



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 2495 OF 2012

KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT
VERSUS
FAST-TRACK MANAGEMENT CONSULTANT LTD.....RESPONDENT

JUDGMENT

1. The claimants brought this claim on behalf of the grievants who were their members at the material times. According to the claimant, the 1st grievant Mr. Itotia was hired by the respondent on 5th February, 2001 as a machine attendant at a salary of Kshs.9,520 per month. He served without any warning letter or disciplinary case against him.
2. The second grievant Mr. Stanley Macharia was hired from 5th January, 2010 as a machine operator at a monthly wage of Kshs.9,520 per month. By the time of his termination he had served the respondent for 2 years.
3. On 18th January, 2012 during the night, some six bags (819 pieces) of safari boots and one complete pair of safari boots were reported stolen and the grievants were suspected by the respondent to have been involved. They were consequently terminated on the 7th February, 2012.
4. The grievants complained that they were not informed of the allegations against them to enable them prepare their defence and or call representatives of their choice to represent them.
5. The respondent on its part averred that it entered into a contract to supply labour services to Bata Shoe Company in 2007 for a period of one year and that the grievants were hired thereafter. They averred that they did not have employees contracted to work for Bata Shoe Company prior to this.
6. According to the respondent, the first grievant was employed on a three months renewable contract effective from 4th April, 2008 and was posted to Bata Shoe Company in Limuru. His consolidated salary per day was initially Kshs.335/= and was adjusted from time to time in line with General Wages Order. At the time of his termination his salary was Kshs.395/= per day.

7. The second grievant according to the respondent was hired in 2009 as a casual worker. His pay per day was Kshs.335 which was adjusted from time to time his amount was paid weekly. At the time of his termination his pay was Kshs.395/= per day.
8. According to the respondent, the grievants absconded duties when some 819 pieces of safari boot uppers and one complete pair of safari boots disappeared from the place where the two grievants were working. The management initiated investigations which established that the two grievants were involved in the disappearance of the safari boots in question. The respondent further averred that by the time investigations were completed the two grievants had absconded duty hence the respondent had to terminate their services.
9. The respondent contended that the grievants were given an opportunity to explain how the various items disappeared when they were within their custody but their explanations were unsatisfactory. The grievants instead disappeared only to surface after a considerable lapse of time.
10. In their closing submissions to Court, Mr. Maina for the claimant submitted that the incident that led to the termination of the grievants took place at night yet the respondent did not satisfactorily tell the Court where the security personnel were. Mr. Maina further submitted that alleged six bags (819 pieces) of safari boots that allegedly disappeared from where the grievants worked was not a light load which could be easily carried by two people. The load could only possibly be carried by a motor vehicle.
11. According to Mr. Maina, the respondent did not table any supporting documents to prove that the two grievants were involved in the disappearance of the alleged goods.
12. The respondent on the other hand submitted that circumstantial evidence showed that the grievants were accomplices in the loss of the shoe parts in question. According to the respondent, the grievants were on duty on 18th January, 2012. When the goods in issue disappeared. They absconded duties thereafter and never collected their termination letters nor came back to the respondent to complain about their termination. Neither the grievants nor the claimant's union raised the issue of unlawful termination with the respondent prior to reporting the issue to the Ministry of Labour.
13. Section 43 of the employment Act places the burden of proof of reasons for termination on the employer and where the employer fails to do so the termination shall be deemed to have been unfair. What this section implies is that whenever a claim is filed in Court by a claimant challenging the fairness of his or her dismissal the employer has a legal duty to bring before Court evidence whether oral, documentary or circumstantial on which such employer relied on to dismiss the employee.
14. The claimants herein were suspended on suspicion of having been collusive or involved in the loss of some 819 pieces of shoe parts and one complete pair of shoes. They were alleged to have absconded duty on being questioned about the loss and were subsequently terminated on 7th February, 2012. Taking into account the burden of proof in claims for unfair dismissal, it was incumbent upon the respondent to lay before Court at least some modicum of evidence which went beyond oral testimony that indeed there were such pieces of shoe parts and that the same went missing at the time the claimants were responsible for them. Some store or factory record of the same could have shed more light than mere allegation by oral testimony.
15. The Court appreciates the complaint by the grievants' union that 819 pieces of shoe parts are by no means a small parcel and could not have been sneaked out by the grievants without notice by the security. This complaint is plausible and required that the respondent produced more concrete evidence in support of their accusations against the grievants than mere oral evidence. The Court therefore finds that the claimants were unfairly dismissed within the meaning of section 45 of the Employment Act.

16. Concerning the length of service of the claimants, the respondent exhibited at appendix 1 of their bundle of documents, supply of manpower agreement between itself and Bata Shoe Company dated 1st January, 2007. This agreement was stated to commence from 15th February, 2007 to end on 14th February 2008. The claimant did not dispute the validity of this agreement either by way of reply to memorandum of response or evidence in Court. The respondent's liability to the grievants therefore can only be after the commencement of the agreement which was 15th February, 2007.

17. According to the respondent, and which fact was not disputed by the claimant, the 1st grievant was employed on 4th April 2008 on a three month renewable contract on a daily wage of Kshs.335 which was raised to Kshs.395 at the time of termination. The second grievant was employed as a casual with effect from 2009 and his exit salary was Kshs.395 per day. It was not in dispute that the grievants were continuously engaged by the respondent for an aggregate period exceeding one month. By virtue of section 37(1) of the Act they were entitled to the same terms as if they were monthly employees.

18. The Court therefore awards each of them as follows:-

Kshs.

- (a) One month's salary in lieu of notice (395 x 28).....11,060
- (b) 2 months' salary in lieu of leave.....22,120
- (c) 6 months' salary for unfair termination of
Employment.....66,360

99,540

(d) The respondent shall issue the grievants with certificates of service

19. It is so ordered.

Dated at Nairobi this 29th day of May 2015

Abuodha J. N.

Judge

Delivered this 29th day of May 2015

In the presence of:-

.....**for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge