



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 14 OF 2014
KENYA SHOE & LEATHER WORKERS UNION...CLAIMANT
VERSUS
KENAFRIC INDUSTRIES LIMITED.....RESPONDENT
JUDGMENT

1. The claimant grievant Mr. Joseph Webo averred that he was employed by the respondent on 5th January, 1998 as a general labourer and worked until 30th June, 2012 on allegations that on the evening of 29th June, 2012 he clocked in and sneaked out a few minutes later. At the time of dismissal he was earning Kshs.8,650 as basic salary plus house allowance of Kshs.2,500/=. Attempts to amicably resolve the matter through conciliation by a Labour Official failed leading to the filing of the present case.
2. The respondent in its memorandum of response conceded that the grievant was its employee. Concerning the circumstances leading to the grievant's dismissal, the respondent averred that on the evening of 29th June, 2012 the grievant reported on duty for the night shift by clocking in the register as attending duty at night. After clocking in the grievant quietly sneaked out and did not undertake his duties that night. The grievant reported the next morning on 30th June, 2012 and clocked out as though he had worked the entire night shift.
3. According to the respondent, on discovery of the misconduct, the grievant was asked to explain why he behaved the way he did and wrote a note dated 30th June, 2014 in which he admitted his offence and apologized for gross misconduct. When called to a meeting to explain his conduct, the grievant lied that he had worked the night shift in the assembling section yet that section was closed and was not in operation.
4. Concerning leave, the respondent denied that the grievant was entitled to leave days claimed since by the time he was dismissed he had save 0.5 days exhausted his leave days. The respondent attached as appendix 4 to memorandum of response leave application forms.
5. In his submissions Counsel for the grievant Mr. Wangira submitted that the grievant did not abscond duty since a keen look at the staff list dated 28th June, 2012 authored by the grievant's supervisor marked APPJWII and attached to the claimant's memorandum of response excluded the grievant's name. The claimant as a diligent employee sought assistance for the Human Resource Officer who advised him to come the following day and fill for leave so that when the volume of work improves he would resume work.

6. Counsel further submitted that the grievant was a member of a union duly recognized by the respondent however there was no evidence that the respondent involved the union in any way in the alleged disciplinary issues facing the grievant. According to counsel no member of the union or shop floor official was invited to any disciplinary hearing where the grievant's dismissal was discussed. Counsel therefore urged the Court to find that the claimant's summary dismissal was unfair and unlawful.

7. Mr. Molenje for the respondent on the other hand submitted that the claimant failed to adduce any evidence to prove that the allegation that his termination was unfair and unlawful. According to counsel the grievant upon committing the gross misconduct was asked to explain in writing and wrote to the respondent's manager admitting his offence and apologized for the gross-misconduct. This was attached as appendix 3 to the memorandum of response.

8. Mr. Molenje further submitted that the grievant's head of department called him to a meeting to explain why he committed the offence but the claimant instead lied that he had worked in the night shift in the assembling section yet the section had long been closed and was not in operation.

9. Concerning compensation for unlawful termination, counsel submitted that this only relates to cases where the employee has been terminated by an employer unfairly. According to counsel, the respondent had proved on a balance of probability that the grievant was dismissed in fair and lawful manner.

10. In termination of employment claims the onus of proving that the termination was unfair or wrongful rests with the employee while the employer has a duty to justify the reasons for the termination.

11. The grievant was dismissed for misconduct, the basis of which was that he clocked in as working on night shift and left shortly thereafter and came back the next morning and clocked out to create an impression that he worked in the night shift yet that was false.

12. The grievant disputed this reason for his dismissal and considered it unfair reason to dismiss him for. He further faulted the procedure of his dismissal on the basis that as a unionisable employee neither a union official nor a shop floor representative was called to the disciplinary hearing where his dismissal was discussed and finally decided.

13. The Court has perused and considered the appendix JW11 and 111. JW11 appears to be an explanation by the grievant why he was not at work on the material night. According to the grievant he came to work on 29th June, 2012 during night shift but was told by one "Sava" that there was no work. He asked another person known as "Abu" was told the same. He therefore changed his clothes and went to Human Resource Department to report but was told by a lady he found there that he could not be assisted instead he was advised to go home and come back the next morning and fill in leave for the previous day (29/6/2012).

14. On his way to Human Resource Department he met a Mr. Wanjala who accused him of coming to clock without working the previous night. According to him, he told Mr. Wanjala that he came to work that night but there was no work assigned to him so he went to sheeting line to check whether there was work.

15. Nowhere in the statements and explanations offered by the grievant in appendix JW11 Does he state he was working that night. Further the nightshift roaster although obliterated at one point did not have the grievant's name on it. The respondent neither raised issue with the obliteration nor questioned the genuinity of the document.

16. If as the Court sees it the reason for terminating the grievant's services was because of the allegations that he checked in as a night shift worker and went away immediately thereafter without working and only to come back the next morning to attempt to check out as though he

worked at night, then the reason is neither a valid nor a justifiable reason for terminating the grievant's services since explanations offered were plausible. It would not have been surprising that if the grievant's union representative or shop floor officials were called a different decision may have been reached but they were not called to hearings leading to grievant's dismissal.

17. The Court therefore finds in favour of the grievant that there were no valid reasons for terminating his services and that the process of termination was not done through a fair procedure. The Court therefore awards him as follows:-

Kshs.

- a. 2 months salary in lieu of notice..... ...17,300/=
- b. 10 months salary as compensation for unfair of services...86,500/=

103,800/=

c. Costs of the suit.

18. The respondent shall issue the grievant with a certificate of service.

19. It is so ordered.

Dated at Nairobi this 13th day of May 2016

Abuodha Jorum Nelson

Judge

Delivered this 27th day of May 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge