



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO: 1310 OF 2010

KENAY BUILDING CONSTRUCTION

TIMBER FURNITURE & ALLIED

INDUSTRIES EMPLOYEES UNIONCLAIMANT

VERSUS

M/S S. S. MEHTA & SONS LIMITED..... RESPONDENT

JUDGEMENT

Introduction

1. This is a claim for employment terminal dues plus compensation for wrongful dismissal from work. It is brought by the claimant union on behalf of Boniface Kyonano and Joseph Mutisya (herein referred to as grievants')
2. There is no defence on record and despite service with a hearing notice on her counsel by the court the respondent never attended the hearing on 18.4.2016. The case therefore proceeded exparte. The issues arising from the pleadings and the evidence are whether the dismissal of the grievant' was wrongful and whether they are entitled to the reliefs sought

The Claimant Case

3. CW1 was employed by the Respondent in November 200 and was only given an Employee Identity Card. He worked as a driver until 2.5.2006 when he was surprised to be given filled leaving forms just to sign and proceed on a 5 days leave he had not requested for. This came shortly after joining the claimant trade union. When he requested for leave afterward he was served with a letter to show cause why he could not go for the leave. After failing to respond, he was served with a summary dismissal letter dated 11.5.2006. He reported to his union who lodged a case with the Labour officer, on 17.6.2010 and after considering the case, the Labour Officer recommended that the grievant be paid all his unpaid wages, pending leave one month salary in lieu of notice plus services gratuity.
4. The grievant now prays for payment of the recommended dues plus compensation for wrongful dismissal. Save for the fact that CW2 was employed on 3.8.1998, he confirmed that he was dismissed with CW1 on the same day and under the same circumstances.

Analysis and Determination

5. There is no dispute that the grievants were given leave forms duly filled for signing. The leave forms shows that the leave was purportedly applied for by the grievants and approved but they have disputed that application. According to them it was a forced leave made in bad faith after they joined the claimant union. That after declining to sign the leave application forms, they were served with show cause letters to explain why they disobeyed a lawful order. There after they were dismissed for the said offence under the provision of Section 17(e) of the Employment Act (repeated).

After carefully considering the evidence before it, this court finds on a balance of probability that the dismissal of the grievants was wrongful and unjustified. The employer did not prove to this court which lawful order or command it made to the grievants and the latter's disobeyed. What however is clear from the record is that the Respondent wanted to suspend the grievants but used the wrong methods of filling leaves forms, without their request and tried to force them to sign. For that reason the court finds and holds that the summary dismissal of the grievants was indeed in violation of the spirit and the letter of Section 17(e) of the Employment Act (Repealed)

Reliefs

6. In view of the foregoing finding the court agrees with the recommendations of the Labour Office that the grievants are entitled to unpaid wages, pending leave and service gratuity. As regards the salary in lieu of notice the court will award the grievants two months salary in lieu of notice as per rule 19(1) (c) of the Regulation of Wages Building and Construction Industry Order 2004. The said rule 19(d) provides for service gratuity of the rate of 14 days, pay per year of services,. The claim for compensation for wrongful dismissal is however dismissed because it was not provided for under the repealed law which was in force when the grievants were dismissed.
7. The grievants respective award is summarized as follows based on the salary pleaded in the suit:-

Boniface Kyonano

Notice:(Kshs 16409x2).....	32818.00
Service gratuity: (16409x14/30 x6).....	4595.20
10 days salary (May 2006).....	5469.66
Provata leave (4 months).....	<u>3828.76</u>
	<u>88,061.62</u>

Joseph Mutisya

Notice :(Kshs 18168x2).....	36336.00
Service gratuity (18168x14/30 x8).....	67827.20
10 days pay (May 2006)	6056.00
7 Leave days.....	<u>4239.20</u>

114,458.40

Disposition

8. For the reasons stated above judgment is entered for the claimant on behalf of the grievant in the aggregate sum of Kshs 202,520.05 plus interest from the date of dismissal.

The claimant will also have costs of the suit.

Signed, dated and delivered at Nairobi on 22nd April, 2016

ONESMUS MAKAU

JUDGE