



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 146 OF 2015

EZEKIEL MBURU KANGETHE.....1ST CLAIMANT

SAMUEL GITAU KAMAU.....2ND CLAIMANT

JULIUS IRUNGU MUNGAI.....3RD CLAIMANT

VERSUS

MUGOIRI FIVE FARMERS CO-OPERATIVE SOCIETY LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 17th November, 2017)

JUDGMENT

The statement of claim was filed on 01.09.2015 through Boniface M. Kavuvi, General Secretary, Kenya Union of Commercial Food and Allied Workers. The prayers are for judgment against the respondent for:

- a) The claimants' terminal benefits being Kshs. 385, 390.00, Kshs. 355, 115.00, and Kshs. 664, 290.50 for 1st, 2nd and 3rd claimants respectively.
- b) The 1st and 2nd claimants be given full compensation for involuntary loss of employment.
- c) Any other relief the honourable court may deem fit and just to grant.
- d) Costs of the suit to claimants.

The response to the claim was filed on 07.02.2015 through Amuga & Company Advocates. The respondent prayed that the claimants' suit be dismissed with costs.

The claimant's are members of the union which has filed the suit and represented them accordingly. There is a binding collective agreement on record. After numerous adjournments for parties to negotiate a compromise, they failed to record consent but agreed that the suit be determined on the basis of pleadings and documents on record. Parties agreed to file final submissions. The claimants filed but the respondent failed the submissions belatedly.

The 1st and 2nd claimants urge that they were terminated from employment as night guards following alleged theft of 6 bags of coffee from the respondent's factory they were assigned to watch over. The 1st

and 2nd claimants' case is that the reason for termination was not valid or genuine as envisaged in section 43 of the Employment Act, 2007 because as at the time of termination - nobody had witnessed the alleged theft; on the material date of the theft all the coffee was on the drying trays and not at the store as was alleged; after the alleged theft, on the subsequent Monday the 1st and 2nd claimants were instructed to carry all the coffee from the drying trays to the store; the stores were not broken into and the store keys were in the custody of the secretary manager; there was no inventory to verify the alleged theft; and after the alleged theft, the 1st and 2nd claimants continued in employment until suspension and thereafter termination on 14.07.2012. The 1st and 2nd claimant had been employed effective 01.07.2005. The respondent had informed the union that the termination of the 1st and 2nd claimant was normal retirement.

The 3rd claimant was employed on 07.05.2005 as a machine operator. His employment was terminated on 17.03.2005 on the ground of ill health. He wrote to retire per clause 3 of the CBA on termination other than by dismissal. The 3rd claimant was released from employment without payment of the last monthly salary and terminal dues per the CBA.

First, the respondent offered no evidence of the reason for termination as envisaged in section 43 and 47 (5) of the Employment Act, 2007 and the court returns that the dismissal of the 1st and 2nd claimants was unfair for want of a valid reason. Further, there was no notice and hearing as envisaged in section 41 of the Act. The court has considered their long service, the aggravating factor that the unsubstantiated allegations that were unfounded bordered matters in the nature of alleged criminal liability, and the 1st and 2nd claimants did not contribute to their respective termination. They are awarded 12 months' salaries in compensation under section 49 (1) (c) of the Employment Act, 2007. They are also entitled to the terminal dues as per the CBA. The belated submissions filed for the respondent simply state that the 1st and 2nd claimants were liable to summary dismissal because they had caused the respondent loss of goods valued at Kshs. 850, 000.00 so that summary dismissal was available per section 44(4) (a) and (c) of the Employment Act, 2007. The court has considered that line of submission and returns that it is not justified in view of the finding that the termination has been found to have been unfair as the reason has not been established by the respondent.

Second, for the 3rd claimant the court returns that he is not entitled to terminal dues per CBA flowing from his voluntary request to retire per clause 3 of the CBA and on account of ill health. In making that finding, the court finds favour with the respondent's belated submissions that the 3rd claimant's case is *res judicata* in view of the earlier suit he filed about the same cause of action and judgment rendered on 20.11.2015 by this court in **Julius Irungu Mungai –Versus- Mugoiri Five Farmers Co-operative Society Limited [2015]eKLR**. In view of the misleading pleading and pursuit of the suit by the 3rd respondent despite the earlier judgment on the cause of action and in view of the belated objection by the respondent, there will be no orders as to costs.

The court reckons that the case was a referral of a trade dispute and conciliation failed to yield satisfactory or amicable compromise.

As computed in the statement of claim and then the claimants' final submissions, the 1st claimant is awarded **Kshs. 385, 390.00**; the 2nd claimant **Kshs. 355, 115.00**; and the 3rd claimant's case is hereby dismissed with no orders as to costs.

In conclusion judgment is hereby entered for the parties and the suit is hereby determined with orders for:

1. The respondent to pay the 1st claimant **Kshs. 385, 390.00**; and the 2nd claimant **Kshs. 355, 115.00** by 01.02.2018, failing interest to be payable thereon at court rates from today till full payment.
2. The 3rd claimant's suit is hereby dismissed with no orders as to costs.

3. The respondent to pay the 1st and 2nd claimant's costs of the suit.

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

BYRAM ONGAYA

JUDGE