



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 42 OF 2011

KENYA UNION OF PRINTING PUBLISHING PAPER

MANUFACTURERS AND ALLIED WORKERS.....CLAIMANT

VS

PRINTING INDUSTRIES LIMITED.....RESPONDENT

AWARD

Introduction

1. This action is brought by Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers on behalf of its member, Willis Njiri Maramba, the Grievant herein. The Respondent filed a Reply on 7th February 2011 but made no appearance when the matter came up for hearing on 11th March 2014. The Court therefore heard the Claimant's case *ex parte* following which the Respondent filed an application to set aside the *ex parte* proceedings.

2. By my ruling dated 23rd May 2014, I allowed the Respondent's application. However, when the matter came up for hearing on 4th May 2015 there was no appearance for the Respondent yet again. The Court therefore closed the Claimant's case and allowed the parties to file final submissions.

The Claimant's Case

3. The Grievant was employed by the Respondent as a Machine Operator on 1st September 1981. By letter dated 11th May 1989, he was confirmed as a Binding Machine Operator. On 8th June 2006, the Grievant's employment was terminated verbally. It is the Claimant's case that the termination was without justification and in contravention of the obtaining Collective Bargaining Agreement (CBA).

4. On 29th August 2007, a trade dispute was reported to the Minister for Labour and Human Resource Development who appointed a Conciliator on 16th October 2008. The Conciliation process did not bear fruit hence the dispute before the Court. At the time of termination of his employment, the Grievant earned a monthly basic salary of Kshs.23,942.00 plus a house allowance of Kshs.2,600.00.

5. The Claimant's claim is as follows:

- a. A declaration that the termination of the Grievant's employment was unlawful
- b. Reinstatement of the Grievant without loss of benefits
- c. In the alternative, 12 months' salary in compensation
- d. Gratuity for 24 years.....Kshs.287,304.00
- e. Salary arrears.....Kshs.17,735.00
- f. House allowance arrears.....Kshs.3,000.00
- g. 21 days leave pay.....Kshs.16,769.10
- h. 4 years leave traveling allowance.....Kshs.8,256.00
- i. Salary arrears(2004/2005).....Kshs.2,256.00
- j. Unremitted Cooperative deductions.....Kshs.50,341.00
- k. 3 months' notice pay.....Kshs.71,826.00
- l. Certificate of service
- m. Costs and interest

The Respondent's Case

6. In its Reply dated 7th February 2011 and filed in Court on even date, the Respondent admits having employed the Grievant in the position of Binding Machine Operator with effect from 1981 but denies that the termination of his employment in 2006 was unlawful.

7. According to the Respondent, the Grievant was in breach of his employment contract and the termination of his employment was in accordance with Clause 12(c) of the CBA. Specifically, between 6th and 8th June 2006, the Grievant worked for a rival company where he was hired to bind 50 books by one Mr. Okwemba, a former employee of the Respondent, for which he was to be paid Kshs.4,000.00. The Grievant admitted this breach of his contract by his letter of apology dated 8th June 2006. The Respondent therefore terminated the Grievant's employment on 9th June 2006. Being guilty of gross misconduct, the Grievant was not entitled to notice.

8. Upon termination, the Grievant was paid his salary and the Respondent undertook to pay him final dues subject to his handing over. The Grievant however failed to hand over.

9. By way of counterclaim, the Respondent claims the following:

- a) Company property in the Grievant's possession
- b) Kshs.20,000.00 paid to the Grievant

Findings and Determination

10. The issues for determination before the Court are as follows:

- a) Whether the termination of the Grievant's employment was lawful and fair;
- b) Whether the Grievant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Grievant.

The Termination

11. It is not in dispute that the Respondent dismissed the Grievant from employment sometime in June 2006. According to the Respondent, the dismissal was as a result of gross misconduct on the Grievant's part. In their pleadings and submissions, both parties made reference to various provisions of the Employment Act, 2007.

12. However, from the evidence on record, by the time the Grievant's employment was terminated in 2006, the new Employment Act had not come into effect. As held by **Nduma J** in

Jeremiah Ojwang Ojak v Central Bank of Kenya [2012]eKLR there is no provision for retrospective application of the Employment Act, 2007 to employment contracts terminated before its operationalisation.

13. The applicable law in this case is therefore the repealed Employment Act (Cap 226). Under the repealed employment law, an employer could terminate the employment of an employee by giving the requisite notice but since the Claimant was summarily dismissed, he was not given any notice.

14. I have however examined the circumstances surrounding the Claimant's dismissal and have formed the opinion that in reaching its decision, the Respondent failed to take into account the Claimant's apology as a mitigating factor. I therefore convert the dismissal to normal termination with the following benefits:

a) Three (3) months' salary in lieu of notice as provided under the Claimant's terms and conditions of employment..Kshs.79,626.00

b) Gratuity at 15 days' pay for 24 completed years of service as provided under Clause 12(b) of the CBAKshs.318,504.00

c) Prorata leave for 2006 (Kshs.26,542/30 days x1.75 days x 5 months).....Kshs.7,741.00

Total.....Kshs.405,871.00

Less advance payment.....(Kshs.20,000.00)

Amount payable.....Kshs.385,871.00

15. The claim for compensation for unfair termination has no legal basis and the claims for salary and house allowance arrears, leave traveling allowance and unremitted Cooperative deductions were not proved. These claims are therefore dismissed.

16. With regard to the Respondent's counterclaim, the amount of Kshs.20,000.00 advanced to the Claimant has been discounted from the award amount and the claim for property held by the Grievant was not proved. The counterclaim therefore fails and is dismissed.

17. Finally I make an award in favour of the Grievant in the sum of Kshs.385,871.00 which shall attract interest at court rates from the date of the award until payment in full. I further direct the Respondent to issue the Grievant with a certificate of service.

18. The Respondent shall meet the costs of this case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF JUNE 2015

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JUDGE

Appearance:

Ms. Njeri (Union Representative) for the Claimant

Mr. Maberu for the Respondent