



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1690 OF 2011**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT**

*VERSUS*

**KAPA OIL REFINERIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant filed this suit on behalf of the two grievants who seek reinstatement to their respective jobs without loss of benefits and in the alternative, compensation for the wrongful and unfair termination of employment.
2. In addition, the grievants seek payment of terminal benefits set out in the memorandum of claim dated 13<sup>th</sup> September 2011 and filed on 14<sup>th</sup> October 2011, as amended on 14<sup>th</sup> December 2011.
3. The 1<sup>st</sup> grievant is Mr. Julius Kasyoki Katuvee who testified on behalf of both grievants.
4. The 2<sup>nd</sup> grievant Mr. Thathi Mwonga, died while this matter was pending.
5. The matter proceeded notwithstanding since the claimant is the Union and not the grievants.

**Facts of the case**

6. Mr. Julius Kasyoki Katuvee 1<sup>st</sup> grievant was employed in February 1995 and worked continuously for the respondent until 15<sup>th</sup> July 2010, a period of fifteen (15) years and five (5) months.
7. The grievant had a clean record for the period and got promotion from a general worker to the position of an assistant maintenance staff.
8. The grievant was away from work from 2<sup>nd</sup> July 2010 on account of sickness. The grievant had presented the off-duty sheet to the time keeper Mr. Antony Mule on 2<sup>nd</sup> July 2010. However, when the same was extended on 5<sup>th</sup> July 2010, he was unable to do so until he returned to duty on 12<sup>th</sup> July 2010 when he had recovered. Upon reporting to work he was stopped from working and on 14<sup>th</sup> July 2010, he received a letter of summary dismissal on account of deserting work from 5<sup>th</sup> July 2010.
9. The grievant appealed against the summary dismissal on grounds of being absent and he presented the off-sheets given to him in the various clinics he attended. The grievant also argued that the CBA Clause

on absenteeism was not followed and that he had no previous warning and ought not to have been dismissed in terms of the CBA. The appeal was not successful hence the suit. The grievant claims as set out in the memorandum of claim.

### **Mr. Thathi Mwonga**

10. The 2<sup>nd</sup> grievant was also dismissed for desertion in that on 2<sup>nd</sup> May 2010 he received information that his child was very sick and he rushed to Makueni Hospital hoping to come back for his night shift duties that day. The grievant realized he could not make it and at 3.30 p.m. he called his immediate boss Mr. Raji to inform him of his predicament. He asked for two (2) days off. The grievant reported back to work on 5<sup>th</sup> July 2010 and joined day shift. At 11.00 a.m. the time keeper demanded his child's certificate of sickness but grievant had not carried the same. The grievant was ordered out of work place. Grievant had no money to go to Makueni until 15<sup>th</sup> July 2010, when his colleagues helped him with fare.

11. The grievant obtained the hospital card and brought it back (exb.7). The grievant had however been dismissed. The CBA provides that an employee who is absent from duty for seven (7) consecutive days shall produce an explanation in writing from a recognized authority that such absence was justified.

12. The grievant states that he was not absent for seven consecutive days and that he had a justifiable reason to be absent.

13. The grievant prays to be awarded as claimed for wrongful dismissal and terminal benefits set out in the memorandum of claim.

14. The claim for notice pay, and gratuity are based on CBA Clauses.

### **Response**

15. The respondent filed a memorandum of defence on the 29<sup>th</sup> May 2012 denying the claim. The defendant states that the two grievants were validly dismissed for absenting themselves from duty without permission and without following proper procedure as per Clause 7 of the CBA.

16. That the two failed to present appropriate medical documents upon return to support their absence on medical grounds. That the documentation filed in court was not submitted to the respondent.

17. That he who alleges must prove. The 1<sup>st</sup> grievant did not notify the respondent the reason for the absence for the entire period he was away. The 2<sup>nd</sup> grievant (now deceased) did not testify, since he died before he could testify. There was also no substitution of the 2<sup>nd</sup> grievant.

18. That the suit be dismissed with costs.

### **Determination**

19. The issues for determination are:

- i. whether the two grievants justified their absence from work;
- ii. whether the two followed the procedure in the CBA for purpose of (i) above;
- iii. whether the grievants are entitled to the reliefs sought.

### **Issue i & ii**

20. With respect to Julius Kasyoki, the 1<sup>st</sup> claimant, he attended clinic on 2<sup>nd</sup> July 2010 and was given two days off upon treatment, the doctor's authorization is presented and marked annex '2'. He also was

treated on 5<sup>th</sup> July 2010 and given off duty for one week. He was to go back for review on 12<sup>th</sup> July 2010.

21. The grievant states that he produced said documents to justify the absence but same were ignored by the respondent. Respondent states that the documents were not given to them.

22. Clause 7 (b) of the CBA, clearly allows for an absence of a maximum of seven (7) consecutive working days without permission for one to be deemed to have absconded work except where he produces explanation in writing from a recognized authority that such absence is warranted.

23. With respect to Thathi Mwonga, the 2<sup>nd</sup> grievant, he has presented before court a letter from Becca medical clinic explaining to whom it may concern that, Mwonga's son Dennis Mwendwa was taken ill, suffering from malaria and pneumonia on 2<sup>nd</sup> July 2010. The grievant explained that he was away for three days while attending to the sick child at the said clinic.

24. The evidence before court clearly shows that the two grievants were not given opportunity in terms of Section 41 of the Employment Act, 2007 to appear before a disciplinary committee to tender documents that justified their absence. Indeed no letters to show cause were served on the two grievants and were neither given opportunity to bring their union representatives to a properly constituted disciplinary hearing to explain why they ought not to be summarily dismissed for absenteeism. The respondent cannot be heard to say that the medical evidence presented before court was not given to them by the grievants before the dismissal when the fact of the matter is that the respondent failed to institute a proper disciplinary process for that purpose.

25. Accordingly, the court finds that the grievants have demonstrated that wrongful dismissal took place because, respondent had no valid reason to dismiss them and also, the respondent did not follow a fair procedure in effecting the dismissal.

26. The two dismissals violate section 45 (b) and (2) of the Employment Act, 2007 in that they were not for a valid reason and were not effected in terms of a fair procedure.

27. The two grievants are entitled to compensation in terms of section 49 of the Employment Act.

28. Issue (i) and (ii) are decided in the affirmative therefore.

### **Issue iii**

29. With regard to Julius Kasyoka on the reliefs sought, the court finds as follows;

#### **a) Compensation**

The grievant worked from February 1995 up to 15<sup>th</sup> July 2010, a period of over five years. His gross salary was Kshs.10,650.00 at the time of summary dismissal. The grievant had a good record at work and was victimized for having fallen sick and given medical rest days. The respondent clearly ignored the medical cards presented to them by the grievant. The grievant suffered loss and damage and did not contribute at all to the dismissal. He was not paid any terminal benefits upon dismissal including salary for days worked. These are aggravating factors in assessing compensation under section 49 (4). Accordingly, the court awards the claimant equivalent of five (5) months salary as compensation for the summary dismissal in the sum of Kshs.10,650 x 5) 53,250.00.

#### **b) Notice**

The claimant is entitled to two months salary in lieu of notice in terms of the CBA, presented before court in the sum of Kshs.21,300.00.

**c) Gratuity**

The CBA, also allows the grievant one month salary for each completed year of service in the sum of Kshs.53,250.00.

**d) Salary Arrears**

Further, the grievant was not paid for fifteen (15) days worked in July 2010 in the sum of Kshs.5,325.00.

e) Total award to the 1<sup>st</sup> grievant Kshs. 133,125.00

**Thathi Mwonga, 2<sup>nd</sup> grievant**

30. The grievant had served the respondent for nine (9) years and nine (9) months from October 1999 to 15<sup>th</sup> July 2010. He was dismissed on similar grounds as the 1<sup>st</sup> grievant. He was not given a notice to show cause and was not afforded opportunity in terms of section 41 of the Employment Act, to justify his absence.

31. The claimant had a good record at work and has provided documentation which would have provided good justification for his absence had he been subjected to due process.

32. For these reasons, the summary dismissal was not for a valid reason and was not affected in terms of a fair procedure.

**33. Compensation**

The claimant did not contribute to the termination, he was not paid terminal dues upon termination, he suffered loss and damage upon loss of his means of livelihood. He had worked with a clean record for over fifteen (15) years. The court awards him ten (10) months salary for the wrongful and unfair dismissal in the sum of Kshs.101,000.

**34. Notice pay**

The claimant was in terms of the CBA entitled to three months salary in lieu of notice in the sum of Kshs.30,300.

**35. Gratuity**

The claimant was also entitled to payment of gratuity in terms of the CBA calculated at one month's salary for each completed year of service fifteen (15) years in the sum of Kshs.101,000.

**36. Salary arrears**

Furthermore, the claimant is entitled to arrear salary for fifteen (15) days worked in July 2010 in the sum of Kshs.5,826.92.

Total award Kshs.238,126.90.

**The court enters judgment in favour of;**

**a) Julius Kasyoki in the sum of Kshs.133,125;**

**b) Thathi Mwonga in the sum of Kshs.238,126.90;**

**c) The awards in (a) and (b) to be paid with interest from date of filing suit till payment in full;**

**d) Costs of the suit.**

**Dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**