



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 368 OF 2014

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS, HOSPITALS AND ALLIED WORKERS.....CLAIMANT**

versus

CANAAN RESTAURANT.....RESPONDENT

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers Union (Union) commenced legal proceedings against Canaan Restaurant (Respondent) on 14 August 2014, and it stated the issues in dispute as

- i. Unlawful/unfair summary Dismissal of Mr. Vincent Chebii and Paul Kivati Kaunange.
- ii. Refusal by the Management to deduct and remit union dues to the Claimant.
- iii. Refusal to sign Recognition Agreement.

2. The Respondent filed a Response on 18 September 2014.

3. On 14 October 2014, when the Court brought to the attention of the parties the possibility of misjoinder of unrelated causes of action, the Union indicated that it would only proceed with the cause of action relating to termination of employment.

4. The Cause was heard on 12 February 2015.

Background

5. Vincent Kiprop Chebii (1st Grievant) was employed by the Respondent on 1 July 2006 as a security guard.

6. On or around 21 May 2014, the Respondent dismissed him and the reason given was that he had admitted taking away the Respondent's iron sheets without consent or authorization.

7. Paul Kivate Kaunange (2nd Grievant) was employed by the Respondent on 8 October 2010 as a cook. He was dismissed on 29 June 2014 verbally.

8. Both challenge their dismissals.

Issues for determination

9. After considering the pleadings, evidence and the submissions, the Court has identified the issues arising for determination as, *whether the dismissals were unfair, whether the Grievants were underpaid, whether the Grievants are owed leave and leave travelling allowance and appropriate remedies.*

Whether the dismissals were unfair

Procedural fairness

10. The 1st Grievant testified that the Respondent's Manager called him and asked him about the missing iron sheets and he gave explanations. He also stated that the Respondent wrote to him a show cause letter dated 16 May 2014, and that he responded on 21 May 2014 and that on the same day he got a dismissal letter.

11. The Respondent's Manager Aineah Ogola who testified on its behalf stated that he summoned the 1st Grievant on 9 April 2014 to explain about some missing iron sheets, which the Grievant said he was given by a Supervisor.

12. The Manager requested the 1st Grievant to return the sheets but he did not and therefore he issued the 1st Grievant with a show cause letter on 16 May 2014. The 1st Grievant did not respond and therefore he wrote him a dismissal letter.

13. The witness denied receiving a response to the show cause letter dated 18 June 2014 and asserted that 3 meetings were held with the 1st Grievant in the presence of a third person Jared Owino (a watchman) though he was not accompanied by a colleague of own choice.

14. The Court has considered the contents of the show cause letter and the written explanation by the 1st Grievant and the testimony of the Respondent's Manager, and is satisfied that the Grievant was informed of the reasons the Respondent was considering for taking disciplinary action against him.

15. The Court is also satisfied that the Grievant made the necessary representations through his letter of 21 May 2014.

16. The Court finds that although the 1st Grievant was not accompanied by a colleague of his choice, he has not shown any prejudice or injustice and thus the dismissal was procedurally fair.

2nd Grievant

17. The 2nd Grievant stated that he was dismissed on 29 June 2014. On the circumstances of the dismissal, he stated that he reported on duty as usual on the material day and that in the course of work, some meat pies he was preparing got burnt which led to the Manager accusing him of not using his brains.

18. The next day, the Manager called him and instructed him not to report to work.

19. The 2nd Grievant stated in cross examination that he wrote to the Respondent on 30 June 2014 in response to the instruction not to report to work and informed the Manager he was waiting for further instructions.

20. The Respondent's evidence in regard to the 2nd Grievant was that he was a casual paid on a piece rate basis but in testimony, no evidence was led as to separation.

21. In the witness statement filed in Court, the Manager stated that he declined to assign him any duty because there was no job for him.

22. The Respondent's Manager stated that the 2nd Grievant must have joined the Respondent after 2011. The 2nd Grievant's unchallenged evidence however was that he was employed by the Respondent as a cook on 8 October 2010.

23. Having served the Respondent for over 3 months, this Grievant was entitled to a written contract pursuant to section 9 of the Employment Act, 2007. None was given to him.

24. The Court finds that the 2nd Grievant was entitled to a hearing but he was not accorded one and therefore his dismissal or non assignment of duty was repudiation of contract by the Respondent. He was dismissed and the dismissal was procedurally unfair.

Substantive fairness

25. The 1st Grievant was dismissed because he had taken the Respondent's iron sheets (property) without consent or authorization.

26. In his explanation to the show cause letter and in Court he stated that he was given the old iron sheets by Mike Ledama (previous Manager) and Peter Kiptanui (previous Assistant Manager).

27. The explanation letter which was filed by the Respondent had a minute '*I gave him the old sheets signed Peter Kiptanui*'. The Respondent's witness confirmed that the 1st Grievant gave same explanation and that Peter Kiptanui was the Respondent's employee at some point.

28. The Respondent did not deny that Peter Kiptanui and Mike Ledama were the 1st Grievant's superiors. He stated he had the permission of these 2 to take the iron sheets. The Respondent produced the 1st Grievant's explanation which had an endorsement by Peter Kiptanui that he gave the 1st Grievant the iron sheets.

29. In this state of affairs, the Court finds that the Respondent has failed to prove that the reasons for dismissal of the 1st Grievant were valid and fair and the dismissal did not accord with justice and equity.

Appropriate relief

Underpayments

30. The Grievants ought to have known the amount of underpayments they were seeking in relation to the Regulation of Wages Orders which were annexed to the Memorandum of Claim.

31. The details were not given either in the pleadings or evidence and the Court declines to make an award under this head of claim. The Court cannot turn accountant or arithmetician for the Grievants.

Annual Leave

1st Grievant

32. The 1st Grievant stated that he did not take annual leave. But he did not state for which years.

33. The Respondent annexed to the Response a Leave application form for the 1st Grievant for 2013.

34. It is the responsibility of employers to keep employment records including leave records (see sections 10(3) and 74 of the Employment Act, 2007). No records for other years were produced.

35. With the material placed before Court, the Court is unable to make any favourable finding for the 1st Grievant.

2nd Grievant

36. The 2nd Grievant also merely stated he never went on leave and left it at that. The Court is also unable to make a finding in his favour.

Compensation

37. The Court has reached a conclusion that the dismissal of the 1st grievant was substantively unfair while the dismissal of the 2nd Grievant was procedurally unfair.

38. An award of compensation for unfair termination/wrongful dismissal is discretionary. The Court's discretion is fettered and is subject to the factors set out in section 49(4) of the Employment Act, 2007.

39. The 1st Grievant served the Respondent for about 8 years. Based on the length of service, the Court would award him the equivalent of 8 months gross wages as compensation.

40. His gross wages at time of dismissal was Kshs 9,500/- and the Court assesses the compensation as Kshs 76,000/-.

41. The 2nd Grievant served for about 4 years and based on the length of service, the Court would award the equivalent of 5 months wages assessed as Kshs 42,000/- based on the Kshs 8,400/- wage at dismissal.

Overtime

42. The Grievants did not prove the prescribed working hours over the week (per day) nor did they compute the same. The Court declines to find in their favour.

House allowance

43. No evidentiary, contractual or statutory foundation was laid for this head of claim and it is declined.

Conclusion and Orders

44. The Court finds and holds that

- i. though the dismissal of the 1st Grievant was procedurally fair, the Respondent has failed to prove the reasons as valid and fair, and therefore it was not in accord with justice and equity
- ii. the dismissal of the 2nd Grievant was procedurally unfair and awards them and orders the Respondent to pay

1st Grievant

- a. 8 months gross wages compensation Kshs 76,000/-

2nd Grievant

- a. 4 months gross wages compensation Kshs 42,000/-

45. The heads of claim for underpayments, annual leave, overtime and house allowance are dismissed.

46. Each party to bear own costs as none filed submissions as directed.

Delivered, dated and signed in Nakuru on this 17th day of April 2015.

Radido Stephen

Judge

Appearances

For Union: Mr. Onwonga, Industrial Relations Officer, KUDHEIHA

For Respondent: Mr. Mburu instructed by Rodi, Orege & Co. Advocates

Nixon Raiback: Court Assistant