



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 69 OF 2017

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

KANGIRI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 8th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 09.03.2017. The claimant claimed failure to pay terminal benefits of its members and former employees of the respondent namely Peter Mwangi, Cyrus Irungu, and Zacharias Irungu.

There was no dispute that the respondent employed the three grievants effective 16.06.2005, 01.05.2012, and 16.06.2005 respectively. They were employed in the capacity of night guards.

The grievants were on duty on the night of 22.12.2013 and some 80 bags of coffee were said to have been stolen from Gakuiya Coffee Factory which the grievants had been assigned to guard. The grievants were arrested and charged with the offence of stealing by servant contrary to section 281 of the Penal Code.

The trial court found that the theft must have been by some people from outside and that the grievants were not the culprits. The trial court further stated, **“Accused themselves told court that they blew whistle to alert the public. Taking into account that the thugs were around they had to ensure of their safety first. This was only possible after the departure of the gang. On the whole, having considered the evidence adduced before me, I find that I entertain doubt in respect to charges the 3 accused are facing. I will therefore give them benefit of doubt and have them acquitted under section 215 CPC. They are free unless legally held.”** The judgment was delivered on 29.09.2015.

The claimant’s case is that pending the decision in the criminal case the grievants had been placed on suspension on half pay. After the acquittal, they reported to the respondent’s secretary manger on 30.09.2015 and the secretary manager advised them to await the respondent’s decision in view of their acquittal. Clause 7 of the collective agreement between the parties on suspension provided as follows:

- a) An employee may be suspended from duty to enable investigations into a matter related to misconduct.
- b) The suspension shall be on half monthly salary for a period of not exceeding ninety (90) consecutive days, during which period the investigations or enquiry shall have been completed.

- c) The employee shall be informed in writing by the co-operative as to the reasons of such suspension.
- d) Where the investigation exonerates the employee of the perceived misconduct, he/she shall be reinstated back without loss of pay and other benefit from the date of suspension.
- e) The Branch Secretary of the Union shall be given a copy of the suspension letter.

The grievants' cases are that they waited for communication in view of the acquittal until 11.11.2015 when they considered that the respondent had opted not to make a decision or to allow them to resume duty after the acquittal; and they each wrote a resignation letter. The letter gave 3 months' notice with effect from 29.10.2015 to pay the terminal dues. The letter stated that due to unavoidable circumstances and in view of the acquittal, the grievants could not continue in the respondent's employment.

The grievants reported the dispute to the claimant and the ensuing conciliation proceedings failed to yield amicable resolution. The conciliator's certificate for referral of the dispute to the court is dated 24.01.2017. The claimant filed the present suit claiming terminal dues for the grievants per the collective agreement and upon the headings of unpaid salary for 24 months of the suspension, accrued annual leave, arrears under CBA, service gratuity for period served, and off days for period of suspension.

The response to the memorandum of claim was filed on 02.05.2017 through Kamau Kuria & Company Advocates. The claimant's case was that the respondent had paid the grievants final benefits being Kshs. 96, 837.00 for Cyrus Irungu; Kshs.177, 512.00 for Peter Mwangi; and Kshs.177, 512.00 for Zacharia Irungu all making a sum of Kshs.451, 861.00. The claim for pay under the heading of arrears under the CBA was subject of a dispute between the same parties in Cause 218 of 2016.

The respondent invoked section 44 (4) (g) of the Employment Act, 2007 and urged that, once the grievants were arrested, the respondent was thereby entitled to terminate the employment. The respondent admitted that as the criminal case No. 1838 of 2013 at the Senior Principal Magistrate's Court at Kagumo and against the grievants was pending, the grievants were on suspension and on half pay as per clause 7 of the collective agreement. Further it was urged that, under clause 8B of the collective agreement, that the respondent was entitled to dismiss the grievants on account of absence from duty without permission for a period of 7 consecutive days. It was the respondent's case that after the acquittal on 29.09.2015 the grievants failed to report back on duty and instead served resignation letters on 11.11.2015 (thus having been 7 days absent without permission). Accordingly, the respondent prayed that the claimant's suit be dismissed with costs.

The parties opted to rely on pleadings and documents on record together with the final submissions. They agreed upon the issues for determination.

The **1st agreed issue** for determination is if the grievants were summarily dismissed per clause 8B (d) of the CBA providing that if an employee abandons work for 7 days he or she is liable to summary dismissal or if the grievants resigned. It is not in dispute that the claimants were acquitted on 29.09.2015 and they resigned on 11.11.2015. For the period between the two dates, the grievants' position is that they kept on reporting at work but the respondent failed to assign them duty as per clause 7 of the CBA on suspension. There was no evidence that the respondent allowed the grievants back at work with full pay and benefits from the date of the suspension as per clause 7 (d). The respondent's position is that the grievants were liable for dismissal per clause 8B (d) on account of abandoning duty for more than seven consecutive days. The court finds that whereas the grievants would be liable as submitted, the respondent never made such decision dismissing the grievants from employment. In the circumstances, the court returns that the claimant's account that the grievants reported on duty but were not assigned duty or decision made as per clause 7 of the CBA is credible.

While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

In the present case, it is not explained by the respondent why the grievants were not summarily dismissed if indeed they abandoned duty between the date of acquittal and the date they opted to resign. The court returns that once the respondent failed to assign the grievants duty after the acquittal, the grievants were entitled to consider themselves constructively terminated and the court further returns that they were entitled to tender their resignation. To answer the 1st issue for determination the court returns that the grievants’ employment was terminated by reason of the resignation on 11.11.2015 as the respondent made no decision of summary dismissal as was urged for the respondent.

The 2nd **agreed issue** for determination is whether the grievants were paid all pending salaries after the acquittal judgment in the criminal case. The issue is related to the 3rd **agreed issue** which is about the computed dues paid to the claimants and the outstanding terminal dues, if any.

The court returns that in terms of clause 7 of the CBA, the agreed terms on suspension apply. It is not disputed that consequential to the acquittal, the suspension stood lifted under the provisions of the said clause 7 and the withheld half salaries became due for release to the grievants. Thus the court returns that the grievants are entitled to pay of withheld half salaries and other benefits up to the date of acquittal 29.09.2015 and full pay up to the date of resignation on 11.11.2015. Peter Mwangi is awarded **Kshs. 94,717.50**; Cyrus Irungu **Kshs.94, 717.50**; and Zacharias Irungu **Kshs.94, 717.50**.

Clause 4 of the CBA provides for service gratuity and the claimants having resigned, they are entitled as prayed for because the clause provides that employees who resign shall be paid service gratuity. Thus Peter Mwangi is awarded **Kshs. 304,194.00**; Cyrus Irungu **Kshs.82, 962.00**; and Zacharias Irungu **Kshs.304, 194.00**.

The court has considered the prayer for pay for off days and for pay in lieu of leave during the period of suspension. The court has considered the provisions of clause 7 of the CBA. Whereas leave and off days are benefits, the same are not remunerative and the grievants having been on suspension, the court returns that they did not earn the annual leave as contemplated in section 28 of the Employment Act, 2007. Similarly, since they were not working but on explained leave defined as a suspension, the court returns that in absence of express agreement in that regard, they did not earn the off days. The prayers are therefore declined.

The respondent had urged that certain amounts now claimed may have been paid to the grievants. The itemised or particularised computation was not provided or evidence of such payment filed. The court considers that the amount payable may be less such sums already paid and whose figures may be agreed upon between the parties.

The claimant did not object to the respondent’s pleading that the arrears for CBA 2014/2016 were subject of the dispute in a case pending before this court. Thus, the court returns that the claims and prayers in that regard are premature and are hereby declined. Indeed, the claimant in the submissions has acknowledged that the said Cause No.218 of 2016 between the parties has not been determined and

consequently, the CBA has not been implemented.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The respondent to pay the grievants thus Peter Mwangi **Kshs. 398, 911.50**, Cyrus Irungu **Kshs. 177,679.50**, and Zacharias Irungu **Kshs. 398, 911.50** by 01.02.2018 failing interest to payable thereon at court rates from the date of the suit till full payment.

b) The respondent to pay 50% claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th December, 2017**.

BYRAM ONGAYA

JUDGE