



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 258 OF 2013**

**TAILORS & TEXTILES WORKERS UNION**

**CLAIMANT**

**v**

**MILLBROOK GARMENTS LTD**

**RESPONDENT**

**JUDGMENT**

1. Tailors & Textiles Workers Union (the Union) filed a Statement of Claim against Millbrook Garments Ltd (the Respondent) on 16 August 2013 and the issue in dispute was stated as *wrongful and unlawful dismissal of Mr. Said Jabir Hassan* (the Grievant).
2. The Respondent was served and it filed a Memorandum of Reply on 12 November 2013.
3. The Cause was heard on 13 November 2013 and 14 November 2013.
4. The undisputed facts are that the Grievant was employed by the Respondent as a cutter on 1 August 1989 until 18 December 2011 when he was summarily dismissed.

**Union's case**

5. According to the Statement of Claim, the Grievant was unlawfully and wrongfully dismissed on 18 December 2011, after a Director of the Respondent saw the Grievant talking to a security lady. The Director who witnessed the conversation asked the Grievant to explain what they were talking about, after which the Director requested the Grievant to see him at 5.00pm, after work.
6. At 5.00 pm the Grievant went to see the Director who told him to go home. When the Grievant reported for work on 20 December 2011, the security guard at the gate refused him entry awaiting the Director to arrive. When the Director came he told the Grievant he did not want to see him, and he was issued with a dismissal letter dated 22 December 2011. Attempts to conciliate the dispute through the Ministry of Labour failed.
7. The Union contends the dismissal was unlawful and wrongful because the Grievant was not given an opportunity to defend himself contrary to sections 41 and 44 of the Employment Act, no notice was given contrary to sections 35 and 36 of the Employment Act, and clause 7 of the Collective Bargaining Agreement, and that there were no justifiable or valid reasons to dismiss the Grievant, contrary to sections 43 and 46 of the Employment Act.
8. During testimony, the Grievant stated that at the time of dismissal, he was earning a basic salary of Kshs 9,304/- and Kshs 2,100/- as housing allowance.
9. On the circumstances leading to the dismissal, the Grievant stated that on 18 December 2011 after lunch, he went to the toilets and a security lady wanted to take his details and he asked her why. A Director of the Respondent noticed and asked him to go to his office after work to explain. After work, the Grievant went to the Director's office but he drove away without seeing him and the next day when he reported for work he was told not to resume duty until he saw the Director. In

the evening, he went with a shop steward to see the Director who asked him to write an apology letter and await a response, but was instead given a dismissal letter through the Union. The letter gave the reason for dismissal as

*refused to obey a lawful instruction from the director on 19 December 2011 to report to his office at 5.00 pm and explain why you were wasting working hours discussing with a security guard at 2.30 pm on the very day.*

10. The Grievant further stated he was not given a notice or any reasons for the dismissal and therefore the dismissal was unfair.
11. The Grievant therefore seeks the prayers set out in paragraph 36 of the Statement of Claim, totalling Kshs 817,032.57.

### **Respondent's case**

12. In its pleadings, the Respondent stated that the Grievant was dismissed due to gross misconduct on 19 December 2011 in that he failed to perform work assigned to him by the Director, refusing to attend a disciplinary hearing, shouting and using insulting language against the Director and a shop steward and declining to obey lawful instructions to proceed on suspension.
13. It was also pleaded that the Grievant was required to show cause and admitted to misconduct through letter dated 22 December 2011.
14. Further, the Grievant was in breach of sections 44(4)(c),(d) and (e) of the Employment Act and clause 20(c),(d) and (e) of the Collective Bargaining Agreement.
15. The Respondent called one witness Patrick Juma Wandhala, a shop steward. He stated that the Respondent's Director Vasant Makwana told him to go and see him with the Grievant on 18 December 2011 after work, which they did. The Director wanted to know what the Grievant was discussing with a security lady but the Director did not agree with the Grievant's explanation. The witness pleaded with the Director to give the Grievant a chance after which the Director requested the Grievant to write an apology letter, which he was aware was done.
16. The next day the Director called him and told him of a fracas. He did not witness the fracas himself but one guard told him that the Grievant would be thrown out if he did not leave. The witness asked the Grievant to leave, and he went back to work.
17. The witness also stated the Grievant did not raise the issue of recording details of employees going to the toilet with him as a shop steward, a practice which had been introduced to deal with lost man hours in the toilets.
18. He confirmed that the Grievant had not been involved in any previous cases before and brought an apology letter on 19 December 2011, though the letter was dated 22 December 2011, and the dismissal letter also had same date.
19. The Union filed written submissions on 29 November 2013, while the Respondent filed its written submissions on 16 December 2013.

### **Issues for determination**

20. Arising from the parties pleadings, testimonies, documents and submissions there are broadly two issues requiring the Court's determination and these are whether the summary dismissal of the Grievant was unfair/wrongful and if so appropriate remedies.
21. Before discussing the two issues, I will briefly set out the applicable law.

### **Applicable law**

22. The complaint relates to unfair and or wrongful termination and therefore the respective parties' statutory onus is found primarily, firstly in section 47(5) of the Employment Act. An employee is under an obligation to prove an unfair/wrongful termination of employment has occurred while an employer is under an obligation to justify the grounds for the termination.
23. Secondly, sections 41, 43 and 45 of the Employment Act require an employer to notify and hear any representations from an employee before terminating his services, proving the reasons for

- termination and that the reasons were valid and fair reasons, respectively.
24. Because the Grievant was summarily dismissed section 44 of the Employment Act is also implicated.

## **Whether the dismissal is unfair**

### ***Procedural fairness***

25. There are two different dismissal letters in respect to the Grievant. One is dated 22 December 2011 and was annexed to the Statement of Claim and another one dated 23 December 2011 and annexed to the Memorandum of Reply.
26. The Respondent who authored the two letters did not produce any evidence on the factual circumstances regarding the two letters and the Court will therefore determine the issue on the basis of the letter dated 22 December 2011.
27. Prior to dismissal, the Grievant, like any other employee had a right to a hearing, what is normally referred to as natural justice in administrative law but procedural fairness in employment law. Section 41 of the Employment Act has set out the basics of procedural fairness.
28. According to the Union's pleadings and evidence, the Respondent's Director noticed the Grievant talking with a security lady on 18 December 2011 and asked him to see him at the end of working hours and the Grievant went to see him but he drove off.
29. On 19 December 2011 the Grievant was denied entry into the Respondent's premises awaiting instructions from the Director. On this day, the Grievant and a shop steward Patrick Juma Wandhala went to see the Director. According to the Grievant, the Director asked him to write an apology letter and await further communication. The Respondent's witness confirmed he was present in the meeting and stated that the Grievant was given an opportunity to explain what he was discussing with the security lady. He stated he pleaded on behalf of the Grievant to be given a chance and the Director requested the Grievant to go and write an apology letter. He stated he was aware the Grievant brought an apology letter.
30. The narrated facts must now be examined against the requirements of procedural fairness in section 41 of the Employment Act. The first observation on the section is that the responsibility is placed upon the shoulders of the employer in a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity to demonstrate to the Court that it has observed the dictates of procedural fairness.
31. The ingredients of procedural fairness, as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed, to the employee.
32. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative, if desired.
33. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
34. Has the Respondent demonstrated that the procedure or process it adopted fitted in with the principles I have attempted to set out herein above ?
35. In paragraphs 9, 10 and 11 of the Memorandum of Reply, the Respondent contended that the Grievant declined to attend a disciplinary hearing or write a statement and dared to be terminated.
36. The testimony however does not support the Respondent's contention that the Grievant declined to attend a disciplinary hearing or write a statement. The Respondent's witness confirmed in evidence that he was present in a meeting called by the Respondent's Director and that indeed the Grievant was requested to write and did write an apology letter.
37. In my view, the Respondent cannot be heard to seek to rely on the reason that the Grievant declined to attend a disciplinary hearing or write a statement to demonstrate that it notified the Grievant of charges he had to confront and that he failed to attend.
38. The Respondent has failed to establish that it complied with the requirements of section 41 of the Employment Act on procedural fairness.

## ***Substantive fairness***

39. An employer, as stated earlier is also under a statutory obligation to prove the reasons for dismissal and that the reasons are valid and fair reasons.
40. The Respondent in paragraphs 5, 6 and 8 the Memorandum of Reply averred that the Grievant was summarily dismissed for gross misconduct by failing to perform work assigned to him. The pleadings in these paragraphs were not supported by the evidence and the reasons set out in the letter of dismissal. Indeed there was no evidence the Grievant refused to perform work which it was his duty to perform.
41. The letter of dismissal made reference to refusal to obey a lawful instruction to report to the Director's office on 19 December 2011 at 5.00 pm. The evidence from the Respondent's own witness was that indeed a meeting took place and he was present as a shop steward.
42. The Respondent has failed to demonstrate that the Grievant refused to obey lawful instructions, by failing to attend a meeting in the Director's office.
43. The Respondent also made reference to the Grievant using abusive or insulting language against the Director. No particulars or details of the words used were given. The Court also notes that in its submissions, the Respondent contended that the Grievant was dismissed for insubordination, which submission was not pleaded nor evidence led.
44. Further, in the submissions the Respondent submitted that it is the responsibility of the litigant who alleges to prove the allegations and that the Union had failed to prove its case. Although this submission is sound under the civil procedure regime, it is far from being the legal position obtaining in employment law in Kenya.
45. Sections 10, 41, 43 and 47 of the Employment Act have placed certain legal obligations to be discharged by employers. Proving the reasons for termination and that those reasons are valid and fair are squarely placed upon employers. The burden placed upon an employee is to prove that an unfair/wrongful termination has occurred. Proving the reasons and justifying the grounds of dismissal is the obligation of an employer.
46. The Respondent has equally failed to prove the reasons for the dismissal. The Respondent was not even clear on which specific reasons were the cause of the dismissal, whether it was use of insulting language, failure to obey lawful instructions to attend a disciplinary meeting or failing to perform assigned work. The summary dismissal was therefore substantively unfair.

## **Appropriate remedies**

### ***Reinstatement***

47. Reinstatement is one of the primary remedies for unfair/wrongful termination. The Court should consider the practicability of ordering reinstatement and the legal principle that there should be no order for specific performance in contracts of service except in very exceptional circumstances. The Grievant did not testify at all on the appropriateness of reinstatement, and the Court declines to order reinstatement.

### ***Days worked in December 2011***

48. The Grievant is entitled as of law to the wages for the days worked. The Union sought Kshs 8,899/07 being the Grievant's wages for 18 days worked in December 2011. The Respondent offered the Grievant Kshs 6,441/-. None of the parties stated the formula used to arrive at the respective figures.
49. The Grievant was earning gross monthly wage of Kshs 11,404/-, and using the correct formula of basic salary plus house allowance divided by twenty six to get the daily rate of pay multiplied by the eighteen days, he would be entitled to Kshs 7,895/- as earned wages for December 2011.

### ***Two months pay in lieu of notice***

50. The Court has found the dismissal of the Grievant was unfair. He had served the Respondent for nearly twenty two years. Under clause 7 of the Collective Bargaining Agreement his employment

was terminable by giving two months written notice or two months pay in lieu of notice. The practice has been to use the basic wage, rather than the gross wage when calculating or awarding pay in lieu of notice.

51. The Grievant's basic monthly wage was Kshs 9,304/- and he is therefore entitled to Kshs 18,608/- under this head.

### ***Accrued leave***

52. The Union sought Kshs 204,688/- being accrued leave for twenty two years. In oral testimony the Grievant admitted that he took all his leave days for the period he was under employment save for the last four months.

53. The Respondent had offered Kshs 1,431.40 under this head of claim and the Court would award the Grievant Kshs 1,431/40.

### ***Leave travelling allowance***

54. The Union sought under this head of relief Kshs 52,800/- for the twenty two years of service. Clause 17 of the Collective Bargaining Agreement provides for leave travelling allowance of Kshs 2,500/- to employees travelling on leave.

55. The Grievant admitted going on leave and in any case this head of relief would be barred through the provisions of section 90 of the Employment Act, 2007, except for the three years prior to dismissal, i.e from 2009 which is Kshs 7,500/.

### ***Terminal benefits for twenty two years/gratuity***

56. Under this head of relief, the Union sought Kshs 110,216.60. The Court has found the dismissal unfair. Clause 24(d) of the Collective Bargaining Agreement is therefore applicable and the Grievant would be entitled to gratuity/retirement benefits equivalent to 308 days pay. Using the formula referred to in paragraphs 49 above the Grievant would be entitled to Kshs 135,093/-.

### ***Twelve months compensation for loss of employment***

57. The equivalent of not more than twelve months gross wages is one of the primary remedies for unfair/wrongful termination of employment. The remedy is discretionary and is subject to any, some or all of the thirteen factors set out in section 49(4) of the Employment Act.

58. Considering the length of Grievant's service with the Respondent and the fact that his trade of a cutter is much sought after in the garments/textiles industry, it is the view of the Court that the equivalent of six months gross wages in the sum of Kshs 68,424/- would be just in the circumstances of the case.

### ***Damages for twelve month***

59. No contractual or legal foundation for this head of relief as distinct from the award under section 49(1)(c) of the Employment Act, 2007 was laid and therefore this prayer is dismissed.

### ***Severance pay***

60. The Grievant was not declared redundant and the claim for severance pay is therefore misplaced. It is dismissed.

### ***Collective Bargaining Agreement Arrears***

61. No evidence or documents were placed before Court on this head and it is dismissed.

### ***Certificate of service***

62.The Grievant is entitled to a Certificate of Service as of right by virtue of section 51 of the Employment Act, 2007. The Respondent should provide him with one.

### **Conclusion and Orders**

63.In conclusion, the Court finds and holds that the summary dismissal of the Grievant was unfair both procedurally and substantively and awards him

a. Salary for 18 days worked	Kshs 7,895/-
b. Two months pay in lieu of Notice	Kshs 18,608/-
c. Accrued leave for four months	Kshs 1,431/40
d. Leave travelling Allowance 2009/2011	Kshs 7,500/-
e. Gratuity/terminal benefits	Kshs 135,093/-
f. Six months compensation	Kshs 68,424/-

TOTAL **Kshs 231,056/40.**

64.The prayers for reinstatement, damages for 12 months, severance pay and Collective Bargaining Agreement arrears are dismissed.

65.Respondent to issue a Certificate of Service to the Claimant.

66.Because of the social partnership and ongoing relationship between the two parties each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 28<sup>th</sup> day of March 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Bonyonte, Branch Secretary

Tailors & Textiles Workers Union

for Grievant

Mr. Molenje, Senior Legal Officer

Federation of Kenya Employers

for Respondent