



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1134 OF 2013

(Before Hon. Justice Maureen Onyango on 26.1.2015)

ALFRED LITUNGIRU UIKIMU ALIAS VULIMU CLAIMANT

-VERSUS-

HALLY'S FOOTWEAR & ANOR RESPONDENT

JUDGMENT

The claimant filed this dispute against the respondents alleging unfair dismissal and non-payment of terminal dues and benefits. He prays for a declaration that his termination/dismissal was illegal, unlawful and unfair and for payment of terminal dues and damages in the sum of Kshs 355,967, certificate of service, costs and interest.

The respondents Hally's Foot Wear and its proprietor Suleiman Haji Kassim filed a response to the claim on 16th September 2013. The respondents denied the claim and averred that the claimant was caught re-handed stealing shoes from the respondent's shop where he worked, that the matter was reported to the area police station. The respondents further averred that the claimant admitted the theft and apologized in writing and was allowed to go back to work but left employment on his own volition. The respondents urged the court to dismiss the claim with costs for being frivolous, vexatious, an abuse of court process and a waste of time for all involved.

The case was heard on 18th June 2014. The claimant testified on his behalf and called one witness, his wife Flora Khamete Soongwa. The 2nd respondent Mr. Suleiman testified on behalf of the respondents. The parties thereafter filed written submissions.

The claimant was represented by Mr. Mwangombe instructed by Mwakio Kirwa & Co. Advocates while the 2nd respondent appeared in person on behalf of both respondents. Mungai J. N. & Co. Associates, Advocates filed a Notice of Appointment on 3rd July 2014 after conclusion of the hearing and filed written submissions on behalf of the respondents.

The claimant testified that he was employed by the respondents as a shop assistant in its footwear shop in Ngara opposite the chief's camp in 1997. His last salary was Kshs 8,300/= per month. He was a member of NSSF and NHIF from 2010.

On 5th March 2012 he reported to work as usual. After about 10 minutes 2 Administration Policemen from the chief's camp went to the shop to look for the 2nd respondent who had not arrived by then. The 2nd respondent came after about an hour and was informed that the Administration Policemen were looking for him and left word that he calls them. The 2nd respondent left the shop and after about 10 minutes went back to the shop with the 2 Administration Policemen who had been to the shop earlier.

The Administration Policemen told him that the 2nd respondent reported that he had stolen shoes. He was arrested with his workmate Meshack Kataka Obadiah and handcuffed, taken to the chief's office and locked up in the cells where he stayed from 11 am to 5 pm. At 5 pm the claimant and his colleague were summoned to the office of the Chief Inspector of Ngara Police Station where they found the 2nd respondent with the Chief Inspector. The claimant was given a pen and paper and forced to write a statement asking for forgiveness. The 2nd respondent also removed a letter he had prepared earlier from his pocket which the claimant was forced to sign. The claimant was then paid his salary for 12 days, told to wear his shoes and never to step in the shop again. He went back to the shop, collected his jacket which had remained there and left. He later reported the matter to the Labour Office which fixed a meeting for 26th March 2012. On that day he went to the Labour Office Nyayo House and waited until 3 pm but no meeting took place. Thereafter he engaged an advocate to file suit.

The claimant denied stealing shoes from the respondents' shop. He prayed for orders as set out in his claim.

The claimant's witness testified that she sells vegetables in a stall at Kangemi. On 5th March 2012 she had sent her husband, the claimant, to her supplier of bananas at Ngara market as she frequently did. She later called her husband twice but he did not take her calls. When she called the 3rd time he answered and informed her that he had been arrested and was at Ngara Chief's Office. He asked her to go there. When she arrived she was informed that the claimant was in the Chief Inspector's office. She went to the Chief Inspector's office and found him with the 2nd respondent and the claimant who was writing. She then saw the 2nd respondent go to the Assistant Chief. The 2nd respondent told the Assistant Chief that the Inspector had done a good job. The Assistant Chief told her to tell her husband to report to Labour as it was wrong to be sacked without being paid terminal dues. She later accompanied the claimant to collect his jacket from the shop.

The 2nd respondent who testified on behalf of the respondents admitted that the claimant was his employee from 1997 to 5th March 2012. He testified that on 3rd March he caught the claimant red-handed stealing 2 pairs of shoes and was pardoned after writing a statement. On 5th March 2012 he again found the claimant with another employee trying to remove shoes from the shop. The 2nd respondent did not tell the claimant and the other employee anything but went to the Chief who referred him to Chief Inspector Nzimbi of Ngara Police Post.

The claimant and another employee were picked by Administration Police Officers and taken to Ngara Police Post where they were interrogated by the chief and admitted that they had stolen. He then paid the claimant his salary for 12 days that was outstanding. The claimant had taken a loan of Kshs 10,000/= which he was paying in instalments. The balance as at 5th March 2012 was Kshs 5,260/= which the 2nd respondent wrote off. The claimant wrote and signed an apology at the Chief's Office in the presence of the Chief and Inspector.

The 2nd respondent testified that he wanted the claimant to go back to work as he was a long serving employee and the 2nd respondent did not want to train another employee but the chief refused. The 2nd respondent testified further that he never saw the claimant after he picked his jacket from the shop on that day until they met in court.

The 2nd respondent was summoned for a meeting at the Labour Office on 26th March 2012. He attended the meeting and explained to the Labour Officer what had happened. The Labour Officer wrote to the chief and the chief replied. The letter is in the respondent's bundle of documents. It is written to the District Labour Officer and states as follows:-

“TO THE DISTRICT LABOUR OFFICER NAIROBI

Ref:NGAR/ADMIN/REC/VOL/70

RE: HALLAYS FOOT WEAR

ALFRED I. BULIMU

Dear Sir,

I refer to your letter dated 4th/4/2012 of one Mr. Alfred I. Bulimu of theft case which was reported in our office on OB no 6/5/3/2012 of 5th March 2012.

Sir I state as follows the complainant came to our office to report theft in our office against one Mr. Alfred I. Bulimu on which the officer called the accused who was an employee of Hallays foot wear, when he came they were two employees when asked they admitted before that they have been taking one by one shoes they had asked for forgiveness from the employer to forgive them.

One was forgiven but later ran away but Bulimu was not forgiven because it was the second time to be forgiven. Because it was a theft case twice it was not easy for an employer to reinstate him back.

Yours faithfully

D. OUMA

CHIEF NGARA

CC: Employer.”

The 2nd respondent urged the court to dismiss the case on the grounds that the claimant is a criminal and does not deserve anything.

From the foregoing, it is not in dispute that the claimant was employed by the 1st respondent in 1997 and was dismissed on 5th March 2012 using the machinery of the chief and the Ngara Police Post. It is also not in dispute that the claimant was paid his outstanding salary for 12 days while at the chief's office and that he was never issued with a letter of termination of his employment contract.

The procedure for termination of employment is outlined in the Employment Act. Section 41 provides that the employee must be given a hearing in the presence of a fellow employee or a union official if he is a member of the union. Section 43 provides that the employer must prove valid reason for the termination. Section 45 provides that failure to comply with both Section 41 and 43 or either of them constitutes an unfair termination or dismissal.

The 2nd respondent testified that he did not dismiss the claimant. This cannot be true. He is the one who reported the claimant to the chief, and he carried the claimant's outstanding salary and paid it at the chief's office. The chief, in his presence, warned the claimant not to go back to the work place. This cannot be construed as anything other than a dismissal by the respondents. The process used is not that provided for in Section 41. An employer cannot delegate the termination of his employees to the public administration.

For the foregoing reasons, the dismissal of the claimant was unfair and I find accordingly.

The claimant seeks several remedies. He seeks one month's salary in lieu of notice. He is entitled to the same as provided in Section 49(1) (a) of the Employment Act. The claimant also prayed for leave for 2012. The respondents did not deny the claim for leave in the response or in the 2nd respondent's testimony. I therefore award the claimant leave of 21 days. The claimant further prayed for gratuity and/or service pay. In view of Section 35(6) of the Employment Act, he is not entitled to the same as he was a member of NSSF.

The claimant further prayed for house allowance of 15 years in the sum of Kshs 180,000/=. The respondents position is that the claimant's salary was consolidated.

According to the Regulation of Wages (General) Order, 2011, the minimum basic wage of a shop assistant was Kshs 10,239/=. If house allowance of 15% is included, this would have been Kshs 11,774.85. He was therefore underpaid by Kshs 3,474.85/=. Since the claimant did not state what he was being paid over the years, I can only grant him this amount over the last 12 months of employment. I therefore award him Kshs 41,698.20/= on account of underpayment.

The claimant also prayed for compensation at the maximum rate of 12 months. Having worked for more than 14 years and having been unfairly terminated, the claimant is entitled to compensation. Having taken into account all the circumstances of the case and the factors set out in Section 49(4) of the Act, it is my opinion that maximum compensation is reasonable in this case. I therefore award the claimant compensation in the sum of Kshs 134,868/= based on the proper consolidated wage (basic + house allowance) of Kshs 11,774.85. The claimant is also awarded costs. The decretal sum shall attract interest at court rates until payment in full.

In summary I award the claimant the following:-

i. Notice (based on statutory minimum

consolidated wage) - Kshs 11,774.85

ii. Leave (based on statutory minimum

consolidated wage) - Kshs 8,242.40

iii. Unpaid house allowances (underpayment

of consolidated minimum wage) - Kshs 41,698.20

iv. Compensation

- Kshs 134,868.00

TOTAL KSHS 196,583.45

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v. Costs

vi. Interest.

Orders accordingly.

Dated and delivered in Nairobi this 26th day of January, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)