



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT NAIROBI

Cause 1476 of 2013

David Nganga Mwangi 1st Claimant

Joseph Muhanga Karanja 2nd Claimant

John Kinya Ngaruiya 3rd Claimant

Lawrence Maina Kahiga 4th Claimant

Versus

Vtechnologies Kenya Limited..... RESPONDENT

M/S Muhada for claimants

M/S Kanyiri for respondent

JUDGMENT

1. The four claimants brought this suit by way of an amended memorandum of claim on 6th February 2014. This suit is opposed vide a statement of response filed on 18th November 2013. The 1st claimant David Nganga Mwangi testified on behalf of the claimants whereas the respondent called RW1 Moses Wachira, service administrator to testify in support of its case.

The parties relied on documentary evidence and written submissions.

Claimants case

2. The claimants and other employees of the respondent sought for a meeting on the 22nd of August, 2013 with the respondent to discuss their welfare issues which the respondent had raised in a memo written to them on the 15th of December, 2012 but had never been addressed.

3. The 1st claimant stated that the respondent was fully aware of the meeting which was to take place on the 22nd of August, 2013 at its rented office at Apple walk apartments along Ngong road which was to be attended by all of the respondent's employees.

4. On the material day the employees faithfully congregated at the respondent's office but the respondent's representative Mr. Lee who was expected to meet them was unavailable and after waiting

for hours they left not having met the said Mr. Lee.

5. On leaving, all employees including the claimants received a message from the said Mr. Lee instructing them to pick and sign a letter from the security office of Apple Walk Park, failure to which disciplinary measures would be taken. The employees refused to pick the letters as the person who had been entrusted with the letters was neither an employee of the respondent nor its agent but an employee of Apple Walk Apartments who had no association whatsoever with the respondent. Secondly the letters were in a sealed envelope thus its details were not known to the employees.

6. It was the claimants evidence that on the 25th of August, 2013 they received an 'sms' terminating their services forth with and no reasons were revealed to them and later they received a letter summarily terminating them.

7. The claimants further testified that despite their services being terminated, the said Mr. Lee quietly and secretly approached the other employees and coerced them to receive the letters they had rejected and subsequently asked them to write apology letters.

Respondent's case

8. The respondent was at the hearing represented by Mr. Moses Wachira a service administrator with the respondent who explained that the claimants with other employees absconded duty on the 22nd of August, 2013 leaving the respondent in a potentially difficult situation.

9. The respondent stated that whereas a letter was written to all employees to explain why disciplinary action should not be taken against them for failure to report to work on the 22nd August, 2013 the claimants refused to collect and respond to the said letter while other employees responded. It was the respondent's evidence that by the 26th of August, 2013 the claimants had not responded to the letter and hence the termination.

10. Issues for determination are;

- i. Whether termination was for a valid reason and in terms of a fair procedure;
- ii. Whether the claimants are entitled to the reliefs sought.

Issue i

11. From the evidence before court, on 22nd August 2013 the claimants and others not before court planned to hold a meeting at the workplace to discuss their welfare issues. According to RW1, Moses Wachira, the employees including the claimants had not sought permission to meet on the day. The claimants on the other hand vide CW1, stated that on 20th November 2012, the employees got an internal memo promising review of their terms of employment but the terms were not reviewed for seven months.

12. The employees wrote an 'sms' to the managing director requesting a meeting with him on 22nd August 2013. The employees went to see the managing director at the offices along Ngong road. Ordinarily, the employees worked in the field and reported to their work stations directly. The managing director Mr. Lee Lockoya arrived at 10 a.m. and did not speak to the employees until 2 p.m. in the afternoon.

13. The employees decided to go to their various work stations but they received 'sms' to the effect that they should not enter any site of the respondent. The employees were directed to go to the offices and collect letters at the security office. The employees did not go back on the day. On 23rd August 2013 they went to collect letters. They were to sign a form and collect a closed envelope. The claimants and others went back home. On 24th August 2013 the employees were called one at a time. The employees were asked to write an apology and sign a letter given to them. The claimants were not called to do so.

14. On 25th August 2013 the claimants got an 'sms' dismissing them from employment.

On 26th August 2013, the claimants went to meet the managing director at the office. The claimants found the secretary and one Mr. Moses. The secretary gave the claimants letter of dismissal. The claimants refused to go until they got paid their dues. They were promised to be paid on 2nd September 2013. On that day, they were asked to sign an agreement in full and final payment before receiving their money. The claimants refused and were not paid. The claimants filed this suit therefore.

15. The claimants state that they were not given notice to show cause. No disciplinary hearing was held. They were not given reasons for dismissal.

16. Upon coming to court the claimants were paid twenty one (21) days salary up to 21st August 2013. The claimants seek full monthly salary for August. The claimants deny they absconded duty whereas the respondent insists that on 22nd August 2013, the claimants absconded duty and wanted to hold unauthorized meeting and therefore dismissal was for a valid reason and in terms of a fair procedure.

17. RW1 says the employees were required to give explanation why they absconded duty but the claimants refused to collect the letters from the security officer. Other employees did the same and were not dismissed from employment.

18. RW1 denied that Mr. Lee abused the employees, including the claimants.

19. The court finds that the claimants have established on a balance of probability that, they had been promised review of terms by the respondent and the promise took too long to be fulfilled. That they wrote an 'sms' seeking audience with the managing director but the managing director refused to talk to employees. The court finds that the conduct by the employees including the claimants was reasonable in the circumstances of the case.

20. The court finds that the respondent dismissed the claimants summarily without affording them opportunity to attend a disciplinary hearing. That the tactic used by the respondent of divide and rule was not in keeping with fair labour practice protected by the Labour Relations Act, 2007 and Article 41 of the Constitution of Kenya, 2010.

21. The reason given in the circumstances of insubordination for failing to respond to a letter by the employer is not a valid reason for summary dismissal in terms of section 44 of the employment Act, 2007.

22. The court relies on the case of **Loice Otieno –vs- Kenya Commercial Bank, Industrial Court case No. 1050 of 2010** per Radido J. and **Industrial case number 146 of 2012 Alphonse Maghanya Mwanchanya –vs- Operation 680 Limited** per Radido J.

In **Loice Otieno**, the judge stated:

“the doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with the procedure set out in section 41 of the Act even in circumstances where summary dismissal or what the respondent referred to as instant dismissal in contemplate.”

23. It should be remembered that requirements of section 41 include:

- i. An explanation to the employee in a language the employee understood the reason why it was considering dismissing him/her;
- ii. Allow an employee, his/her representative or both opportunity to make representations on the case face by the employee;

- iii. Follow any specific requirements of a human resource policy manual in place at the workplace;
- iv. Give reasons for the summary dismissal.

24. The summary dismissal of the claimants was substantively and procedurally flawed and the claimants are entitled to compensation in terms of section 41 of the Act. The court will deal with the reliefs sought for each claimant.

Reliefs sought

David Nganga Mwangi

25. The 1st claimant was employed on 1st April 2010 and earned Kshs.77,776.00 at the time of dismissal on 25th August 2013. From the finding of unlawful summary dismissal the claimant is entitled to one month's salary in lieu of notice in the sum of Kshsh.77,776.00

He is also entitled to twenty five (25) days salary for the month of August 2013 which was duly paid.

The claimant also established that he was not granted leave for three (3) years served in the sum of Kshs.99,291.

26. The claimant was registered with NSSF and the employer contributed to it per the payslips produced and so he is not entitled to either service gratuity in terms of section 35 of the Employment Act, 2007 or severance pay since he was not retrenched.

27. The claimant was summarily dismissed for exercising his right of expressing a grievance at the work place under the the guise of insubordination.

28. Workers, whether unionised or not have an inherent and constitutional right to organize and air their grievances as in this case. Victimization for exercising work rights is viewed in very dim view by the court.

29. The 2nd claimant had served for five (5) years with unblemished record. The claimant did not contribute to his summary dismissal. He suffered loss and damage and the court awards him five (5) months salary compensation for the unlawful and unfair summary dismissal in the sum of Kshs.388,880.

Total award Kshs.565,947.

Joseph Muhanga Karanja

30. The 2nd claimant is entitled to one month salary in lieu of notice in the sum of Kshs.48,990. The claimant is also entitled to twenty five (25) days salary for the month of August 2013 which was paid already.

31. The 2nd claimant worked for eight (8) years without leave and is entitled to Kshs.30,395. The claimant was registered with NSSF and is not entitled to service gratuity nor is he entitled to severance pay for he was not retrenched.

32. The 2nd claimant was summarily dismissed under similar circumstances with the 1st claimant. He had served eight (8) years without blemish, was victimized for exercising his right to organize and raise grievances. He is awarded ten (10) months salary for unlawful and unfair dismissal in the sum of Kshs.489,900.00

Total award Kshs.842,841.00.

John Kinya Ngaruiya

33. The 3rd claimant had served from 31st October 1996 to the date of dismissal on similar grounds as the other claimants. He was victimized for daring to exercise his labour right to organize and raise grievances with the employer. He had a good record at work for seven (7) years served. The court awards him eight (8) months salary as compensation for the unlawful and unfair summary dismissal in the sum of Kshs.806,392.00 The 3rd claimant is also entitled to one month salary in lieu of notice in the sum of Kshs.100,799.00 The claimant was paid twenty five (25) days salary for the month of August. The claimant is not entitled to severance pay nor is he entitled to service gratuity. The claimant has proved he had forty two (42) days untaken leave in the sum of Kshs.128,093.00.

34. The 3rd claimant was also victimized for daring to exercise his right to organize and raise a collective grievance. He did not contribute to the dismissal. He suffered loss and damage. He served diligently for seven (7) years.

35. The court awards the 3rd claimant eight (8) months salary compensation in the sum of Kshs.806,392.00.

Total award Kshs.1,136.083.00

Lawrence Maina Kahiga

36. The 4th claimant earned Kshs.61,161.40 at the time of summary dismissal. He is entitled to one month salary in lieu of notice in the sum of Kshs.61,161.40. The claimant was paid August 2013 salary for twenty five (25) days. The claimant is entitled to Kshs.294,000.00 for seven (7) years untaken leave.

37. The claimant suffered summary dismissal for raising a collective grievance with the employer. The 4th claimant had a good record at work for nine (9) years and did not contribute to the dismissal.

38. He suffered loss and damage as a result of the unlawful and unfair conduct of the employer. The court awards him ten (10) months salary compensation for the summary dismissal in the sum of Kshs.611,614.00.00

Total award Kshs.966,775.40.

39. The final orders of the court are as follows;

The respondent is directed to pay:

- i. 1st claimant David Nganga Mwangi Kshs.565,947.00;**
- ii. 2nd claimant Joseph Muhanga Karanja Kshs.842,841.00;**
- iii. 3rd claimant John Kinya Ngaruiya Kshs.1,136,083.00;**
- iv. 4th claimant Lawrence Maina Kahiga Kshs.966,775.40.**
- v. The award to be paid with interest at court rates from date of filing suit till payment in full;**
- vi. Costs to follow the outcome.**

Dated and delivered at Nairobi this 25th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE