



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1682 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st December, 2015)

KENYA BUILDING CONSTRUCTION, TIMBER,

FURNITURE AND ALLIED INDUSTRIES

EMPLOYEES UNIONCLAIMANT

VERSUS

ODDS AND ENDS LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed their Memorandum of Claim on 3/10/2011 through their National General Secretary on behalf of the Grievant Michael Ogolla. The issue in dispute by the Claimant is the unlawful termination and failure to pay terminal benefits of Michael Ogolla.
2. The Claimants' case is that the Grievant Michael Ogolla is their member and that the union has the right to represent the interest of their members in the Timber Building and Furniture Industry. The Claimants aver that on or about the 13th September 2008, the Grievant fell ill and was given 5 days sick off. The proof of this is Grievant's treatment notes marked FKM 1. They aver that the Grievant reported back to work and was served with a letter terminating his services dated 1/10/2008. The Respondents had alleged that the Grievant absconded duty after 2 weeks after he was given permission to seek medical attention.
3. It appears that the Claimants had attempted to reconcile with the Respondent on this issue but the reconciliation process bore no fruits. They were then issued with a certificate of failure to reconcile (Appendix 3).
4. The Claimants have now filed this claim and want this Court to order the Grievant paid his terminal dues being payment in lieu of notice, salary for September, 3 days worked in October, accumulated leave, service pay and compensation for unlawful termination all totaling 200,945/=.
5. The Respondent on their hand filed their Memorandum of response on 4/11/2011 through the firm of Walker Kontos Advocates. They admit that the Grievant worked for them as a carpenter and was terminated on 1/10/2008 and that they did it lawfully after the Grievant absconded duty and failed to communicate his whereabouts.
6. The Respondent also called one witness who stated that he was the Grievants supervisor. In cross

examination however, he stated that the Grievant had been given 5 days off on 15/9/2008 and on 20/9/2008, he was also given another 5 days off. He stated that the Grievant was terminated because his medical documents were found to be fake.

7. I have considered the evidence of both parties plus the submissions filed thereto. The issues for determination are as follows:

1. ***Whether the Grievant was terminated for valid reasons.***
2. ***Whether due process was followed before he was terminated.***
3. ***Whether the Grievant is entitled to prayers sought.***

8. In determining issue number 1 above, I refer to the letter terminating the Grievant's services which is dated 1/10/2008. The same states as follows:

“After the company gave you a salary advance last month, for which you were to seek medical attention, you stayed away for two weeks. You did not call your supervisor or any of your colleagues to inform them of your absence from work, affecting workshop production schedule. On your return you did not bring adequate proof that you were away due to illness. Further, it was brought to our attention by your colleagues that you were working elsewhere. In your discussion last week, it was initially agreed that you are willing to move on. It is for these reasons that the company has decided to terminate your employment with effect from 30th September 2008-----“.

9. The letter lists various reasons for the termination being abscondment from duty and working elsewhere. The Grievant on his part has told this Court that he was unwell and sought medical attention after being given permission to do so. This authority seems to have been granted as evidenced from the termination letter which states that he was given salary advance to seek treatment.

10. The Respondents aver that the documents he produced alleging treatment were fake. The Respondents have not led any evidence to show that these documents were indeed fake and on the face of it they appear genuine. From the documents the Grievant was treated on 15/9/2008 and given 5 days off and then on 20/9/2008 and also given 5 days off duty.

11. In the same letter, the Respondent avers that the Grievant was working elsewhere. There is no proof of this allegation. It is this court's finding that the reasons given for terminating the Grievant are not valid as they are not established.

12. On the issue of due process, at the time of grievance, the Grievant was terminated on 1/10/2008. At the time, the law in force in dealing with employer-employee issues was the Employment Act Cap 226 (now repealed) unfortunately the repealed Act unlike the current Employment Act 2007. However, the right to be heard is an inherent right and a rule of natural justice that provides that a man should not be condemned unheard. In the case of the Grievant he was served with a termination letter without hearing him nor confirming the allegation that he had absconded duty or that he was working elsewhere.

13. It is therefore my finding that the termination of the Grievant was unfair and unlawful for lack of valid reasons and hearing. I therefore find for the Grievant and award him as follows:

1. ***1 months salary in lieu of notice = 12,000/=***
2. ***Service pay for each year worked =***

$$\frac{1}{2} \times 12,000 \times 3 = 18,000/=$$

3. ***September salary in full = 12,000/=***
4. ***12 months salary as compensation for unlawful***

$$\text{termination} = 12,000 \times 12 = 144,000/=$$

TOTAL = 186,000/=

Less statutory deductions

The Respondent should also pay costs of this suit.

Read in open Court this 1st day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Githinji holding brief for Chege for Claimant

Ogude for Respondent