



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 356 OF 2009

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th July 2016)

BAKERY, CONFECTIONARY, FOOD

MANUFACTURING AND ALLIED

WORKERS' UNION (KENYA)..... CLAIMANT

VERSUS

SPIN KNIT DIARY LIMITED RESPONDENT

JUDGMENT OF THE COURT

1. The Claimants herein filed this claim on behalf of the Grievants on the 1.10.2009. They indicated that the issues in dispute were victimization and wrongful dismissal of seven employees by the company namely Wickliffe Mangoli, Henry Nyaga, Kamau Tumbo, Samuel Luvisia, Lawrence Muria, Joseph Karanja and Erick Owiti hereinafter referred to as the Grievants.

2. The Claimants averred that the Grievants were employees of the Respondents having been employed at different dates as follows:

(a) Wycliffe Mangoli (1st Grievant)

Employed on 1.6.2002 and based at Engineer Kinangop and was earning a basic salary of Kshs.8,173/= and house allowance of Kshs.1,600/= per month and was dismissed on 19th July 2007.

(b) Henry Nyaga (2nd Grievant)

Was employed on 1.6.2003 as a General Worker (Tipper) earning a basic salary of Kshs.6,233.98 and house allowance of Kshs.1,600/= per month. He was dismissed on 16th July 2007.

(c) Kamau Tumbo (3rd Grievant)

He was employed on 15.7.2001 and was based at Engineer Kinangop Milk Procurement Depot as a General Worker earning a basic salary of Kshs.6,233.00 and a house allowance of Kshs.1,600/= per

month. He was dismissed on 19th July 2007.

(d) **Samuel Luvisia (4th Grievant)**

He was employed on 8.6.2005 at the Respondent's Kinangop Milk Procurement Depot as a Grader earning a basic salary of Kshs.6,490.00 and a house allowance of Kshs.1,500/= per month and was terminated on 19th July 2007.

(e) **Lawrence Muria (5th Grievant)**

He was employed on 1.5.2007 at the Respondent's Milk Procurement Depot as a General Worker. He was earning basic salary of Kshs.5,667.00 and a house allowance of Kshs.1,600/=. He was dismissed on 16th July 2007.

(f) **Joseph Karanja (6th Grievant)**

He was employed on 1.12.2004 at the Respondent's Milk Procurement Depot Kinangop. He was earning a basic salary of Kshs.7,430.00 and a house allowance of Kshs.1,600/= per month. He was dismissed on 19th July 2007.

(g) **Eric Owiti (4th Grievant)**

He was employed on 15.6.2007 Respondent's Milk Procurement Depot in Kinangop as a General Worker. At the time of termination on 16.7.2007 he was earning a basic salary of Kshs.5,667.00. House allowance was Kshs.1,600/=.

3. It is the Claimants case that all the Grievants were unfairly dismissed summarily without an indication as to the reasons thereto.
4. The dismissal letters all refer to gross misconduct (Appendix 2 to 2(f). The Claimants also indicated that the Grievants were denied a hearing before dismissal.
5. The Claimants aver that particulars of fraud attributed to the Grievants have not been given and neither were the 6th Grievants charged in a criminal court save for the 2nd Grievant who was charged before a Naivasha Court with offence of attempted stealing by servant but who was discharged under Section 87(a) of CPC after the charges were withdrawn against him.
6. The Claimant reported a trade dispute to the Minister for Labour after the Grievants were dismissed. A Conciliator was appointed to investigate the matter on 7.12.2008 made a finding that the Grievants were not given a chance to defend themselves against unspecified charges and this was against the rules of natural justice and therefore the dismissal was done in bad faith was wrongful.
7. He recommended that the dismissal be reduced to normal termination with full benefits in accordance with the parties CBA and also they be paid 12 months wage for wrongful termination and loss of employment.
8. This was never done hence this suit where Claimants seek payment of terminal dues as per their CBA and compensation for unlawful dismissal.
9. The Respondents filed their Memorandum of Defence on 9.6.2010 through the Federation of Kenya Employers (FKE). They aver that the Grievants were terminated because of irregular performance of their duties. They contend that the Grievants failed in their work where they were making wrong records for milk delivered and were involved in fraudulent activities.

10. The Respondents contend that the Grievants committed acts of gross misconduct contrary of Clause 23 of the Parties CBA which recognized an act supported to be criminal or to the substantial detriment of the employee on employers' property as being a gross misconduct.

11. The Respondents submitted that the action taken against the Grievants was lawful and fair and prayed that the Claimants case be dismissed with costs.

12. Having considered evidence of the Parties, I note that the Grievants were dismissed in 2007 when the repealed Cap 226 was the operative law governing the employment contract. Under the said Act, the Respondents were not obliged to give reasons for dismissal so long as requisite notice was given. In case of gross misconduct however, the employer was allowed to dismiss the employees without any recourse to a hearing.

13. In this case the Respondents aver that the Claimants committed acts of gross misconduct.

14. The Grievants have denied this. They aver that they had not been involved in any acts of gross misconduct. They also aver that though the dismissal letter indicated that investigations had been done, they were not involved.

15. Concerning 2nd Greviant, he stated that he was a loader and was not responsible for issuing milk reception notes. 2nd Greviant was charged in Court with offence of stealing by servant but the case was withdrawn when Respondent failed to produce any evidence against him.

16. CW2 told Court that on 11.7.2007, the date it is indicated he was involved in theft, he was on leave and he showed Court his leave form which shows he was on leave from 24.6.2007 and was to resume duty on 11/7/2007 and so he never committed the offence in question.

17. CW3 also told Court he was not on duty on 11.7.2007 and was dismissed for no reason.

18. The Respondents didn't call any evidence.

19. Given the nature of evidence, the issue for determination is whether there were acts of gross misconduct committed by the Grievants and if not what remedies they are entitled to.

20. The acts complained of as being acts of gross misconduct said to have been committed by the Grievants was fraud or concealing the right weight of milk delivered. It turns out that some of the Grievants were loaders and were not engaged in issuing milk delivery receipts. CW2 was on leave on the day he was said to have issued the milk delivery receipts.

21. CW3 stated he was not responsible for issuance of milk delivery receipts but that one George Ouma used to do it. The Respondents didn't call any evidence to explain how the Grievants were involved in the issuance of the milk delivery receipts. Even for Grievants who were on leave/off, it is not clear how they were involved in the fraud.

22. I find the Grievants were dismissed summarily without proper reasons.

23. I therefore convert the dismissal to a normal termination and award them as follows:

1. 1 months salary as notice.

2. Service pay at 15 days salary for each year worked.

3. Salary for days worked in July 2007.

4. Leave allowance where applicable.

5. Unpaid leave where applicable.

24 . For each Grievant the dues are computed as follows:

1. Wycliffe Mangoli employed 1.6.2002 -19.7.2007

Basic Salary - 8,173.00

House Allowance - 1,600.00

1. 2 month's salary in lieu of notice as per the CBA - 19,546.00

2 . Service pay @ 15 days for each year worked - 24,433.00

3 . Salary worked in July 2007 - 6,190.00

4 . Leave allowance - 1,250.00

Total - 51,419.00

2 . Henry Nyaga employed 1.6.2003 -16.7.2007

Basic Salary - 6,233.98

House Allowance - 1,600.00

1. 2 month's salary in lieu of notice - 15,666.00

2. Service pay @ 15 days for each year worked - 15,666.00

3 . Salary worked in July 2007 - 4,178.00

4 . Leave allowance - 1,000.00

Total - **36,510.00**

3 . Kamau Tumbo employed 15.7.2001 -19.7.2007

Basic Salary - 6,233.00

House Allowance - 1,600.00

1. 2 month's salary in lieu of notice - 15,666.00

2. Service pay @ 15 days for each year worked - 23,799.00

2 . Salary worked in July 2007 - 4,439.00

3 . Leave allowance - 1,667.00

Total - **45,571.00**

4 . Samuel Luvisia employed 8.6.2005 -19.7.2007

Basic Salary - 6,490.00

House Allowance - 1,500.00

1. 1 month's salary in lieu of notice - 7,990.00
2. Service pay @ 15 days for each year worked - 7,990.00
- 3 . Salary worked in July 2007 - 5,060.00
- 4 . Leave allowance - 667.00

Total - 21,707.00

5 . Lawrence Muria employed 1.6.2007 -16.7.2007

Basic Salary - 5,667.00

House Allowance - 1,600.00

1. 1 month's salary in lieu of notice - 7,267.00
2. Salary worked in July 2007 - 3,876.00

Total - 11,143.00

6 . Joseph Karanja employed 1.12.2004 -19.7.2007

Basic Salary - 7,430.00

House Allowance - 1,600.00

1. 1 month's salary in lieu of notice - 9,030.00
2. Service pay @ 15 days for each year worked - 9,030.00
- 3 . Salary worked in July 2007 - 5,719.00
- 4 . Leave allowance - 1,166.00

Total - 24,945.00

7 . Eric Owiti employed 15.6.2007 -16.7.2007

Basic Salary - 5,667.00

House Allowance - 1,600.00

1. 1 month's salary in lieu of notice - 7,267.00
2. Salary worked in July 2007 - 3,876.00

Total - 11,143.00

GRAND TOTAL - 202,438.00

Read in open Court this 29th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of:

Simiyu for Claimant – Present

No appearance for Respondent