



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 58 OF 2013

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

KITULANI STORES LIMITED..... RESPONDENT

JUDGMENT

1. The grievants herein plead that they were employed by the respondent in various positions in the year 2011 and worked in such positions until March, 2012 when their services were terminated verbally for failure to procure guarantors for any loss or damage they may occasion in their course of their services as employees of the respondent.

2. According to the grievants, upon failure to procure guarantors they were asked to resign as a precondition for payment of their terminal dues which they all did but were not paid thereafter. The claimant union took up the matter on behalf of the grievants and reported the same to the Minister for Labour who in turn appointed a Mr. Chigitty as a conciliator. The conciliator made efforts to bring the parties to a conciliation meeting but without success since according to the claimant, the respondent failed to attend the meetings. The conciliator consequently issued a certificate of unresolved Trade Dispute and asked the parties to refer the matter to the Court for adjudication.

3. The claimant further averred that during the grievant's employment, they were underpaid hence claimed the difference between what was actually paid and what ought to have been paid.

4. According to the claimant the requirement for the guarantee was vague and not specific on the value to be guaranteed and further the period given to the grievants to procure a guarantor was too short. The claimant therefore contended that this was deliberate to make it impossible for the grievants to continue working for the respondent. The claimant therefore contended that the dismissal was unfair and sought an order for compensation for such for the grievants. The claimant union further sought an order that the grievants be paid the accrued underpayment for the period they worked for the respondent.

5. The respondent on its part denied the grievant's allegations. According to the respondent, the grievants were its employees until sometime in March, 2012 when they absconded duty.

6. According to the respondent, due to pilferage and loss of money at work by employees, the respondent introduced a guarantee system from which the employees were required to sign. This was intended to curb the prevalence of employees occasioning the respondent losses then disappearing without a trace.

7. According to the respondent, the guarantee forms were given in February, 2012 and each employee given at least one month to find a close relative who would guarantee them. Approximately 80 employees provided the guarantee but the three grievants refused to do so.

8. According to the respondent, the claimants' union official a Mr. Wambua intervened on behalf of the grievants and it was agreed that they would return to work and have the guarantee forms signed but with some modifications. The grievants did not sign the forms as agreed and refused to return to work prompting the respondent to dismiss them for absconding duties on 9th April, 2012. According to the respondent, the grievants were issued with a warning letter prior to dismissal.

9. Regarding underpayment, the respondent pleaded that the grievants held no formal technical qualification and that the salaries earned were commensurate with their work and skills and were in conformity with the provisions of the Regulations of Wages Order, 2010. According to the respondent, the job description it used in the various stores were solely for purposes of identification and did not indicate that such individuals had such qualifications.

10. The 1st grievant Ms. Carolyn Wangu informed the Court that she was working as a Branch in-charge earning a salary of Kshs.5,000 per month at the time of termination. It was her evidence that she failed to get a guarantor within the stipulated 14 days hence could not continue working without one.

11. The second grievant Mr. Julius Wambua Kitua stated that he was employed as a shop assistant and later promoted to floor manager. His salary was Kshs.5,800 when he left.

12. The 3rd grievant Mr. Robert Musyoka Muinde stated that he was employed as a stock manager earning Kshs.5,800 by the time he left the respondent's employment.

13. The respondent's witness Ms. Esther Musyoka informed the Court that she was one of the respondent's directors and that she knew the grievants. They were former employees of the respondent. They started working for the respondent as attendants. It was her evidence that the grievants left employment between 23rd and 28th March, 2012 voluntarily. She stated that there were severe cases of misappropriation of stock so the respondent came with a policy of guarantee. The claimants neither got guarantors nor signed the forms. The grievants reported the issue to their union and the clauses they had issues with were redrafted but disputed that the grievants failed to procure the required guarantors. This therefore makes it more probable that the grievants were not able to continue working without procuring these guarantees. The absence of a show cause letter prior to dismissal on account of absconding duty was necessary in the circumstances. The Court therefore finds that the respondent has not discharged the burden of proof imposed by law to prove reasons for a dismissal or termination. On that basis the Court finds the dismissal to be unfair and awards the claimants six month's wages on account of unfair termination of services.

14. Concerning under payment of wages, the Court noted that the grievants did not produce any academic or professional credentials to back their claim for wages as persons skilled in their areas. It was however not in dispute that they were assigned roles which elevated their positions from just general workers. They had some added responsibilities and supervisory roles. They could not in the circumstances be remunerated as general workers. The grievants would therefore fall under the rubric of item 11 of 2010 Wages Order. That is to say they would be classified ejus dem generis with cashier, driver and salesman – driver whose minimum wages under the Order was Kshs.13,426 for the area where the grievants worked.

15. The Court will therefore award them the difference between the salary they actually earned for the period they worked and the statutory minimum wage of Kshs.13,426. This will be payable from the dates the grievants were hired and the dates at which they were individually terminated.

16. The claimant will in addition have costs of the suit.

17. It is so ordered.

Dated at Nairobi this 14th day of October 2016

Abuodha Jorum Nelson

Judge

Delivered this 14th day of October 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge