



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1567 OF 2010**  
**TAILORS AND TEXTILE WORKERS UNION...CLAIMANT**  
**-VERSUS-**  
**BUNNY INDUSTRIES LIMITED.....RESPONDENT**

Mr. Wyclyfe Omondi for claimant

M/S Kariuki for respondent

**JUDGMENT**

1. The claimant union brought this suit on behalf of its members;

- (i) Risi Anyango
- (ii) Ephraim Vidah
- (iii) Shem Mengesa
- (iv) Kenedy Odhiambo
- (v) Mary Njoki
- (vi) Joseph Owidi; and
- (vii) David Musyoka

former employees of the respondent Bunny Industries Limited.

2. The claimant seeks compensation for wrongful dismissal on grounds of redundancy and payment of terminal benefits set out in table 2 annexed to the memorandum of claim including payment for;

- (i) days worked;
- (ii) annual leave;
- (iii) 15% house allowance;

- (iv) underpayments;
- (v) leave travelling allowance; and
- (vi) severance pay.

### **Facts of the case**

3. On or about 30<sup>th</sup> June 2005, the grievants reported to work in their positions of machine operators as usual.
4. At 10.00 a.m., a supervisor by the name of John, walked to the factory and switched off the machines and ordered the grievants to leave the factory. The grievants were informed that this was a directive by the directors of the company.
5. The grievants attempted to meet management but their efforts were unsuccessful and were all locked out without being given any reason.
6. The grievants reported the matter to the union. The union reported a dispute to the Ministry of Labour. An instigator was appointed named Mrs Mucheru to investigate the matter. No report was given to the union by the investigator and the suit was filed in court.
7. The claimant prays that the dismissal was wrongful and unfair and the grievants be compensated and be paid terminal benefits as prayed.

### **Response**

8. The respondent filed a statement of defence on 23<sup>rd</sup> March 2011 in which it denies;
  - (i) existence of a Recognition Agreement with the claimant union
  - (ii) existence of any Collective Agreement with the claimant union and states therefore that the claimant union has no locus standi to represent the grievants.
9. The respondent denies the particulars of claim while admitting that a dispute was reported to the Ministry of Labour by the union regarding this matter.
10. The respondent states that the suit is frivolous, vexatious and an abuse of the process of the court and it be dismissed with costs.
11. The respondent filed list of documents on 15<sup>th</sup> January 2013 with leave of court.

### **Testimony**

12. CW1 Lisi Anyango, one of the grievants testified under oath on behalf of her colleagues. She told the court that she was employed by the respondent in January 2000. On 30<sup>th</sup> June 2005, she reported to work as usual. The supervisor came to the factory and told her and seven others to stop the machine and go home. These are the grievants in this case.
13. They reported a dispute to the Ministry of Labour, their demands were not met hence the suit. CW1 told the court that they were not given any reason for the dismissal nor did they get dismissal letters. They were not given a chance to explain why they ought not be dismissed. They got no notice. They were all union members and their terms were contained in a CBA. That NSSF and NHIF was not paid on their behalf. The respondent refused to register them. They were not paid house allowance. They did not go on leave also. CW1 had worked for a period of five years and the colleagues worked for periods set

out in annex 2 to the statement of claim.

14. That all of them were underpaid since they worked as machine operators and were paid lesser amounts than that provided in the wage order.

15. CW1 Prayed that they be awarded as set out in annex 2 to the memorandum of claim.

16. CW1 added that they were wrongfully and unfairly dismissed and they be compensated as prayed. CW1 stated that her salary was Kshs.7,920. She denied that the grievants refused to be deducted statutory dues. She said she was testifying on behalf of all the grievants. She insisted that there was a CBA between the respondent and the union and the terms were read to them by the union officials. That they paid Kshs.200 monthly union dues.

17. CW1 denied that there was any altercation between the respondent and the grievants on the day they were dismissed.

## **Defence**

18. RW1 Loise Njeri testified in chief, but failed to turn up for cross examination. Her testimony is therefore expurgated from the record.

19. The respondent replaced Loise Njeri with one John Nyaga, RW1. He told the court that he had worked for the respondent for a period of twenty (20) years as a foreman supervisor. That he left the employ of the respondent in 2013. That he knew the grievants well and was their supervisor. That they worked as casual labourers. He produced their engagement letters as casuals. That they had a daily rate but were paid weekly.

20. In June 2005, NHIF officials visited the respondent to register employees. Those who agreed were taken passport size photographs and forms were filled. Other employees refused and the respondent declined to employ them any longer. These included the grievants before court. They were sent away upon refusal to register with NHIF which was a mandatory requirement.

21. RW1 told the court that the claimant union had no recognition agreement with the respondent. RW1 told the court further that David Musyoka and Joseph Ohidi returned to work for the respondent and their claims be dismissed.

22. That other grievants were paid their terminal benefits upon dismissal. They were casuals. That they were registered with NSSF and same was paid for them. They should not be paid gratuity. Notice pay is not applicable since they were casuals. They all went on leave in December when the company closed for holiday. House allowance was included in their daily wage as per the forms they signed and in terms of the wages order on page 39 of the respondent's bundle. They were paid leave travelling allowance whenever they went on leave. They were not declared redundant and so no severance pay is payable.

23. The grievants filled casual employment forms for a long time and were paid weekly. RW1 insisted under cross-examination that the grievants joined the union after they were sacked, not before.

24. RW1 was unable to produce any document to show that the grievants ever went on leave. RW1 further said that the grievants were paid for two (2) days worked upon dismissal.

25. That this was deposited at the Ministry of Labour and they collected. That they quarreled with the employer on the day they left employment. That letters of appointment indicate that house allowance was part of their daily rates. That they left voluntarily and were not sacked.

26. RW1 prays the suit be dismissed with costs.

## **Determination**

27. The issues for determination are as follows

- (i) Is the claimant suited to represent the grievants?
- (ii) Were the grievants employed as casuals or were they permanent employees?
- (iii) Are the grievants entitled to the reliefs sought?

**Issue (i)**

28. The grievants have testified under oath that they were members of the union and paid Kshs.200 union dues per month.

29. The court has no reason to doubt this testimony. The claimant union is suited to represent them in court in terms of section 13 of the Employment Court Act, as read with Rule 5 (1) (a) of the Employment and Labour Relations Court (Procedure) Rules, 2016 that replaced the 2010 Rules which had a similar Rule with respect to representative claims. The preliminary objection is dismissed.

**Issue (ii)**

30. In terms of section 37 (1) of the Employment Act, 2007, an employee who was initially employed as a casual ceases to be a casual when he/she;

- a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
- b) Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three (3) months or more.

31. Section 35 (1) (c) applies to such a worker and is entitled to termination upon giving of not less than twenty eight (28) days notice. The employment is also to be terminated following the other relevant provisions of the Employment Act, including a valid reason in terms of section 43 and 45 and in terms of a fair procedure in terms of sections 41 and 45 of the Act.

32. The testimony before court shows that the claimants were initially employed and paid as casuals but by fact of lengthy and continuous employment by the respondent, their employment had converted to permanent terms.

33. The grievant's employment could therefore only be terminated for a valid reason and in terms of a fair procedure.

34. The evidence before court however shows that the grievants resisted deduction of NHIF dues and became unruly at the work place, hence the separation. There is no evidence that the respondent had any intention of terminating their employment contracts. The testimony that some of their colleagues subsequently apologized to the employer and returned to work collaborates the evidence by RW1 that indeed, the respondent had no alternative but to let the grievants leave the premises upon their unruly conduct, hence the separation from employment in circumstances which in court's view were lawful.

35. The court therefore finds that the claimant has failed to show on a balance of probability that the termination of the employment of the grievants by the respondent was wrongful or unfair.

**Issue (iii)**

36. With regard to the terminal benefits claimed by the grievants, the court finds as follows;

**Leave pay**

37. It is clear that the respondent regarded the grievants as casuals and therefore did not grant them annual leave.

38. The court finds that the grievants are entitled to payment in lieu of leave days not taken as set out and prayed in annex 2 to the claim.

### **Gratuity /severance**

39. The grievants were not declared redundant but were lawfully ejected from the employer's premises, upon resisting deduction of NHIF dues in an unruly manner. The employees were not registered with NSSF since they were regarded as casuals and are therefore entitled to gratuity equivalent to fifteen (15) days salary for each completed year of service as set out in annex 2 to the statement of claim. The claim is granted accordingly.

### **Leave travelling allowance**

40. The grievants did not go on leave and are therefore not entitled to leave allowance, the claim claim is dismissed accordingly.

### **Days worked**

41. The claimants left the employment of the respondent on 30<sup>th</sup> May 2005 and no evidence of payment of days worked was presented to court. The court awards the grievants for the arrear salary as prayed in table 2 to the statement of claim.

### **Notice pay**

42. The grievants were employees in respect of whom section 35 (1) (c) of the Employment Act applied, notwithstanding that the employer had justification to eject them from the premises, he was obliged to give them at least one month salary in lieu of notice and the same is awarded to each grievant accordingly.

### **Under payments**

43. The claimant has failed to prove that the grievants were under paid for the period they worked between the year 1999 to the year 2005. The claim is dismissed.

### **15% House allowance**

44. Equally, the claim for 15% house allowance in addition to the salary received by the grievants was not proved and same is dismissed.

### **Compensation**

45. The separation was lawful and this claim is equally dismissed.

46. **In the final analysis, Judgment is entered in favour of the claimant union the amount to be shared by the grievants in terms of table two to the statement of claim as follows;**

**a) Arrear salary Kshs.55,440;**

**b) Notice pay kshs.71,280;**

**c) Annual leave, Kshs.309,120;**

**d) Gratuity, Kshs.154,440;**

**Total award, Kshs.590,280;**

**e) Interest at court rates from date of filing suit till payment in full.**

**f) Costs to follow the outcome.**

47. Since no application was filed to strike out the claims in respect of David Musyoka and Joseph Owidi, in the event they returned to work immediately as claimed by RW1, they are still entitled to the terminal benefits awarded except payment in lieu of notice.

48. All employees must be registered with NSSF and NHIF and deductions made and remitted accordingly.

**Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**