919.60
Compensation	Kshs.182,184
Total	Kshs. 325,828.60

Jonathan Mudembeyi

Notice	Kshs. 44,142
Gratuity	Kshs.160,439
5 days worked	Kshs.4,244.40
Compensation	Kshs.264,852
Total	Kshs.473,677.40

Peter Njoroge

Notice	Kshs. 49,960
Gratuity	Kshs.167,192
5 days worked	Kshs.4,423
Compensation	Kshs.276,000
Total	Kshs. 497,575

The foregoing does not include annual leave balances which the Respondent is also directed to pay as undertaken in the letters of dismissal.

There will be no orders for costs.

Dated, Signed and Delivered this 4TH day of MAY, 2017

MAUREEN ONYANGO

JUDGE