



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.211 of 2013

KENYA SHOE AND LEATHER WORKERS UNION CLAIMANT

VERSUS

FAST TRACK MANAGEMENT CONSULTANTS LIMITED.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful termination of Daniel Mburu by the respondent. The Claimant union filed the claim for the Grievant Daniel Mburu.
2. The claim is that the Claimant union has a Recognition Agreement with the Respondent and have an ongoing dispute with the Respondent with regard to a collective agreement under Cause No.1978 of 2011.
3. He Grievant was employed by the Respondent on 4th April 2004 as a binding operator on a daily wage of kshs.380.00 paid bi-monthly through a bank deposit. On 13th September 2012, the Grievant was terminated upon being served with a termination letter. The Claimant intervened and later reported the matter to the minister and was later issued with a certificate upon failure to resolve the matter.
4. The claim is that the Grievant was issued with a termination letter without being given an audience to be heard in defence or accorded rights as under article 50 of the constitution, section 41 of the Employment Act was not complied with as the allegations levelled against the Grievant did not warrant summary action. The termination was contrary to section 45(4) of the Employment Act and hence unfair. There were warning letters in the file that were unprocedural only meant to taint the grievant.
5. The Claimant is seeking that the Grievant be reinstated back to his position or any work which may not be similar in nature but of the same grade or in the alternative he should be paid notice pay; 63 days leave due; service gratuity; compensation and he be issued with a certificate of service.
6. In evidence, the Claimant called the Grievant Daniel Mburu who testified that he was a Machine Operator with the respondent. He was accused of absconding duty which was followed with a termination. He also restated the claims outlined in the memorandum of Claim.
7. Upon cross-examination, the Grievant testified that he was aware of various warning letters, the first being on 13th February 2012 when he was late and for absconding work and that he was forced to sign the letter to avoid losing his job but he lodged a complaint with his union, the claimant. On 23rd February 2012, the second warning was issued and on 4th June 2012, the 3rd warning was issued. He received all the warning letters but did not make any complaint. On 13th September 2012 he was terminated from employment.

8. The Grievant further stated that on 12th September 2012 he was supposed to do overtime work upon direction by the general manager but on this day, such direction for more work was not conveyed in writing. He left the Respondent premises and did not know if his colleagues did any overtime work. He had done his 8 hours, clocked out and he knew that to be found at the Respondent premises would be trespass and so he left. He had nothing to show that he should have worked overtime. He continued to work 5 days a week and when he worked over the weekends, he was paid for his time.

Respondent's case

9. In defence, the Respondent filed the statement of reply on 9th October 2013. The Respondent states that they got a contract with Bata Shoe Company to supply labour from 1st January 2007 and before then the Respondent did not have staff working at the Bata Shoe Company. The Grievant was employed on 3 months renewable contracts from 2nd January 2007 and posted to Bata Shoe Company in Limuru at a salary of Kshs.240.00 per day and was adjusted over the years to Kshs.395.00 at the time of termination on 12th September 2012.

10. The Grievant was terminated due to persistent lateness and disobedience to lawful instructions by absconding duty without reasonable cause. He was issued with several warnings but failed to oblige. On 12th September 2012 the Grievant disobeyed instruction by absconding duty and the Respondent had no alternative but to terminate his employment contract. The Grievant had grossly misconducted himself as per section 44 of the Employment Act. There were warning letters that were issued procedurally. Lateness affected the flow of work in the process chain of a production line. He failed to attend to overtime work hence affecting the production chain. The action taken was justified. The claim should be dismissed with costs.

11. In evidence, the Respondent called Lorna Matsalia the Human Resource Manager of the respondent. She testified that the Grievant was terminated after being issued with 3 warning letters the last one being on 12th September 2012 for absconding duty. He was called to explain himself but he refused. He knew he was to work overtime from 7.30am to 12.45 pm but refused to return for overtime. All the staff were informed by their manager collectively but the Grievant decided to abscond hence affecting production. This was gross misconduct that warranted termination.

12. On the claims, leave days due were paid and all pending leave had been taken and travel allowance paid. Accumulated leave was taken in August for the department under which he worked. Gratuity is not payable in a case of gross misconduct and by this time there was no collective agreement in force so as to justify a claim for gratuity.

3. In cross-examination the witness testified that she did not keep the records to lateness or other matters with regard to the Grievant work. On 23rd February 2012 the clocking schedule does indicate that he was late for 5 minutes and that cumulatively such time affected production. Each staff was supposed to clock in well before their work start time. Second warning was issued for lateness. The next letter issued with the Grievant related to absconding duty. He refused to work and left the premises and said that overtime was not paid well and hence did not want to do such work.

Submissions

14. Both parties filed their submissions. The Claimant rely on the provisions of section 45(4) of the Employment Act and noted that the reasons for termination were not valid as being late for 5 minutes cannot warrant termination. Before termination the Claimant was not heard or the shop floor representative called. The termination was unfair.

15. The Respondent on their part submitted that the termination of the Grievant was justified following warnings that were acknowledged. The Claimant admitted that he absconded duty on the reason that when he was told to do overtime work this was not done in writing. This was gross misconduct and warrant summary action but the Respondent opted to terminate him. The remedies sought are not

available as this was a case of gross misconduct and the parties had no existing collective agreement at the time. The case should be dismissed with costs.

Determination

16. The basis of the claim is that the Grievant Daniel Mburu was unlawfully terminated. The reasons given for the termination are that;

This is because you absconded from work on 12th September 2012 when your fellow colleagues remained behind after it had been communicated earlier that you were to work extra time. This was an act of insubordination and refusal to take lawful instructions from your seniors

...

Please note that you have been issued with three warning letters and the 3rd and final one was for the same mistake that is absconding from work, facts and details which you accepted

When called to explain, you could not give acceptable reasons for your continuous indiscipline actions

17. Thus as at 13th September 2012, the Grievant had been issued with several warning letter all in a span of 3 months speaking to his lateness as work and absconding work, the last such time being on the 12th of September 2012. In evidence, the Grievant stated that there were over 500 workers who would clock in at the same time and he was only late for 5 minutes. That he refused to attend to the overtime work since the general manager had not issued any communication in writing and for him to remain at the respondent's premises would be trespass.

18. There are several instances that the law permit summary dismissal. Such instances are outlined under section 44(4) of the Employment Act. They include cases where an employee fails to attend work for no due cause and also for failing to take lawful orders or directions. Such action warrant summary action under section 44(4) of the Act but prior to the exercise of such summary action section 41 of the Act must also apply. The employee must be heard in their defence upon notification of the wrong they have committed. It is however important to note that where the employee does not challenge the notice of such misconduct and accepts the mistake and opts to attach their own explanation into their misconduct later, such late action should be treated very cautiously.

19. In the case of **Ann Njoroge versus Topez Petroleum Limited, Cause No. 1248 of 2012** the Court held that;

When an employee claim is based on unfair termination that is countered with a defence of absconding, this Court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice. This is as outlined under section 44 of the Employment Act and more particularly as under paragraphs 44(4) (a) as read together with (c);

(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

...

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

20. In this case the Grievant testified that he was asked to remain and undertake overtime work but

refused as this should have been communicated in writing by the general manager. Upon cross-examination, the Grievant confirmed that he was aware of overtime request but he knew that it was not paying much and since he did not want to be illegally at the Respondent premises after clocking his hours, he opted to leave. In such circumstances, the Grievant admits that indeed he was aware of the need by the Respondent to have him work overtime but since he knew that it did not have much pay, opted to walk out.

21. Other explanation given by the Claimant is that he is aware that he reported late by 5 minutes since upon reporting to work there were over 500 employees at the que seeking to clock in all at the same time and that 5 minutes was not an inordinate delay.

22. These they become admissions of absconding duty and reporting to work late. The justification for absconding duty that there was no written request to work overtime from the general manager of the Respondent is neither here or there, workers in various industries are not all necessary supervised by the overall person the general manger as to ensure effectiveness and proper supervision at the shop floor, various levels of managers are put in charge. For the Grievant to state that he refused to work overtime simply because there was no written request by the general manger and that to stay longer at the work place would be trespass is a simple lame excuse. This is not a justification for misconduct however minute. The availability of work at the Respondent is what ensured that the Grievant was able to work and earn a living daily. To therefore refuse to undertake work as directed by the Respondent manager at the shop floor under the guise of lack of written letter from the general manager is not sufficient to invite the Court to negate the decision taken to terminate the Grievant from his employment.

23. Equally, upon the Grievant realising that he was required at his place of work at a particular time and hour, it was his duty to ensure that he kept his timelines. It is not enough to cite that other employees were reporting late. The duty rests with the Grievant to ensure he met his own contract bargain by being at his place of work on time. By reporting late for 5 minute of several occasions, cumulatively this adds up to 15 minutes and if not stopped and situation arrested in good time, the same can progress into hours of work lost. Most industries are time sensitive and lateness of whatever nature cannot be justified by stating that all other employees were reporting late.

24. I find the reasons leading to the termination of the Grievant to have justification, there is admission under oath by the Grievant that he reported late to work and that he failed to attend to work upon being directed by an officer of the respondent. I find the Grievant not a worker keen to attend to his duties with the Respondent to justify the claim for reinstatement.

Remedies

25. The Claimant is seeking notice pay upon his termination. Where summary action is found justified in this case, notice was not due. This shall not be paid.

26. 63 days of leave earned were claimed. The Respondent stated that each August the Claimant took his annual leave. There was however no evidence in this regard. Where leave has been earned, it has not been taken and there is no proof by the employer as to any payment in this regard, this is a right that does not abet even where there is a finding the termination was no unfair. The Grievant is entitled to leave pay at Kshs.23, 940.00.

27. Service gratuity is claimed. The Claimant base this claim on a collective agreement but has not attached the same. Where indeed the parties herein had a Recognition Agreement, this should have progressed to a collective agreement spelling out the terms and conditions at work including the issue of gratuity payable upon end of employment. Without any outline of a legal right to the gratuity or a collective agreement creating enjoyment of the same, this is declined.

28. Upon the finding that this was not a case of unfair termination, no compensation is due.

Conclusion

On this basis, the claim herein is dismissed, save that the Grievant is awarded Kshs.23, 940.00 for 63 leave days not taken. Each party shall bear their own costs.

Delivered in open court this 21st day of **September** 2015.

M. MBARU

JUDGE