



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2490 OF 2012

KENYA SHOE & LEATHER WORKERS UNION.....CLAIMANT

VERSUS

HR STRATEGIC PARTNERS LTD.....RESPONDENT

JUDGEMENT

1. Issue in dispute – wrongful/unfair termination of the Grievant Leonard Okoth.
2. The Claimant union represents employees working in leather industry including shoe manufacturing and repair, shoe soles, laces, plastics, rubber and boots and the Respondent is a registered company with the core business including cutting pieces of shoe upper parts, stitching and assembling for Bata Shoe Company. The parties have a registered dispute on recognition in Cause No.94 (N) of 2009 with an award in favour of the Claimant and at the time of filing suit on 13th December 2012, parties were awaiting court directions.
3. The claim is that the grievant, Leonard Okoth was employed by the Respondent on July 2004 as a general labourer at an accumulated salary of kshs.210.00 daily and paid every fortnight. The Claimant was promoted through the ranks to the position of pressing machine at a daily wage of Kshs.386.00 per day. The Grievant was deployed for work at the Bata Shoe Company (Bata).
4. On 19th October 2011 the Grievant reported to work where he worked until 1.00pm when the Bata chief security officer instructed him to stop work and without any due cause directed him to collect his termination letter. On 20th October the Grievant made an appeal through the site manager who refused to listen to him. Termination of employment with the Respondent was on 25th October 2011.
5. The claim is also that the Grievant was terminated without being given a hearing and contrary to section 41 of the Employment Act; he was not allowed to call the Claimant or be accompanied by another employee; the provisions of section 43 and 44 of the Employment Act were not adhered to or section 45 of the Act addressed. The termination was therefore unfair. The claim is for;
 - a) *One month notice pay at kshs.10,036.00;*
 - b) *Annual leave of 7 years at kshs.56,742.00;*
 - c) *Gratuity of 3 years at Kshs.17,370.00;*
 - d) *Compensation at kshs.120,432.00;*

e) *Sunday overtime at Kshs.20,586.00;*

f) *Certificate of service; and*

g) *costs*

6. The Grievant testified in support of the claim. He testified that upon employment by the Respondent he worked diligently until he was wrongly accused of stealing 120 safari boots soles. The allegations were not true as the police were never called or charged in court with any criminal offence. He was only called and issued with a termination letter. The Grievant reiterated the claims set out by the claimant.

7. On cross-examination, the Grievant testified that he had been employed by Bata which later changed his employment to the respondent. He was paid through the bank. While at work shoe soles were stolen. On 17th September 2011 while he was at work, 120 shoe soles went missing. He was the one on duty. He was told to leave work and await communication by the respondent. He was not told why he had been told to leave. That investigations would be conducted. He was only told he was a suspect. He did not sneak back to the Respondent premises as alleged.

8. The Claimant also testified that every August the company would close for maintenance. Every employee would leave waiting maintenance. There was no leave allowance paid. He would remain at work while others took leave but the factory would be shut down. He worked all week even on Sunday but no overtime was paid. There was an incentive paid over the salary but this was not overtime pay which is claimed.

Defence

9. In defence, the Respondent case is that the parties have no recognition but the Grievant was employed by the Respondent between 7th July 2007 to 26th October 2011 when he was summarily dismissed for valid reasons in line with section 43, 44 and 45 of the Employment Act upon disobeying lawful instructions. The termination was procedural as the Grievant committed offences against the respondent. The reasons for termination were well within the knowledge of the Grievant and section 41 of the Employment Act was fully complied with. The Respondent had paid all NSSF dues for the grievant; all salaries due were paid; and the claims set out are not due. The claim should be dismissed with costs.

10. In evidence, the Respondent called James Maina, the Administrative Manager. He testified that he worked with the Grievant before his dismissal when Bata outsourced labour with the respondent. The Grievant was implicated in a theft scandal involving shoe soles. He was told to keep off Respondent premises to allow for investigations but it was realised that he sneaked back and was compromising investigations. The Respondent had wanted independent investigations when it was discovered that Zachariah and Isaiah were accomplices. The matter was reported to Tigoni police station and the Grievant told to write his statement. The Grievant came back to the Respondent work place and when he was asked to write a statement he refused. For defying orders, lawful instruction, this amounted to gross misconduct hence the termination of employment. On 17th October 2011 the Grievant was directly asked to keep off the work place but he disobeyed and came sneaked back.

11. Mr Maina also testified that the practice at Bata was to close operations in August for maintenance when all machines were closed. All employees went on leave. While on leave all employees were paid. There is no gratuity due as the Respondent has paid all statutory dues. All work on Sunday was fully paid for with overtime work being paid for extra. Whenever the Grievant worked on Sunday, this was fully paid for.

12. The termination was justified as he defied orders upon suspicion of committing a serious offence of stealing the property of the respondent. The claim should be dismissed with costs.

Submissions

13. The Claimant reinterested the claim as set out.

14. The Respondent submit that the termination of the Grievant was lawful and all requisite procedures followed. On 17th October 2011 the Grievant was asked to keep off work to allow for investigations but he defied which he admitted. Such formed a reasons for summary dismissal under section 44(3) of the Employment Act as this was a clear breach of his employment contract. There were ongoing investigations over theft of Respondent property and the failure by the Grievant to abide with instructions to keep off work while he was a suspect rendered his conduct subject for summary dismissal. In the case of **Shankar Saklani versus DHL Global Forwarding (K) Ltd [2012] eKLR** the court held that summary dismissal is allowed under section 44 of the Employment Act where an employee by his own conduct has fundamentally breached his employment contract as such amount to gross misconduct.

15. The Respondent was justified in dismissing the Grievant in this case. All terminal dues were paid and the claims set out are not due.

Determination

16. There are instances where an employer is allowed to summarily dismiss an employee. Such are instances set out under section 44 of the Employment Act and in instances where the employer has a clear policy setting out the instances which amount to gross misconduct and are subject to summary dismissal once committed by an employee. Where the employer has such a policy, this must be issued to all employees so that they can have knowledge of such matters so that once committed, the policy apply.

17. However, the right to summarily dismiss an employee under section 44 of the Employment Act is regulated under section 41(2) thus;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

18. The court in the case of **Kenneth Gichuru versus BOG St. Teresa Girls Secondary School, Cause no.1329 of 2011** held that;

Before the summary dismissal, an employee must be given a hearing and an opportunity to defend himself. A chance to state his case. Where an employee is unionized, such union should be notified as this is the body that acts for the employee and the purpose of joining such union is to ensure representation in matter such as how to address a threat to termination of employment. Where an employee is not unionized, the same right is present as such an employee should be allowed to have a fellow employee of his choice present. This is to safeguard the interests of the employee who at this point is faced with a possible loss of his employment. It is also a fundamental requirement that finds support in article 41 and 47 of the constitution as regard fair labour practices and fair administrative action. [Emphasis added].

19. Where the employer is unable to hear the employee before the summary dismissal, such circumstances must be clearly set out. The exceptional circumstances that affect the execution of the right to hearing of the employee as required under section 41(2) are for the employer to set out. In this case, the Grievant is alleged to have sneaked back to the work place when he was directed to keep off so as to allow investigations into the cases of theft of 120 shoe soles. However, when the Respondent required the attendance of the grievant, communication was issued and he dully complied. I therefore do not find any exceptional reasons for the failure to adhere to mandatory provisions of the law. This is a position affirmed by the court in the cited case of Shankar Saklani (above), where the court at page 6 of the judgment sets out that a notice and hearing, however short is required for cases of gross misconduct pursuant to the provisions of section 41(2) of the Employment Act.

20. In this case, I find the Grievant was not given notice or hearing before his summary dismissal. Such

was unfair under the provisions of section 45 of the Employment Act.

Remedies

21. On the finding that there was unfair termination of employment, the Grievant is entitled to compensation. However, it is not lost to the court that circumstances of the case that the Grievant was under suspension of serious gross misconduct, and save for the procedural safeguards that the Respondent failed to comply with, he does not challenged that indeed 120 safari boots sores were missing while he was at work and his only defence is that he was never charged with a criminal offence. Such put into account, compensation is awarded at 3 months' salary all at aKshs.30, 108.00.

22. Notice pay is due on the finding that procedures set out in law were never adhered to. The Claimant is awarded kshs.10, 036.00.

23. On the claim for gratuity, the Claimant has clearly set out that at the time of the grievants summary dismissal, the recognition agreement was a matter subject of litigation. There is no collective agreement attached setting out any agreement on payment of gratuity outside the legal provisions over the same. The Grievant admitted that the Respondent paid for all his statutory due including NSSF. Under the provisions of section 35 of the Employment Act, no gratuity is payable in this case.

24. Overtime is claimed but the Grievant admitted that there was an incentive paid when he worked overtime. He did not explain why such an incentive was paid instead of the overtime. I find no plausible reason for the Respondent to pay an incentive while they owed overtime. Such claim is declined.

25. A certificate of service is a right under section 51 of the Employment Act. Such certificate should be issued together with the termination letter and should not await litigation. Failure to issue such a certificate impedes on an employee's right. It is not for the employee to ask for it, the law requires that an employer should issue the certificate to the employee as of right. Failure to issue such a certificate herein is a grievous error. Costs of the suit are therefore due.

Judgement is entered for the Claimant against the Respondent in the following terms;

a) I declare the termination of the Grievant by the Respondent was procedurally unfair;

b) Compensation awarded at kshs.30,108.00;

c) Notice pay Kshs.10,036.00;

d) Certificate of Service shall be issued unconditionally;

e) Costs of the suit.

Orders accordingly.

Dated and delivered in open court at Nairobi this 19th day of July 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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