



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

CAUSE NO 244 OF 2014

KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT

VERSUS

BATA SHOE COMPANY (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Kenya Shoe and Leather Workers Union on behalf of its member, John Omondi Owuor, the Grievant herein. The claim is contained in a Memorandum of Claim dated 20th February 2014 and filed in Court on 21st February 2014.

2. The Respondent filed a Memorandum of Reply on 2nd October 2015 and the matter proceeded to hearing with the Grievant testifying on his own behalf. Peninah Wanjiru Kariuki, Muthui Muchiri and Peter Giathi testified for the Respondent.

The Claimant's Case

3. The Grievant states that he was employed by the Respondent on 4th January 1997 as a general labourer. He rose through the ranks to the position of key operator. At the time of leaving employment on 11th December 2012, the Grievant earned a basic monthly salary of Kshs. 13,169 plus a house allowance of Kshs. 2,000.

4. The Claimant states that on 3rd December 2012, the Grievant reported on duty while unwell. He was asked to write a statement and he obliged. He was subsequently dismissed on 11th December 2012. The Union reported a trade dispute to the Minister for Labour and Human Resource Development who appointed a conciliator but no agreement was reached. The Grievant's claim is as follows:

- a) Reinstatement or re-engagement
- b) 2 months' salary in lieu of notice as per CBA.....Kshs. 26,330.00
- c) Prorata leave.....7,900.80
- d) Days worked.....9,217.80
- e) Overtime.....9,297.00

- f) Leave travelling allowance.....2,557.50
- g) 12 months' salary in compensation.....158,028.00
- h) Service pay @ 21 days' pay for 15 years.....159,547.50
- i) Certificate of service
- j) Costs of the suit

The Respondent's Case

5. In its Memorandum of Reply filed on 2nd October 2015, the Respondent denies the Grievant's averment that he was employed on 4th January 1997. The Respondent states that the Grievant was first employed as a key operator on a 4 months' fixed term contract running from 1st September 2012 to 31st December 2012.

6. On 3rd December 2012, the Grievant reported for duty while drunk rendering himself incapable of performing his assigned duties. He was taken to the Respondent's clinic where it was observed that he smelt of alcohol. The Grievant himself confessed having indulged in alcohol the previous day. The Respondent states that the Grievant attempted to disguise his drunken state as the effect of high blood pressure.

7. The Grievant was invited to show cause why disciplinary action should not be taken against him and he recorded statements in response. The Respondent's Human Resource Officer, Peninah Wanjiku Kariuki also recorded a statement.

8. The Grievant was summarily dismissed on 11th December 2012 upon which he was paid his final dues.

9. It is the Respondent's case that the Grievant was dismissed for a justifiable cause after due process and the dismissal was fair in the circumstances.

Findings and Determination

10. There are three (3) issues for determination in this case:

- a) The effective date of the Claimant's employment with the Respondent;
- b) Whether the Grievant's dismissal was lawful and fair;
- c) Whether the Grievant is entitled to the remedies sought.

Effective Date of Employment

11. The Claimant pleads the effective date of the Grievant's employment as 4th January 1997. The Respondent on the other hand states that the Grievant was employed on a 4 months' fixed term contract running from 1st September 2012 to 31st December 2012.

12. The Respondent was however unable to explain the existence of a pay slip in the name of the Grievant for August WKS 35-36 2012. The Respondent's first witness, Peninah Wanjiru Kariuki could not tell when the Grievant entered the Respondent's employment.

13. In the absence of any explanation on the pay slip predating the stated date of employment which carried deductions on account union and Sacco dues, the Court has arrived at the conclusion that the Respondent intentionally suppressed evidence on the effective date of the Grievant's employment.

Consequently, I invoke Section 10(7) of the Employment Act, 2007 and adopt the date pleaded by the Claimant being 4th January 1997 as the effective date of the Grievant's employment.

The Dismissal

14. The Grievant was dismissed by letter dated 11th December 2012 stating as follows:

“Dear Sir,

RE: SUMMARY DISMISSAL

This is to inform you that it has been brought to our attention that you reported for duty on 3rd December 2012 when you were very drunk and incapable of performing your duties. This was detected at the main gate when you were seen staggering as you were walking. When you attempted to run to catch up with your colleagues due to your drunkenness state you fell down, this facts (sic) were verified and confirmed at the health clinic. Due to this you had to be sent home to go and sober up. The pictures taken on the material date also clearly reflects (sic) this.

When called upon to explain you could not give any acceptable reasons as to why you reported to work being drunk. Hence due to the foregoing we regret to inform you that you are summarily dismissed as from that date, because the foregoing is a fundamental breach of your contract of employment. The dismissal is in line with Employment Act of 2007 section 44(4b).

Your case will be treated as follows:-

You will be paid earned salary as at that day, your earned leave days & leave traveling allowance worked out on a pro-rata basis and any other monies that could be owed to you, this will be paid to you less any company liabilities that you might have and on surrendering the protective clothing for the company name to be erased from it and on presentation of a duly signed clearance certificate, indicating that you are fully cleared from any company liabilities.

Yours faithfully

BATA SHOE COMPANY (K) LTD

(signed)

PM GIATHI.

HUMAN RESOURCES MANAGER”

15. From this letter, the Grievant was dismissed for reporting to work on 2nd December 2012, while drunk. The Respondent's first witness, Peninah Wanjiru Kairuki told the Court that she had reached the conclusion that the Grievant was drunk because he was staggering. The second witness, Muthui Muchiri who was in charge of the Respondent's staff clinic testified that the Grievant was in a staggering gait and appeared excited.

16. In explaining the incident of 2nd December 2012, the Grievant stated that he was suffering from the effects of hypertension. The Respondent's second witness, Muthui Muchiri confirmed that he had been treating the Grievant for hypertension and on checking his vitals on 2nd December 2012, he found the blood pressure and heart rate critically high. Muchiri did not run any tests to confirm the level of alcohol content in the Grievant's blood; he simply relied on clinical observation and thereby reached the conclusion that the Grievant was indeed drunk.

17. I have weighed the allegations leveled against the Grievant against his own explanation in defence

and find that on the whole, the Respondent failed to carry out the required clinical examination to establish the cause of the Grievant's unusual presentation. As a result, I have reached the conclusion that the Respondent failed to establish a valid reason for dismissing the Grievant. Further, apart from the recorded statements by the Grievant and the Respondent's witnesses, there was no evidence that the Grievant was subjected to the mandatory procedural fairness requirements set out under Section 41 of the Employment Act.

Remedies

18. Overall, I find that the Grievant's dismissal was substantively and procedurally unfair and award him twelve (12) months' salary in compensation. In making this award I have taken into account the Grievant's length of service and the Respondent's conduct in the disciplinary process.

19. I further award the Grievant two (2) months' salary in lieu of notice in accordance with the obtaining Collective Bargaining Agreement (CBA). The Grievant is also entitled to service pay as per CBA.

20. The claims for prorata leave, leave travelling allowance, salary for days worked and overtime were settled in the course of the trial.

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

- a) 12 months' salary in compensation.....Kshs. 316,032
- b) 2 months' salary in lieu of notice as per CBA.....52,672
- c) Service pay for 15 years (26,336/30x21x15).....276,528
- Total.....645,232**

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

23. I direct the Respondent to issue the Grievant with a certificate of service and to pay the costs of this case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF DECEMBER 2016

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JUDGE

Appearance:

Mr. Maina (Union Representative) for the Claimant Miss Bonyo for the Respondent