



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 622 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 30th July, 2015)

JOSEPH MUGO KABARIA & 10 OTHERSCLAIMANT

VERSUS

PUNCHLINES LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimants herein filed their Statement of Claim on 15/4/2014 through the firm of Charles Gomba and Company Advocates.
2. **Issues in dispute**
 1. *Whether the Claimants are entitled to a copy of the contract of service.*
 2. *Whether the Claimants are entitled to join a trade union.*
 3. *Whether the Claimants dismissal was lawful and fair.*
 4. *Whether the Claimants were entitled to remedies sought.*
3. The Claimants worked for the Respondent herein having been employed at different times as Machines Operators as follows:
 1. *1st Claimant 1/2/2012 at a salary of 17,043/=.*
 2. *2nd Claimant 1/6/2011 at a salary of 15,182/=.*
 3. *3rd Claimant 3/7/2010 at a salary of 15,660/=.*
 4. *4th Claimant 3/7/2010 at a salary of 15,660/=.*
 5. *5th Claimant 1/11/2012 at a salary of 12,324/=.*
 6. *6th Claimant 1/6/2011 at a salary of 14,676/=.*
 7. *7th Claimant 15/7/2010 at a salary of 23,529/=.*
 8. *8th Claimant 19/10/2012 at a salary of 27,279/=.*
 9. *9th Claimant 1/2/2012 at a salary of 12,324/=.*
 10. *10th Claimant 3/3/2010 at a salary of 29,413/=.*
 11. *11th Claimant 2/2/2013 at a salary of 23,567/=.*
4. The Claimants aver that despite working for the Respondents they were never issued with copies of the contract they signed and they continued working under difficult conditions. That they tried to form a union but this was shunned upon. The Claimants aver that they worked from Monday to Saturday and at times on Sundays and would be paid 100/= extra on Saturday if they left late. They would also be given milk and bread for lunch on such a day.

5. However, on 22/3/2014, the claimants aver they were denied the 100/= as expected. They protested and were informed that they would be given a word on the same on Monday.

On 26/3/2014, people got to work as usual and were ordered to stop the machines and go away. Even those who came to work in the evening were sent away. They were then told to go for their termination letters on 31/3/2014. On 31/3/2014, they were sent away.

6. The Claimants aver that the Respondents acted in bad faith and didn't given them letters of employment, notices, any warning or disciplinary hearing before they were chased away.

7. They then consulted their advocate who wrote a letter to the Respondents on 4/4/2014. The Respondents replied on 10/4/2014 stating that the Claimants should go back to work within 7 days without addressing the issues of the termination.

8. In cross examination CW1 told court that the directors decided to lock up the factory on 26/3/2014 and they were all sacked (15 of them).

He stated that 11 of them came to court. He avers that they had been sacked already and so in response to the Respondents letter of 10/4/2014, they couldn't go back to work.

9. The Respondents filed their response on 16/5/2014 through the firm of T.K. Kariba Mbabu and Company Advocates. They denied the Claimants allegation that they were chased away and dismissed unprocedurally. They aver that the Claimants were each issued with the contract they each signed and were clearly aware of the terms. They also deny that the Claimants were forbidden from joining a union of their choice.

10. The Respondents aver that on Saturdays and during public holidays, the Claimants worked on agreed piece work and were paid for it and would also provide transport and meals for those who agreed to work. The Respondents decided to revoke the transport arrangement for Saturday as they were putting up a plan to review the salaries.

This is when the Claimants protested and walked out of the factory on 26/3/2014. That the said Claimants didn't go back to work from 27/3/2014 save for only four out the 15 who protested. That the said four are still working for the Respondent. The rest refused to go back to work despite numerous requests to do so.

11. The Respondents further aver that the Claimants Advocate wrote a letter dated 4/4/2014 and the Respondent explained vide their letter of 10/4/2014 that the Claimants had failed to report and would be dismissed if they didn't report. The Claimants vide their letter of 14/4/2014 now insisted that they had been terminated and rushed to court to avoid disciplinary proceedings.

12. The Respondents aver that the Claimants case was filed in haste and was purely meant to curtail the Respondents from completing the disciplinary process.

RW2 was one of the workers who states he was among those who demonstrated on 26/3/2014 but he decided to go back to work. He denies they were dismissed.

13. The Respondents witnesses were cross examined on payments and RW1 stated that he does not know if the Claimants were paid their payslips submitted in court, the Claimants were all paid their March 2014 salaries.

14. I have considered the evidence of both parties and submissions filed, The issues for determination are as follows:

1. ***Whether the Claimants were terminated by the Respondents.***
2. ***If so whether due process was followed.***
3. ***Whether the Claimants are entitled to remedies they have sought.***

15. On the 1st issue, the Claimants aver that they signed contracts with the Respondent but were never given a copy. The Respondents argue that, that is not the correct position stating that the claimants were given copies of the contract. The Respondents who are custodian of the said contracts were not able to show a copy of the said contracts. The assumption is that the Claimants were not issued with any contracts.

16. Under Section 10 (7) of Employment Act 2007:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

17. Without the contract being produced by Respondents herein, the burden thus of proving or disproving any terms of the contract rests on them.

18. The terms of the contract would have aided court in deciding on procedures and processes to be employed in case of indiscipline as alleged by the Respondent. This would also have been instrumental in deciding whether or not the terms of payment for Claimants were as alleged and the payments due for working on Saturdays and Sundays.

19. In any case, the employment Act 2007 is a place of refuge. The Respondents aver that the Claimants protested and ran away from duty. However, there is Appendix 12 in Claimants list of documents a letter from the Claimants Advocates dated 4/4/2014 stating that the Claimants had been dismissed and making various demands for payments. The Respondents reply Appendix 13 is denial that the Claimants had been dismissed and stating that the Claimants had refused to go back to work on their own. They were even asked to go back to work within 7 days. This, they didn't do stating that having been dismissed, they could only go back on a fresh contract.

20. The mistake here is the omission by Respondent to issue the Claimants with an appointment letter and not following procedures laid down in Employment Act. As Respondents allege that Claimants refused to go back work, no report was made to the labour office. On 15/4/2014, the Claimants filed this case in court a record of 18 days after the alleged dismissal.

21. Whereas there could have been doubt as to whether there was a dismissal or an abscondment of duty, it is the view of this court that it was improper for the claimant to rush to court even without attempting to resolve the issue as envisaged under Section 15(2) of Industrial Court Act 2011 which states that:

“The court may refuse to determine any dispute other than an appeal or review before the court, if the court is satisfied that there had been no attempt to effect a settlement pursuant to subsection (1)”.

22. The Claimants were asked to go back to work but they opted to run to court.

23. I find that there was room to resolve this issue and I won't consider this a dismissal. I would instead consider this a normal termination.

24. I award the Claimants as follows:

1. ***Each should be issued with a Certificate of Service.***
2. ***Each Claimant be paid 1 months salary in lieu of notice as per their last pay certificate.***
3. ***Each Claimant should be issued with a copy of their letter of contract.***
4. ***Each Claimant be paid an equivalent of 6 months salary as terminal benefits.***
5. ***Respondent to pay costs of this suit.***

Read in open Court this 30th day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gomba for Claimant

Miss Barasa holding brief for Mbabu for Respondent