



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1389 OF 2013

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

SANPAC AFRICA LIMITED.....RESPONDENT

Mr John Owiyo for Claimant

M/s Oyombe for Respondent

JUDGEMENT

1. The two causes 1190 of 2013 and 1389 of 2013 were consolidated on 2nd July 2014 pursuant to a consent of the parties. The two grievants were both employed by the Respondent. The two grievants had worked for a period of two years respectively. The two were summarily dismissed on 26th September 2011 on allegation of theft of a floodlight and a blow mould code No. pp 99.
2. Mr Stephen Omondi Meda worked as a mechanic attendant earning a monthly salary of Kshs 10,401 whereas Mr Bidad Kimani Njeri worked as an electrician earning a salary of Kshs 15,664. The Respondent conducted internal inquiries in vain and opted to involve the police of Embakasi Police Station.
3. The grievants deny that they were involved at all in the theft of the two items in that the two items are very big and no one could get them out of the premises without being noticed by the security officers. That the gate is manned 24 hours and employees are subjected to thorough search/inspection before leaving the Respondents premises by the Security Officers.
4. That the Key to the store where the floodlight was are always in the custody of the manager. That the gates/doors to the store were not broken. The Claimants conclude that the machines could only have been taken by persons using a motor vehicle and a crane or a forklift machine and that the vehicles and employees leaving the premises must have had a gate pass authorizing such exit signed by the manager of the respondent.
5. The grievants therefore state that they were wrongly victimized leading to the unlawful and unfair termination of employment. They seek the following reliefs:

Bidad Kimani

- i. One month salary in lieu of notice in the sum of Ksh 15,664
- ii. Prorata leave 7,120
- iii. Gratuity 20,344.60
- iv. 12 months salary as compensation for the unlawful and unfair termination 187,488

Stephen Omondi Meda

- i. One month salary in lieu of notice in the sum of Ksh 10,401
 - ii. Gratuity as per the parties Collective Bargaining Agreement (CBA)
 - iii. Reinstatement without loss of salary and benefits in the alternative
 - iv. Compensation for unlawful loss of employment
 - v. Any other benefit not indicated
6. The grievants were arrested, put in custody, charged and released on bond upon plea of not guilty. The grievants, were subsequently released without any prosecution. The two tried to get back to work but were refused. Their effort to get consideration through the union was in vain. The two suffered loss and damage and seek compensation accordingly and payment of the terminal benefits aforesaid.

Response

7. The Respondent filed a statement of response on 18th July 2014 in respect to Stephen Omondi Meda and Bidad Kimani Njeri. The Respondent admits it had a recognition agreement and a CBA with the claimant union. The Respondent admits the monthly salaries of the grievants to have been 10,401 and 15,664 respectively and attaches their respective payslips.
8. The Respondent states that it relied on the investigation of police officers to come to the conclusion that the two grievants were involved in the theft of a floodlight and a blow mould code No pp99. The grievants were suspended on 28th September 2011 to pave way for the police investigations. The grievants were arrested and detained at Embakasi Police Station.
9. The Respondent states that it did not get any information on the progress of the police case involving the grievants until the 7th November 2011 when the claimant's branch secretary stormed into the respondents premises accompanied by Bidad Kimani Njeri and demanded that the two be reinstated to their previous positions.
10. In December 2011 the Respondent agreed to treat the dismissals of the grievant as normal termination and pay the terminal benefits of the grievants set out in appendix '1b' & 'd' on 21st December 2011.
11. In terms thereof:

Mr Stephen Omondi Meda was to be paid;

- i. notice pay of Kshs 10,401 and;
- ii. severance pay for 2 years (1.12.08 to 28.9.2011) Kshs 12,309

Total 22,710

Less deductions Kshs 1,640 net

Bidad Kimani Njeri was to be paid

- i. Notice pay kshs 15,664
- ii. Severance pay for 2 years (1.4.09 to 20.9.2011) Kshs 20,406

Total 36,070

Less deductions Kshs 24,778 net.

12. The Respondent prepared certificates of service for the grievants attached as appendix '6' to the memorandum of response. On 2nd May 2012 the Respondent wrote to find out the state of the pending criminal case but the request was not answered. The dispute was reported to the Ministry of Labour but conciliation meetings did not take place and a certificate of disagreement was

issued.

13. The Respondent submits that the grievants' employment was terminated for a valid reason in terms of section 44 (4) (f) and (g) of the Employment Act 2007. That since the dismissals were reduced to normal termination the grievants should accept the terminal benefits computed and not received and the matter be put to rest. That the suit be dismissed with costs therefore.

Determination

14. Upon careful analysis of the facts of the case, the issues for determination are as follows;

- i. Whether the Respondent had a valid reason to terminate the employment of the grievants
- ii. If answer to (i) is in the affirmative, whether the termination was done in terms of a fair procedure.
- iii. Whether the grievants are entitled to the reliefs sought by the Claimant Union.

Issue I & ii

15. The court will deal with issues (i) & (ii) together since they are related. It is common cause the two grievants were suspected of having stolen a floodlight and a blow mould code No pp99. The evidence by the claimant that the two items were very large and required to be carried by a motor vehicle and placed into the vehicle by a forklift is not disputed by the respondent. The respondent does not dispute that the items were kept in a store whose key was kept by a manager. It is not disputed also that the respondent's premises was guarded 24 hours and employees were carefully checked while going out of the premises.

16. It is also not in dispute that motor vehicles going out of the premises required a gate pass signed by the Manager. The two grievants were junior employees in the category of machine operator and electrician respectively. Not an iota of evidence was presented by the respondent to show any link between the two grievants and the alleged theft. The allegations by the respondent can best be said to have been pure conjecture.

17. Section 43 of the Employment Act provides

“43 (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45”,

18. The respondent has completely failed to show any nexus between the grievants and the loss of the alleged lost items. To this extent, the Claimant has discharged the onus placed on it under section 47(5) of the Employment Act, 2007 to show on a balance of probability that an unfair termination of employment took place in the circumstances of this case. In the converse, the respondent has failed to rebut the evidence by the claimant in order to justify the termination.

19. It is also not in dispute that the two employees were not subjected to an internal disciplinary process. They were not requested to show cause why their employment should not be terminated. No charges were laid against them by the employer and no disciplinary hearing took place. *Ipsa facto* the manner in which the termination took place violated section 41 of the Employment Act and the termination was not only for an invalid reason but was also done in terms of unfair procedure.

20. The termination therefore violated section 45(1) and (2) of the Employment Act which provides;

“45 (1) No employer shall terminate the employment of an employee unfairly “Whereas section 45(2) provides “A termination of employment by an employer is unfair if the employer fails to prove-

- a. *That the reason for the termination is valid;*
- b.
- c. *That the employment was terminated in accordance with fair procedure”*

21. The court therefore finds that the two grievants' employment was both wrongful and unfair and the grievants are entitled to compensation in terms of section 49(1) (c) as read with section 49(4) of the Employment Act.
22. Section 49(1) (c) provides for a maximum compensation of twelve months salary whereas Section 49(4) provides consideration to be taken into account in assessing compensation. In this regard, the two grievants had served for about two years each. The two were wrongly accused of theft. The allegations were not substantiated at all. The two were wrongly imprisoned, charged for theft but were not prosecuted at all. No disciplinary hearing was held at all by the respondent and the two were simply refused to return to work. No letters of termination were given to them.
23. The two lost employment abruptly and without payment of any terminal benefits at the time of termination even though the benefits were computed but not paid out later. The court does not consider reinstatement of the grievants practical given the nature of allegations made against them without any justification. The two are technical persons and lost prospects of career progression with the respondent to their loss and detriment.
24. The court awards the two six (6) months' salary compensation for the unlawful and unfair termination of employment. The court also awards the grievants the terminal benefits computed and not paid to them. In the final analysis the award to the grievants as against the respondent is as follows:

Bidad Kimani Njeri

- i. Compensation equivalent to 8 months salary $(15,664 \times 8) = 125,312$
- ii. Payment in lieu of notice Kshs 15,664
- iii. Severance pay for two (2) years 20,406

Total award Kshs 161,382

Stephen Omondi Meda

- i. Compensation equivalent to 8 months salary
 $(10,401 \times 8) = 83,208$
- ii. Payment in lieu of notice pay of Kshs 10,401
- iii. Severance pay for 2 years Kshs 12,309

Total award Kshs 105,918

25. Since no counterclaim was made by the respondent the court makes no award in respect of any monies due to the respondent from the grievants. The respondent is to provide certificates of service to the grievants within 14 days from date of this judgement.
26. The respective awards are payable with interest at court rates from date of filing suit till payment in full.
27. The respondent is also to pay to the claimant costs of the suit.

Dated and delivered at Nairobi this 18th day of March 2016

MATHEWS N. NDUMA

JUDGE