



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 163 OF 2014

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

v

TULAGA FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

JUDGMENT

1. The Kenya Union of Commercial, Food & Allied Workers Union (Union) commenced legal proceedings against Tulaga Farmers Co-Operative Society Ltd (Respondent) on 22 May 2014 and the issue in dispute was stated as *unlawful and wrongful dismissal of Ms. Jane Nyambura (Grievant)*.
2. The Respondent filed a Response on 4 July 2014, and the Cause was heard on 24 March 2015 and 28 October 2015. The Grievant testified while the Respondent called its Chairman.
3. The Court has considered the pleadings, evidence and submissions (Union filed submissions way outside the agreed timeline) and identified the issues for determination as, *whether the dismissal of the Grievant was unfair, whether Grievant's remuneration included house allowance, whether Grievant has outstanding leave and appropriate remedies/orders including contractual/statutory entitlements accruing out of the employment relationship.*

Whether dismissal was unfair

4. The Grievant was employed by the Respondent in March 2006 as a bookkeeper. She rose to become a Stores Supervisor. The Respondent through a letter dated 26 March 2012 informed the Grievant that she had been dismissed following a meeting of the Respondent's Management and Supervisory Committee held on 23 March 2012.
5. The reason given in the letter was that the Grievant had failed to report for work for more than 5 days.
6. The Grievant, in her testimony stated that after promotion to Stores Supervisor, she raised several grievances with the Respondent's Manager called Milkah in writing but because the Manager was proceeding on leave, she directed her to the Assistant Manager, Jeremiah Kariuki.
7. The Assistant Manager could not resolve the grievances and instructed the Grievant to go home on 8 March 2012.
8. On 16 March 2012, the Respondent's officials visited her at home with the Police and picked her up and took her to the office. They asked her about office keys and asked her to resume work which she did

and worked together with Lydia Njeri Mwangi.

9. The next the Grievant heard from the Respondent was when she was summoned and issued with a dismissal letter on 26 March 2012.

10. The Grievant in cross examination denied that she was aware that the Respondent Board sat on 23 March 2012 or that she was requested to hand over on 16 March 2012.

11. The Respondent's Chairman in his testimony stated that the Grievant applied for unpaid leave on 17 January 2012, and that from 9 March 2012 to 16 March 2012 she did not report for work.

12. The absence prompted the Respondent to consult the District Cooperative Officer and together with the local Officer Commanding Station (Police), they went to look for the Grievant because they did not want to break into her office in her absence.

13. When the Grievant was found, she went with the group to the offices where she was asked to hand over (in writing) to Lydia Njeri, her Assistant, and wait for the Respondent's Board decision on her fate, because she indicated she wanted to rest.

14. The letter also referred to the Grievant's 6 day absenteeism.

15. According to the witness, the Respondent's Board sat on 23 March 2012, but the Grievant did not attend or offer any explanations and the Board resolved to dismiss her.

16. During cross examination, the witness admitted that the Grievant was not issued with a show cause letter to explain her absence but that the Grievant was invited in writing to attend the meeting of 23 March 2012 but he did not have a copy of the invitation letter.

17. Pursuant to section 41(2) of the Employment Act, 2007, an employer is obliged to hear and consider any representations to be made by an employee before dismissing the employee where an employee has fundamentally breached an obligation arising under the contract of service or where the employee has been absent without permission or lawful cause.

18. Assuming the Grievant was absent without permission as suggested by the Respondent, a hearing ought to have been held to hear and consider any representations she had to make. The process could also have been conducted through writing.

19. The Respondent's witness admitted in cross examination that no show cause was issued to the Grievant. In other words, the Respondent did not take the written option in order to satisfy the requirements of section 41(2) of the Employment Act, 2007.

20. The witness also stated that the Grievant was invited to the meeting of 23 March 2012. Nevertheless, a copy of the said invitation letter was not produced. The failure to produce a copy was not disclosed.

21. The Respondent had written to the Grievant on 16 March 2012. The letter advised her to hand over and await the decision of the Respondent's full management Board.

22. The Grievant denied receiving this letter. However, even if she had received it, it did not meet the statutory threshold because it did not invite the Grievant to make representations, or to appear before the full management board.

23. The Court is therefore satisfied that the summary dismissal of the Grievant was procedurally unfair in so far as the Respondent did not follow a fair procedure.

Whether remuneration included house allowance

24. Clause 10 of the Terms and Conditions of Service for All Members of Staff produced by the Respondent provided for provision of housing or payment of 15% of monthly salary as house allowance.

25. The Union pleaded in paragraph 4 of the Memorandum of Claim that the Grievant was not getting house allowance. In examination in chief, the Grievant stated that she was getting house allowance of Kshs 700/- after confirmation on 1 September 2006.

26. In paragraph 13, it was pleaded that she was getting Kshs 2,080/- on account of house allowance.

27. The Respondent's witness did not refer at all, to whether the Grievant was housed or was paid house allowance.

28. With the state of evidence produced, the Court finds that the Grievant was getting house allowance.

Leave

29. The pleadings indicated that the Grievant was not granted annual leave from 2006 to 2009.

30. The Respondent's witness testified that the Grievant either took her annual leave or the same was commuted into cash.

31. The Respondent exhibited a letter by the Grievant dated 24 January 2008 in which she requested that her annual leave for 2007 be commuted into cash. This should have been the leave for 2006/2007.

32. An extract of the muster roll produced show that the Grievant was paid commuted leave in February 2008 together with the January 2008 wages. This should have been leave for 2007/2008.

33. Again, an extract of the muster rolls for March/April 2009 indicate that leave was commuted and paid to the Grievant.

34. The Court finds that the Respondent does not owe the Grievant any accrued leave for the period pleaded.

Appropriate remedies

Pay in lieu of notice

35. With the conclusion reached that the dismissal of the Grievant was procedurally unfair and in consideration of sections 35 and 36 of the Employment Act, 2007 the Grievant is entitled to an award of 1 month's pay in lieu of notice

36. The Grievant's plea at paragraph 13 of the Memo of Claim that her monthly pay at time of dismissal was Kshs 13,869/- was not responded to or controverted in testimony.

March 2012 wages

37. The Grievant sought Kshs 15,949/ as wages for March 2012. The Respondent's witness admitted that this was not paid and the same is due to the Grievant.

Compensation

38. The Grievant served the Respondent for some 6 years and considering the length of service, the Court would award her the equivalent of 6 months gross wages (monthly wage and house allowance as pleaded).

Leave

39. This head of claim is declined for the reasons outlined in the body of the judgment.

Gratuity

40. Under this head, the Grievant sought Kshs 119,618/-.

41. Because the Court has found the dismissal of the Grievant unfair, she is entitled to gratuity in terms of clause 23 of the Terms and Conditions of Service.

42. The Court would award the gratuity as calculated, as the computation was not challenged/controverted.

Conclusion and Orders

43. The Court finds and holds that the summary dismissal of the Grievant was procedurally unfair and awards her and orders the Respondent to pay her

a. 1 month's pay in lieu of notice	Kshs 13,869/-
b. March 2012 wages	Kshs 15,949/-
c. 6 months wages compensation	Kshs 95,694/-
d. Gratuity	Kshs 119,618/-

TOTAL Kshs 245,130/-

44. The other reliefs are dismissed.

45. Each party to bear own costs as it was not demonstrated the Claimant and Respondent had a recognition agreement, and the Union having failed to adhere to timelines on filing and serving of submissions.

Delivered, dated and signed in Nakuru on this 19th day of February 2016.

Radido Stephen

Judge

For Claimant Mr. John Owiyo, Industrial Relations Officer, Kenya Union of Commercial, Food & Allied Workers

For Respondent Mr. Kinyanjui instructed by Mwangi Kinyanjui & Co. Advocates

Court Assistant Nixon