



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 149 OF 2009**

**BAKERY, CONFECTIONARY, FOOD MANUFACTURING**

**& ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**THE WRIGLEYS CO. (E.A) LIMITED .....RESPONDENT**

**JUDGMENT**

1. The memorandum of claim herein was filed on 29<sup>th</sup> July 2009. Parties were heard by Chemmutut J. (As he then was) lastly on 12<sup>th</sup> July 2012. Parties appeared before different Judges since until 17<sup>th</sup> November 2014 when the Court directed that hearing should commence *de novo*.

Issue in dispute

2. Victimization and wrongful dismissal of Stanley Nyoike and William Oyugi as employees of the respondent.

**Claim**

3. The Claimant is a trade union representing industrial interests of all employees engaged or employed in the food manufacturing and related industries. The Claimant and the Respondent have a Collective Agreement (CBA) governing terms and conditions of employment for employees of the respondent.

4. The Grievant William Oyugi was employed by the Respondent on 19<sup>th</sup> January 1998 as a Merchandiser and was dismissed on 16<sup>th</sup> June 2006 on the grounds that he committed criminal offence to the substantial detriment of the Respondent and its property which was not true. The Respondent relied on clause 6(g) of the CBA to dismiss the grievant. At the time his basic salary was Kshs.18, 708.00 and house allowance at Kshs.4, 206.00 per month. That he had served diligently without any disciplinary case or caution and the dismissal did not follow due process.

5. The other Grievants Stanley Nyoike was employed by the Respondent on 3<sup>rd</sup> August 2001 as a Merchandiser and was dismissed on 16<sup>th</sup> June 2006 allegedly for contravening clause 6(g) of the CBA. It was alleged that his wife Fresia Nyoike was treated and discharged at the Digore Medical Clinic on 9<sup>th</sup> February 2006 where she paid Kshs.7, 940.00 and the bills presented for reimbursement. At the time of termination of employment the Grievants was earning was Kshs.18, 708.00 and house allowance at Kshs.4, 206.00 per month.

6. On 15<sup>th</sup> August 2006 the Claimant reported a dispute with the Minister, an investigator was appointed and on 19<sup>th</sup> March 2007 a conciliator held a meeting with the parties and a report was released on 23<sup>rd</sup> September 2008. The conciliator recommended that the grievants' dismissal by the Respondent be upheld.

7. On 30<sup>th</sup> September 2008 the Claimant rejected the findings of the conciliator and requested the Minister to forward the dispute to Court on 27<sup>th</sup> October 2008.

8. The claimant's case is that under clause 20(d) of the CBA, medical benefits to the Grievants were of the nature that they covered the self and family members and where there was an expense such could be reimbursed to a maximum of Kshs.25, 000.00 per year from 1<sup>st</sup> January 2003 and a maximum of Kshs.27, 000.00 from 1<sup>st</sup> January 2004. The medical documents presented for reimbursement by the Grievants were genuine and within allocated limits. The termination of the Grievants was therefore malicious and the conciliator in making recommendations was not neutral.

9. The claim is for a declaratory order that the summary dismissal is contrary to clause 6(g) of the CBA; a cancellation and expunge of the letters of dismissal dated 16<sup>th</sup> June 2006; reinstatement of the Grievants without loss of benefits; payment of pecuniary loss since termination to date inclusion salaries that should have been paid; salary not paid for period prior to termination; and any other relief that the Court may deem fit to grant.

10. In evidence, the Claimant called 3 witnesses.

11. Stanley Kibiro Nyoike testified that he is a Grievant herein and was employed by the Respondent until his termination on 16<sup>th</sup> June 2006. That on 9<sup>th</sup> February 2006 his wife fell sick while he was away on duty and went to Digore Medical Clinic for treatment and was discharged. A sum of kshs.7, 940.00 was paid and the Grievant claimed for a reimbursement from the Respondent in accordance with the policy and CBA where he was entitled to a refund of up to Kshs.21, 000.00 per year. The letter of appointment also made provision for medical cover for self and family and when his wife Fresia Wanjiku fell sick, she sought for treatment at Digore Clinic. At the time the Grievant was away for work and when he returned he made a claim that was paid. However in June while he was from Nakuru for work he was issued with a letter of termination on the reasons that there were questions with regard to receipts presented for payment.

12. Mr Nyoike also testified that before his termination he was not called for hearing or given a chance to defend himself. The shop steward was not called and the summary dismissal was unfair as there had been a misunderstanding with his supervisor when the Grievants reported improper use of a motor vehicle. There was malice in the summary dismissal.

13. The Grievant is seeking reinstatement without loss of benefits or payment of terminal dues.

14. The second witness was William Osongo Oyugi a Grievant and formerly employed by the Respondent. He testified that he had gone to Naivasha for work with his supervisor Beatrice who used the Respondent motor vehicle improperly and when the Grievant was questioned he reported the same which made the supervisor swear that she would ensure he was dismissed.

15. Mr Oyugi also testified that whenever he got sick he would be treated at Aga Khan Hospital without paying as he had a medical cover under the Respondent for self and family. While the Grievant was away at work in Kwale, his wife and children got unwell as they had just moved to Mombasa and had not been used to the weather. A neighbour directed her to Digore Medical Clinic where she was treated together with Gerald Oduor and Hellen Auma, son and daughter. The Grievants presented the receipts for reimbursement and the Respondent paid. His supervisor, Lawrence Digo issued the Grievants with a termination letter without hearing or reference to the shop steward. At the time of termination he had a child in class 8, 6, 4 and class one. This affected his entire family as the financial disruption was of tremendous effect and he remained jobless and could not support his children in school or take care of

them noting they had just moved from Nairobi to Mombasa and not so far before had moved from Kisumu.

16. The Grievants is seeking his salaries due since termination or a return to work.

17. In cross-examination, Mr Oyugi testified that when he was issued with termination letter he was allowed to defend himself through written submissions. He reported to the union which reported the dispute to the Minister.

18. The third witness was Christine oyugi, Spouse to William Oyugi the Grievant herein. She testified that she is the mother to Hellen Auma and Jared Oyugi. While in Mombasa accompanying her husband who had been transferred there, the children got sick and a neighbour directed them to Digore Clinic. The husband was away for the week and had to have the children attended to. She paid for the treatment and gave the receipts to her husband.

## **Defence**

19. In defence, the Respondent admit that they have a recognition agreement and CBA with the Claimant that addressed terms and conditions of employment for employees and the Grievants were their employees at the material time subject to the dispute herein. Clause 20 of the CBA made provision for medical treatment where the Respondent would pay the cost of medical treatment of all employees. Such treatment would cover treatment at government facilities or where the drugs [medicines] were not available at the government facility and were purchased at private hospitals. Outpatient covered up to kshs.20, 000.00 and kshs.21, 000.00 with effect from 1<sup>st</sup> January 2002.

20. In January 2006, Mr Oyugi presented 2 medical claim statements for Christine Oyugi and Helen Auma on the basis that he had spent Kshs.5, 300.00 for treatment for Christine and Kshs.3, 400.00 being treatment costs for Hellen. He was paid kshs.8, 700.00 in good faith. In March 2006 he presented other receipts for Jared Oduor and was refunded kshs.6, 700.00. The medical reports had allegedly been issued by K. Ombangi and J. Orachi from Digore Medical Clinic. The Respondent became suspicious as all the treatments related to similar ailments and thus decided to investigate to authenticate the same.

21. Mr Nyoike the other Grievant also submitted receipts for reimbursement allegedly for treatment done in February 2006 for his wife Frecia Wanjiku from Digore medical Clinic. He was reimbursed kshs.7, 940.00. The documents from Dr. K Mokaya did not have a letter head and the Respondent decided to carry out investigations.

22. The defence is also that upon investigations the Respondent established that all the receipts submitted together with medical documents were fictitious. The Grievants were asked to explain the anomalies. Both wrote back and asked the Respondent to question the clinic that issued the documents. From the clinic, the Respondent established that James osoro was not in their records as having treated the persons stated in the issued receipts and medical records; they do not charge consultation fee which appeared in the receipts; they have no employee in the name of K Ombongi; the documents allegedly issued from the clinic were not genuine; and no receipts were issued as presented by the grievants.

23. The defence is also that given the failure by the Grievants to justify the authenticity of the documents presented by reimbursements, confidence was lost in these employees hence both were issued with termination letter. The Grievants were paid wages in lieu of notice; days worked; and paid for leave days due. The Grievants failed to appreciate that they had an employment relationship with the Respondent and where their family members engaged in fraud it was upon them as the principals to take responsibility and had to exonerate themselves. On their letters of denial, it was left to the Respondent to investigate and found that the presented recipes and medical records were not genuine. Such amounted to criminal conduct hence the summary dismissal was justified. The claims should be dismissed.

24. In evidence the Respondent called Fred Gor the Human Resource and business officer of the respondent. He testified that he was employed by the Respondent in May 2009 after the Grievants had

already been dismissed but rely on the records as the previous officers have since left the Respondent employment. He testified that the Grievants were terminated on the grounds that they presented fictitious receipts to claim reimbursements for alleged expenses incurred by their relative at Digore medical Clinic. Mr Oyugi had document dated 17<sup>th</sup> January 2006 for Helen Auma and Christine Oyugi; and 1<sup>st</sup> March 2006 for Jared Oduor. Looking at these records, all the persons attended to had similar ailments and the treatment was similar. The documents had no letter head and the receipts were suspicious. The Respondent conducted investigations and it emerged that the records presented by Oyugi were not genuine. No such persons had been attended to on the stated dates and the staff allegedly attending to these persons were either not in the employment of the clinic or were not at work as stated.

25. In the case of Mr Nyoike, the documents he presented for Fresia Wanjiku for reimbursement were fictitious.

26. The Grievants were asked to show cause and the responses given were found not to be satisfactory. They were not able to explain the discrepancies. On this basis the Grievants were terminated and paid their dues. The termination was justified noting what the Grievants had done were criminal offences.

#### Submissions

27. The Claimant submit that the Grievants were victimised and wrongly dismissed from employment. There is evidence that the Grievants were victimised by Beatrice misori who threatened them with termination for reporting her use of the motor vehicle and mileage unexplained was due to fuel consumption. The investigations conducted did not put these facts into account. There was also evidence that the Grievants had their family sick and were attended at the Digore clinic who issued medical records and receipts that were not faulted as not being authentic. It was for the clinic to contest the genuineness of the records which was not done in this case. The Claimant is therefore entitled to the remedies sought.

28. The Claimant has replied on the case of **Nicholas Otinyu Miruka versus Equity bank Limited, Cause No.25 of 2013.**

29. The Respondent on their part submit that before the matter herein commenced *de novo* there was evidence of both grievants, both spouses and the owner of Digore Clinic which was favourable to the claimant. That the Claimant was able to reorganise its evidence and did not call the witness from Digore clinic. That this should be put into account in analysing the merits of the case.

30. The Respondent also submit that the cause of action arose at the time of the repealed Employment Act and termination of employment did not require giving of reasons or a hearing. Mr Gor for the Respondent testified as the representative of the Respondent based on filed records for the office he hold. Such should be put into account as the Court is directed to deal with substance and not technicalities.

31. The Respondent had a basis to terminate the Grievants based on fraudulent claims lodged for refund. Upon production of suspicious receipts and payments thereof, the Respondent lodged their investigations and found such not to be genuine and the health facility did not have such records and denied having issued the documents as they did not charge consultancy fee and as such the records did not emanate from their office or officers. The Grievants were issued with show cause letters but instead of explaining as to how the anomalies arose asked the Respondent to the clinic that had issued the receipt. As such there was no satisfactory responses hence the termination. There was therefore a basis for the termination.

32. The Respondent has relied on the following cases – **Duncan Kariuki kinyanjui versus Kenya powered & Lighting Company [2015] eklr; James nyaribo Versus PS Ministry of Public Works & Another [2014] eklr; Shimeo Ayienda Ontita versus NAS Airport Service Ltd [2013] eklr; George Wesonga Ojwang versus KNUT [2014] eklr.**

#### **DETERMINATION**

On the analysis of the emerging issues I find the following questions critical to resolve herein;

What is the applicable law?

Whether the dismissal was wrongful; and

Whether there are any remedies due.

33. Dismissal of the Grievants was on 16<sup>th</sup> June 2006. The dispute was reported to the minister and the conciliator submitted report on 23<sup>rd</sup> September 2008 which the Claimant rejected on 27<sup>th</sup> October 2008. The Minister referred the dispute to the Court on 29<sup>th</sup> July 2008. The memorandum of claim was filed on 29<sup>th</sup> July 2009.

34. This case was therefore caught up within two legislative frameworks – the Employment Act, Cap 226 (repealed) and the Employment Act, 2007. At the time of dismissal, the Grievants were covered under the repealed legislation that did not provide for hearing before termination or make provision for giving of any reasons before or with the termination or dismissal. The only requirement was to follow the contract terms or issue requisite notice or payment in lieu thereof. However the Trade Disputes Act (now repealed) also made provision for filing of a dispute with the Minister upon which, where parties were not in agreement, the Minister could refer the dispute to the court. In this case, such referral was on 27<sup>th</sup> October 2008 when the Employment Act, 2007 was in force giving the right to claim for unfair termination.

35. Noting the above, I find no dispute or conflict in what law to apply. At the time of dismissal, the Respondent applied the applicable law as appropriate. Dismissal was in accordance with the Employment Act, Cap 226 (repealed) and at the time of filing the claim herein, even where the Employment Act, 2007 was in force as at 2<sup>nd</sup> June 2008, the same was not to act retroactively. The Claimant could only benefit in terms of time within which to file the claim but the issue in dispute and cause of action arose and was addressed in the context of the applicable law then, the repealed Act.

36. On the question as to whether the dismissal of the Grievants was wrong, I note from the pleadings and the evidence of Mr Oyugi and Nyoike is that prior to their dismissal on 8<sup>th</sup> June 2006 they were issued with show cause letter and they filed their responses. They were required to address the anomalies in regard to receipts and records submitted for medical treatment and payment for their family members that the Respondent had noted to warrant their explanations.

37. Section 17 of the Employment Act (repealed) allowed an employer to summarily dismiss an employee upon committing acts considered of gross misconduct which included;

*(g) If an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

38. Such *suspicion* was sufficient to warrant summary dismissal. Such are matter I find were clearly set out in the notice to show cause issued to the Grievants who opted to casually treat the same to their detriment. As at 8<sup>th</sup> June 2006, the Respondent as the employer, had sufficient reason(s) looking at the submitted receipts from the Grievants relating to members of their families to require them to explain the noted anomalies. Such anomalies were set out thus;

*[William Oyugi]... it has come to our attention that you present fictitious claims to the company; from Digore Medical Clinic, Mombasa dated 17<sup>th</sup> January 2006 and 1<sup>st</sup> March 2006.*

*This is a very serious matter and disciplinary action is being considered against you, however you are being given an opportunity to defend yourself.*

39. A similar notice was issued to Mr Nyoike. Such a find to have been notices that should have invited the Grievants to reflect and where indeed their spouses in their absence had committed acts leading to the issuance of *fictitious* receipts, to have carefully and keenly addressed the same as appropriate. To simply ask the Respondent to go and find out from the Digore clinic was simplistic and not adequately responding to the issue(s) as hand. The law then only required the employer to have *suspicious* to warrant issuance of notice before termination or payment in lieu thereof. Such law gave the employer and wide latitude. Such was lawful can I cannot fault it in the absence of any plausible explanation by the Grievants as to how the suspicious records were obtained and presented to their employer and reimbursements effected.

40. The matters herein were subjected to findings of an investigator and conciliator who confirmed the termination. I cannot fault such findings on the basis and analysis herein based on the evidence presented in court. I therefore there was no wrongful termination of employment. Such was allowed under the applicable law and clause 6 of the CBA between the parties.

41. On the remedies, on the finding that this was not a case of wrongful termination, the claim for reinstatement does not arise. The Grievants were paid in lieu of notice; days worked and leave days not taken. Such dues were not contested. I find nothing else that arise.

**In conclusion, noting the foregoing, I find no merit in the entire claim and hereby dismiss the same. noting the age of the matter, the fact that parties had to commence hearing *de novo* after being heard by Chemmutut, J. (as he then was) it is only appropriate that each party should bear their own costs.**

Orders accordingly.

DELIVERED IN OPEN COURT AND SIGNED THIS 31<sup>ST</sup> DAY OF MARCH 2016.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

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