



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1101 OF 2014
KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT
VS
TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant Union brings this action on behalf of its member, Samwel Gitau Mbuha, the Grievant herein. The Claimant and the Respondent have a Recognition Agreement pursuant to which they have negotiated and signed a Collective Bargaining Agreement. The claim is contained in a Memorandum of Claim dated 19th June 2014 and filed in Court on 2nd July 2014.

2. The Respondent filed a Statement of Response but did not attend the hearing in spite of due service. Both parties filed written submissions.

The Claimant's Case

3. The Grievant was employed by the Respondent on 1st May 2001 in the position of Shop Assistant at a monthly salary of Kshs. 4,130 plus a housing allowance of Kshs. 620. On 19th January 2006, he was promoted to the position of Section Head and to Assistant Supervisor from 15th March 2008. The Grievant worked in several Branches culminating with Daima Branch. By the time of leaving employment, his monthly salary stood at Kshs. 26,879.

4. On 27th February 2013, the Grievant was issued with a show cause letter on allegations of insubordination, particulars being that on 25th February 2013, he was involved in an argument with his Manager and a subordinate staff.

5. The Grievant responded on 28th February 2013 denying the allegations made against him. He appeared before the Disciplinary Committee and was subsequently terminated on 17th April 2013.

6. The Claimant reported a trade dispute on 29th May 2013 and P.N. Macharia of the Ministry of Labour was appointed as Conciliator. The Respondent failed to attend conciliation meetings and also rejected the Conciliator's report.

7. The Claimant prays that the Grievant be reinstated unconditionally and without loss of benefits and continuity of service or in the alternative that the Grievant be paid the following:

- a. 2 months' pay in lieu of notice.....Kshs. 53,758
- b. 23 days' annual leave.....23,778
- c. Service gratuity for 12 years @ 20 days per year.....248,160
- d. 12 months' salary in compensation.....322,548
- e. Costs of the suit

The Respondent's Case

8. In its Statement of Response, the Respondent states that the Grievant was in its employment holding different positions between 1st May 2001 and 30th April 2013.

9. On 25th February 2013, while working as an Assistant Supervisor at the Respondent's Tuskys Daima Branch, the Grievant was involved in an argument with the Branch Manager and a subordinate staff.

10. On 27th February 2013, the Grievant was issued with a show cause letter on accusations of insubordination and on 6th March 2013, he was notified of a disciplinary hearing to be held on 16th April 2013. The disciplinary hearing took place as scheduled and the Grievant and the Claimant Union fully participated. The Respondent avers that the disciplinary process was lawful and fair.

11. It is the Respondent's case that it was entitled to summarily dismiss the Grievant. All terminal benefits due to the Grievant were tabulated and released to him.

12. Regarding the Conciliator's report, the Respondent states that the recommendations were arrived at without the benefit of its submissions. Further, the Conciliator failed to appreciate that the Grievant had been found guilty by a duly constituted Disciplinary Committee.

Findings and Determination

13. There are two issues for determination in this case:

- a. Whether the termination of the Grievant's employment was lawful and fair;
- b. Whether the remedies sought are merited.

The Termination

14. In a claim for unlawful and unfair termination such as the instant one the Court is expected to examine whether there was a valid reason for the termination and whether in effecting the termination, the Respondent observed due process.

15. The termination letter issued to the Grievant states as follows:

"Dear Samuel

RE: MISCONDUCT

Following allegations of misconduct leveled against you by your Branch Manager and the deliberations of the Disciplinary Committee hearing held on 16th April 2013 it has been as

concluded follows (sic):

a. The Branch Manager's allegations that you were disrespectful and disobedient to him and your Supervisors are true. This is confirmed when on several occasions you are reported to have declined to follow instructions that are within your jurisdiction to perform. On several instances you have refused to stand in for staffs at the packing section to enable them proceed for their meals or sanitary breaks.

b. The Branch Manager on 11th February 2013, found you hiding in the luggage area during working hours fast asleep,

c. On 17th February 2013, you are recorded as having reported for work late for the fourth time in that month without satisfactory reason and instead engaged the Branch Manager in an argument concerning the accuracy of the official clock at the branch.

d. The report that you uttered threatening and intimidatory words to your subordinate at the Packing section and when cautioned about it by the BM you engaged him in an argument was also confirmed as true.

It was also confirmed that on numerous occasions management has engaged you in discussions and counseling in an attempt to address your conduct and negative attitude towards authority. The matter was also addressed directly to you by the Director Human Resources who reminded you of the responsibility placed upon you as an Assistant Supervisor and cautioned you that patience of management was running out.

Despite our best efforts it is clear that you are unable to conform and attain the standards of conduct expected of you by the company. Consequently, your services with the company are terminated with effect from 30th April 2013. You are therefore required to immediately handover to the BM-Daima all company property for which you were responsible during your employment and get a clearance letter from him.

You may collect your terminal dues, if any, from the HR office on Saturday 4th May 2013 at 11.30am.

Regards,

Tusker Mattresses Limited

(Signed)

P.M Mwenda

G.M-Human Resources"

16. Prior to the termination, the Grievant was issued with a show cause letter dated 27th February 2013 alleging insubordination. Specifically, the Grievant was accused of being involved in an argument with his manager and subordinate. He was also accused of refusing to take instructions from his manager. The Grievant responded to the show cause letter on 28th February 2013 generally denying the allegations leveled against him.

17. On 16th April 2013, the Grievant appeared before the Disciplinary Committee. According to the record of proceedings, he was accompanied by two Shop Stewards, John Kinyanjui and Samson Omechi.

18. Section 43 of the Employment Act, 2007 requires an employer who terminates the employment of an employee to have a valid reason for doing so. In assessing compliance with this provision, all the Court is

required to do is to ask whether the reason given for the termination is one which would have moved a reasonable employer to take a similar decision.

19. In its final submissions, the Claimant complains that not all the allegations contained in the termination letter were contained in the show cause letter. Nevertheless, from the Disciplinary Committee proceedings, it seems to me that the Grievant was confronted with all the allegations that eventually caused the termination of his employment.

20. Moreover, the record confirms that the Union Representatives who accompanied the Grievant at the disciplinary hearing were well aware of the Grievant's volatile temperament. This was consistent with the nature of accusations made against the Grievant. Additionally, the Grievant admitted having left the Branch without the permission of the Branch Manager.

21. Taking the circumstances of this case in their totality it would appear that the Respondent had a valid reason for terminating the Grievant's employment.

22. Regarding the termination procedure, the only thing to say is that the Grievant was taken through a disciplinary process within the parameters set out under Section 41 of the Employment Act and the termination was therefore procedurally fair as well. That being the case, I find the claim for compensation for unlawful and unfair termination to be without basis and proceed to dismiss it.

Other Remedies

23. From the Respondent's conduct which was confirmed in its final submissions, the Grievant's exit was treated as a termination rather than a dismissal. He is therefore entitled to notice pay and gratuity as provided in the applicable Collective Bargaining Agreement. Further, the Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.

24. Finally I enter judgment in favour of the Grievant in the following terms:

a. 2 months' salary in lieu of notice.....	Kshs. 53,758
b. Service gratuity for 12 years (26,879/30x20x12).....	215,032
c. 23 days' annual leave (26,879/30x23).....	<u>20,607</u>
Total.....	289,397
Less amount paid as gratuity and leave pay.....	(48,313)
Amount payable.....	241,084

25. The judgment amount will attract interest at court rates from the date of judgment until payment in full.

26. Each party will bear its own costs.

27. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF NOVEMBER 2016

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JUDGE

Appearance:

Mr. Nyumba (Union Representative) for the Claimant No appearance for the Respondent