



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1905 OF 2011
KENYA UNION OF COMMERCIAL, FOOD AND
ALLIED WORKERS.....CLAIMANT
VERSUS
INSTA PRODUCTS (EPZ) LIMITED.....RESPONDENT

Mr. Nyumba for claimant

M/rs Doreen Oyombe for respondents

JUDGMENT

1. The 58 grievants were dismissed after being issued with a first warning to resume work following a strike on 6th April 2011, a second warning at 3.50 p.m. on the same day and a final warning issued on 7th April 2011 at 2.00 p.m.
2. Cause no. 594 of 2011, was filed in this court alleging lock out of 122 employees who included the 58 grievants and the suit was dismissed for lack of prove by Justice E. K. Mukunya on 17th June 2011.
3. This suit was filed by the 58 grievants on 22nd June 2011 following the dismissal of the collective suit alleging lock out.
4. The present suit alleges unlawful and unfair dismissal of the 58 grievants.
5. This followed referral of the dispute by the Secretary General of the claimant union Mr. Boniface M. Kavuvi on 22nd June 2011 and issuance of a certificate of unresolved dispute by a labour officer, Mr. Nelson S. Kimani on 17th August 2011. Issue in dispute is “unlawful, unfair and unjustified dismissal of 58 employees”
6. The letters of dismissal of the 58 claimants all dated 13th April 2011 written by the Managing Director Mr. S. W. Allison have been produced as exhibits in this case.
7. They are all written the same way and provide the reason for dismissal to be refusal to work from 4th April 2011 and continued refusal to return to work upon issuance with 1st warning at 2.10 p.m. on 6th April 2011; a 2nd warning on 3.50 p.m. on the same day and a final warning at 2.00 p.m. on 7th April

2011.

8. The action was taken in terms of Section 80 of the Labour Relations Act, 2007 and the employees were notified to collect their final due from the labour office Machakos from 19th April 2011.

9. The claimants allege that the dismissal was unlawful and exhibited bad faith on the part of the respondent in that:

(i.) Brenda Syombua Samuel grievant no. 20.

(ii.) Caroline Mueni Mwema grievant no 28.

(iii.) Stella Mbuki grievant no. 46 and

(iv.) Edna Chepkemoi grievant no. 53 were at the time of the alleged strike on maternity leave and therefore could not have participated in the strike.

10. That there was a Return to Work Formula signed between the claimant and the respondent which cushioned the employees from victimization. The respondent violated the agreement in bad faith.

11. That there were genuine grievances by the employees which the respondent failed to resolve but instead victimized the employees without giving each one of them opportunity to be heard.

12. That these grievances included delay in issuing letters of appointment and delay in paying salaries hence the strike that led to a lock-out and eventual dismissal of the 58 grievants *interalia*.

13. The claimant deny that the grievants were involved in an illegal strike and assert that the workers were instead locked out by the respondent and eventually dismissed.

14. That in any event, the respondent was looking for a way round the court order of 28th February 2011 in Cause no. 281 of 2011 to declare the workers redundant.

15. That the respondent ought to have followed lawful means to reduce the workforce instead of engaging in illegalities.

16. The claimant prays for:

(i.) Unconditional reinstatement of the 58 grievants.

(ii.) In the alternative grant compensation equivalent to 12 months salary for the unlawful and unfair dismissal

17. The claimant relies on the memorandum of claim filed on 11th November 2011 and the list of documents attached thereto. No oral evidence was adduced in this matter. The parties filed formal submissions having agreed to dispense with oral hearing on 31st January 2017.

Response

18. The respondent filed a preliminary objection on 8th February 2017 stating that the suit was *resjudicata*. The objection was dismissed by the court by a ruling delivered on 31st May 2016.

19. The respondent had earlier filed memorandum of defence on 23rd October 2012 in which it admits that the 58 employees were dismissed on 13th April 2011 vide attached letters of the same date referred to earlier.

20. The reason for dismissal was engaging in an unlawful strike from 4th April 2011 to the 7th April 2011 when they were issued with letters of dismissal upon being served with 1st, 2nd and final warning to no avail.

21. It is apparent that the respondent did not engage individual employees before deciding to dismiss them.

22. The warning notices produced as annexure 4, dated 6th April 2011 (1st warning), annexure 7 (a), dated 6th April 2011 2nd warning) and annexure 8 dated 7th April 2011 (the third and final warning were not addressed and served on individual employees but rather were in the nature of general notices addressed to the Chief Shop Steward, CSB Unionisable Workers and addressed also to “Dear Employee”

23. Annexure 5 is a response to the 1st warning letter by the Chief Shop Steward Mr. George Getanda and copied to the Labour Officer Machakos in which the Chief Steward denies that the workers are involved in an illegal strike but rather the workers were making a demand in respect of long standing grievances which had remained unresolved.

24. The respondent while admitting the four named grievants were on maternity leave at the time of the strike, denies that the respondent dismissed them from employment adding that the four never returned to work upon completion of maternity leave.

Determination

25. The issues for determination are as follows:

- (i.) Was the dismissal of the grievants for a valid reason and done in terms of a fair procedure.
- (ii.) Were the four (4) grievants on maternity leave dismissed from employment or they absconded?
- (iii.) Are the grievants entitled to the reliefs sought?

Issue i

26. The matter proceeded by way of the pleadings, list of documents and written submissions the parties having consented to dispense with oral testimony.

27. The Branch Secretary of the claimant union filed verifying affidavit sworn on 2nd November 2011 to verify that the averments in the memorandum of claim and annexures thereto are true and correct. The memorandum of claim contains detailed facts of what transpired leading to the dismissal of the 58 employees. The memorandum also captures all the employment particulars and conditions of service of each of the grievants at paragraph 34 of the memorandum of claim.

28. The respondent also has detailed facts on what transpired leading to the dismissal of the claimants via letters of dismissal dated 13th April 2011 and has attached letters addressed to all individual employees informing them of their dismissal from work and the reasons for the same.

29. Section 80 of Labour Relations Act No. 14 of 2007 provides:

“(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee’s contract and –

(a) Is liable to disciplinary action; and

(b) Is not entitled to any payment or any other benefits under the Employment Act,

during the period the employee participated in the strike.”

30. This provision is not a *carte blanche* for mass sacking of employees alleged to have participated in a strike without subjecting each employee to a disciplinary process in terms of the disciplinary code of the organization and or in compliance with Section 41 of the Employment Act, 2007.

31. In the present case, there was no attempt by the respondent at all to provide each employee with a notice to show cause with opportunity for the employee to explain why he/she ought not to be dismissed from employment summarily as happened to the 58 grievants in this case.

32. In any event, the onus is on the respondent to demonstrate to the court that each of the employees participated in an unlawful strike and considering personal circumstances of the particular employee, he/she is liable to summary dismissal.

33. It is a lawful defence to a charge of absenteeism from work under Section 44 (4) (a) of the Employment Act No. 11 of 2007 to show that the employee was on leave or away on other lawful cause. This is the reason why each employee must be presented opportunity to defend themselves against summary dismissal from employment.

34. Accordingly, the claimant has proved on a balance of probability that the summary dismissal of the 58 grievants was not for a valid reason and was not effected in terms of a fair procedure contrary to Sections 41, 43 and 45 of the Employment Act, 2007 and the court so finds.

Issue ii

35. It is common cause that the four (4) employees were on maternity leave at the time the strike occurred. They were also unlawfully summarily dismissed for participating in a strike. This fact demonstrates the fallacy of mass dismissals without giving each employee a chance to be heard.

Issue iii

36. The grievants have sought reinstatement to their work without loss of benefits and in the alternative compensation in terms of section 49 of the Employment Act, 2007 as read with Section 12 of the Employment and Labour Relations Act, CAP 234 B.

37. The considerations the court is required to make in determining the appropriate remedy are set out under Section 49 (4) of the Employment Act as follows –

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

38. Given the provisions of Section 12 (3) of CAP 234 B which provides that the court shall have power to make any of the following orders –

(iii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances completed under any written law;”

this is not an appropriate case to order reinstatement of the 58 grievants who were dismissed over six (6) years ago on 13th April 2011. However, the grievants are entitled to compensation for the unlawful and unfair summary dismissal of employment.

39. In arriving at a just compensation, we have considered the following comparable cases –

(i.) Mohamed Yakub Athman & 29 others v Kenya Ports Authority [2016] eKLR

The claimants herein were dismissed for participating in industrial action. The Court awarded six months gross salary as damages for unfair termination.

(ii.) William Nembe Obora & 73 others v Rift Valley Railways (K) Limited [2014] eKLR

The claimants in this case were served with summary dismissal notices for the reasons that they engaged in unlawful sit-it, declined to resume duty and disobeying lawful orders to return to work and absenteeism from their work station. It was held that what happened to the claimants was unfair and contrary to section 44 and 42 of the Employment Act and thus an unfair labour practice. **The claimants were awarded compensation equivalent to twelve (12) months gross salary.**

(iii.) Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Pwani University [2015] eKLR

In this case, the shop steward was dismissed on the ground of involvement in a strike. The Court found the dismissal unlawful and ordered payment of *2 months' gross salary in compensation for unfair termination*

40. We have also considered personal circumstances of each employee which are not materially different as follows –

- a. They were all dismissed in similar circumstances.
- b. They were not paid terminal benefits upon dismissal
- c. They were not given any notice to prepare themselves for the loss of their livelihood.
- d. That it has not been shown that they individually contributed to the dismissal having not been given opportunity to show cause.
- e. They all had wished to be reinstated to their employment.
- f. They had served the respondent for periods ranging from one (1) year; two (2) years; three (3) years; four (4) years; five (5) years; six (6) years; seven (7) years and nine (9) years.
- g. Majority earned 7,000/= and 9,000/= and others ranged between 10,000/= to 20,000/=.

41. Considering all these factors, the court awards the grievants as follows;

- (i.) Those who had served for period between one month (1) to three (3) years, equivalent of three (3) months salary.
- (ii.) Those who had served between four (4) to seven (7) years equivalent of seven (7) months salary and;
- (iii.) Those who had served for nine (9) years and over, equivalent of nine (9) months salary.

Total award Kshs.3,278,368/= as broken down in the schedule to the judgment.

- (iv.) The award is payable with interests at court rates from date of judgment till payment in full.
- (v.) The respondent to pay the cost of the suit.

Dated, Signed and Delivered on this 31st day of October 2017

MATHEWS NDERI NDUMA

JUDGE