



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
CAUSE NO. 619 (N) OF 2009
TAILORS AND TEXTILE WORKERS UNION.....CLAIMANT
VERSUS
WILD ELEGANCE FASHIONS LIMITED.....RESPONDENT

M/s Njuguna for Claimant

Mr Lwande for the Respondent

JUDGEMENT

1. The suit was brought by the Union on behalf of the grievants. The grievants were employed as machine operators making clothes on diverse dates indicated in the filed tabulation of terminal benefits. They were paid a monthly salary of Kshs 8,604. The grievants worked for the Respondent until 11th April 2006 when their employment was terminated for failing to meet production target set on the same day.
2. CW1 Joannes Ouma Ochina and Mathuku Musyoka testified on behalf of all the grievants. The witnesses told the court that the target was too high and they could not meet it. Their employment was terminated without notice and without being given opportunity to showcause why their employment should not be terminated. The two had no adverse record at work and were aggrieved by the termination. The Union reported a dispute on behalf of all the grievants to the Ministry of Labour. The conciliator recommended that the summary dismissal be reduced to normal termination and the grievants be paid terminal benefits in terms of the collective bargaining agreement (CBA) between the union and the Respondent.
3. The Claimants seek;
 - A. Payment of the days worked
 - B. House allowance at the rate of Kshs 1,850 per month for the respective period of service
 - C. Underpayment of wages in terms of the General wage order for machine operator.
 - D. Payment in lieu of notice
 - E. Payment in lieu of leave days not taken
 - F. Travelling allowance
 - G. Gratuity calculated at 17 days salary for each completed year of service and
 - H. Compensation for unlawful dismissal.
4. The CBA is attached to the statement of claim filed on 10.2.2011 and marked 'App1'. The same provides overtime rates, applicable termination notice periods, leave travelling allowance while proceeding on annual leave in the sum of Kshs 1,650, housing allowance of Kshs 1,850 per month and 26 days annual leave among other terms of service.

Response

5. In the statement of defence filed on 2nd November 2012, the Respondent avers that the grievants were employed as casuals and clause 16 of the CBA applied to them from 1st day of December 2004. The Respondent further relies on Section 14(5) of the Employment Act, cap 226 (now repealed) on the dismissal of Casual Employees and their entitlement. That the dues claimed can only be due from the date of the CBA and not prior if at all.
6. That the dismissal of the grievants was lawful, in particular Mathuku Musyoka was dismissed for absconding from duty for 14 days whereas the others were dismissed for failing to meet set targets. Respondent called RW1 Joshua Odhiambo on behalf of the Respondents. RW1 stated that on 10th April 2006, Respondent had urgent assignment which was given to the casual employees. The task had to be completed by the following day but the casuals did not meet the target set. The customer refused to take the product and the Respondent lost the order. The grievants were dismissed for misleading the Respondent that they had met the target when they had not. The Respondent wrote to the Union accordingly. The Respondent paid terminal dues after the dismissal was reduced to normal termination by the conciliator.
7. RW 1 testified that Mr Musyoka was not a casual. He had gone home for 14 days without permission from 13th February 2006 hence the dismissal. RW1 did not know when the grievants were employed. That in terms of the CBA a casual who had worked for four months converted to a permanent employee. RW1 was unable to produce the record of the alleged order whose target was not met.
8. RW1 stated that some grievants worked on the finished product and had to wait for other workers to make the products. The target did not depend of them. RW1 said these grievants had finished their part. RW1 said that the grievants were daily paid and were paid overtime when they exceeded normal working hours. They were not given certificates of service. R w1 did not have payment records.

Submissions

9. The Claimants submit that the grievants were permanent employees by dint of section 16 of the CBA. That they were unlawfully terminated on allegation that they did not meet production targets. RW1 admitted before court that some had infact met their targets as they worked on finished products given to them by other workers. That the employees were not given opportunity to show cause why their employment should not be terminated and were not paid terminal benefits and the court should award them as prayed.
10. The Respondent on the other hand submitted that the grievants were dismissed for lawful reasons in that the grievants were dismissed for not meeting the targets whereas CW2 was dismissed for absconding from work. That all grievants except CW2 were casuals and were daily paid and are not entitled to the reliefs sought. That if the court finds that the employees were not casuals and were unlawfully dismissed the terminal benefits should be calculated from the date the CBA came into force in 2004.

Determination

11. The grievants were employed on diverse dates as per the list of tabulation filed before court. The grievants worked continuously for the Respondent until they were summarily dismissed on 11th April 2006. RW1 agreed with the testimony by the CW1 and CW2 that some grievants dealt with finished products and had completed working on the finished products passed to them by their colleagues,. From this testimony of RW1, it is clear that there was no good reason to summarily dismiss all the grievants.
12. Furthermore, there was no notice to show cause given to the grievants. The evidence by RW1 that CW2 had absconded from work for 14 days is not supported by any documentary evidence and is contradicted by RW1 who does not refute that CW2 was at work on 11th April 2006 when the grievants were dismissed. This is a case of collective punishment to employees without the employer bothering to establish liability on the part of individual employee. This mode of punishment is unlawful and unfair *abinito* as it is contrary to the tenets of a fair hearing. The claimant has established on a balance of probability that the employment of the grievants was

- unlawfully and unfairly brought to an end without notice and payment of terminal benefits set out in the CBA.
13. The court finds that the grievants had served the Respondent continuously for periods ranging from 2 months to 14 years as reflected in the list of tabulation. All the grievants except Emmanuel Omondi who had served for two months had satisfied clause 16 of the CBA to qualify to be permanent employees after a period of 4 months and the court finds that indeed they were permanent employees. The fact that the CBA came into effect after some of the employees had started working does not negate that the employees served continuously from the date of their respective employment.
 14. The tabulation of the terminal benefits which the court finds has been sufficiently proved by the Claimant on behalf of the grievants is reflected correctly in the list of tabulation provided in court. In deed the Respondent has not provided a counter tabulation in this respect.
 15. The court therefore awards each of the grievants terminal benefits set out in list of tabulation except for compensation for the unlawful and unfair dismissal which the court proceeds to assess as follows;

Compensation

16. In granting compensation, the court will take into account the length of service of each of the Claimants. In this respect, the grievants who served the Respondent for periods of between 2 months to 8 months will be awarded 4 months' salary whereas those who served for 2 to 4 years will be awarded 8 months salary as compensation. The only grievant who served the Respondent for 14 years is granted 12 months salary as compensation. In granting the award the court takes into account that all grievants were summarily dismissed in similar circumstances and they suffered loss and damage as a result of the unlawful conduct by the Respondent.
17. The Claimant cannot be reinstated to their jobs having been dismissed many years ago. They have waited for a long time to receive their terminal benefits and were not given certificates of service to ease their getting alternative employment.

A. In the final analysis the total award to each of the grievants is as follows;

1. Joseph Soi	250,224.40
2. Muthaka Musyoka	211,114,30
3. Edward Shigali	171,528.20
4. Musembi Kiosya	73,307.60
5. Evans Nanjoli	73,307.60
6. Francis Waema	80,835.40
7. Emmanuel Omondi	80,835.40
8. Onesmus Mutua	80,835.40
9. Joannes Ouma	87,743.20
10. Peter Mawili	171,528.20

B. Total award to the Claimant as against the Respondent is Kshs 1,264,360.

C. The award is payable with interest at court rates from date of filing suit till payment in full.

D. The Respondent to provide certificate of service to the grievant within 30 days from date of judgement.

E. Costs of the suit.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE