



REPUBLIC OF KENYA

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IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1917 OF 2011

GEOFREY NYONGESA NYONDO.....CLAIMANT

VERSUS

STRAIGHT LINE CO. LIMITED.....RESPONDENT

JUDGMENT

1. At the commencement of the hearing of the case on 25th July 2013 Mr. Onguti for the Claimant sought to amend paragraph 3 and 4 of the Claim on date of termination from 28th November 2011 to read 28th February 2011. Mr. Masese for the Respondent had no objection and the same was allowed.

2. The Claimant gave sworn testimony in Kiswahili and stated that he works in *jua kali* Eastleigh as a tailor. He testified that he was hired by Respondent on 30th November 1993 as a tailor and that on 28th February 2011 when he reported at 7.30 a.m he found that his assignment had been removed and replaced by another set. He testified that at 8.30 a.m. a senior manager came and sat on a stool near him and started writing and that the Senior manager spoke English. The Claimant stated that he had stopped studying in primary and did not know if the Senior Manager was talking to him or not. The Manager came and stood by the machine and observed the Claimant's work and went downstairs and returned with the supervisor. The Supervisor asked why the Claimant had been talked to and failed to reply. The Supervisor and Senior Manager left and the Claimant was called to the bosses office. The Claimant stated that he was threatened with the sack and no pay. The Claimant was told to get out and tried to ask why, but was told to go out and not question the boss as it was his company. The Claimant was advised to go away and return on Thursday as union officials were not available till then but was not given reason for termination on 28th February. He did not receive any payment and on return on 3rd March the Claimant found the union officials inside the office and they had a sitting for 2 hours with the company officials. Mr. Ngare and Mr. Ochuka from the union were in the meeting but the Claimant was not in the meeting but waited at reception. After a while the officers called the Claimant in and Mr. Ngare told the Claimant that the case seemed complex. They told the Claimant to go to the union offices which he did on Friday and met Mr. Obonyo as Mr. Ngare was absent. The Union official advised the Claimant that he had got a date for the Claimant to return to the company on 10th March, which was a Thursday, at 10.00 am. When they went to the Respondent's offices on Thursday, the Claimant was told to wait at the reception and this time they took half an hour and called the Claimant in. When they called the Claimant in the company said they would pay him 2 months as gratitude for the years of service. The accountant calculated and found the Claimant was entitled to 31,000/= . Mr. Ngare advised the Claimant that the funds were too low and that they should leave as the Claimant should not to get such a low figure. They were to return again and when the Claimant went to the union office on 11th March he found Antony Obonyo who told him to wait for word from Ngare. The Claimant then went away and called Mr. Ngare who told him to wait but they kept dodging the Claimant. They would say they are in a meeting, not in office and they would at times fail to pick the Claimant's calls. He felt they were taking him for a ride and so he got himself a lawyer. He testified that the dismissal letter he got was a lie because if he had failed to clean up he would have been dismissed on 14th February and if he had not obeyed the supervisor on 24th he would have been sent away. He testified that he was not given opportunity to defend himself and denied that he disobeyed the directions of his supervisors or employer. He asserted that he was not given an opportunity for hearing neither was he given a change to state his version of events. He said that he was not given notice that he would be terminated and was terminated suddenly. He added that he had a family and his son had just joined form 1 and the Claimant therefore could not just go to sit at home. He thus wanted this Court to order the Respondent company to pay service for the years he worked as his termination was unlawful and badly done. He admitted that he had been given warning for lateness but not for something else and did not have warnings in 2010.

3. In Cross-Exam by Mr. Masese for the Respondent, the Claimant testified that on when he reported to work on 28th February 2011 he found new clothes that he was required to start stitching. The unfinished clothing the Claimant had left on

the preceding Friday were not there. When he enquired from his supervisor he was told to start with new ones. He testified that the premises were swept in the morning and in the evening. He said that when stitching, there was no one who cleaned the cloth fell to ground and in the evening someone came to sweep the pieces of cloth. He added that at the time there were 10 tailors and 2 helpers and the stitching machines used electricity but there was no timer on the machines. The supervisor was also the one who would cut the pieces the tailors stitched and also took the finished cloth. The Supervisor used to check on work and there was a quantity of work expected to be completed daily. The tailors would be given the clothes they were to stitch and the Supervisor would come for finished products. He testified that a 'white' man sat behind him but not for long, maybe 30 minutes. The stranger was writing but the Claimant claimed that he did not know what the stranger was doing. The stranger spoke in English because if the stranger had spoken in Kiswahili the Claimant would have known if he was speaking to the Claimant or not. The Claimant stated that the supervisor is African and the supervisor asked the Claimant why the Claimant was in disagreement with the manager. When the Claimant answered the Supervisor signed the book and after a while the supervisor returned and the Claimant was sent away after being summoned to the office. In the meeting there was his supervisor, the manager (the white stranger) and the boss who is Asian. The boss is the one who addressed the Claimant in Kiswahili. The Claimant admitted that he was unwell from October 2010 and was referred by the company doctor to go for tests in October. He had been unwell for 3 months and there is even an x-ray. He said that he used to go to hospital after work and give the receipts and documents he got from the hospital to the employer. When he was sent home, he was not told reason and he was not allowed to ask, but instead was sent out. The supervisor went back to his work-station and when he was summoned to the offices again, the union officials went in and the Claimant was left at the reception. The Union official by the name Mr. Ngare is the one who asked the Claimant what he had done wrong and the Claimant explained what had happened. On the first day they went in and stayed for 2 hours, they took tea and there was even a time even Mr. Ochuka came out holding a tea cup and made a telephone call on his cell phone and returned to the meeting. He testified that he was later called in and did not hear them talk about his case. When he went in they the union officials said the case was seemingly complex. The Claimant was told to return to the union office where he found one of the officers in a meeting and when he enquired he was advised that they were waiting for reply. He testified that he relied on the union officials because they were pursuing the issue for him. He was anxious to know why he was dismissed. He admitted that he got the letter of dismissal and that the letter gave a reason. The first reason is that the Claimant was called by the Director, another was that he was asked a question and refused to reply. He got the letter while the union officials were in the meeting and someone read for the letter for him later. He said that he took his training at a school called Olympic in Dandora in 1999 and the instructor was male and the instruction were in Kiswahili. He said that he did not do the exam as he did not have the money for fees. He replied to a question posed by Mr. Masese that he did not know what "stitching" is. In school instructions were in Kiswahili. He stated that waist is 'kiuno' and overall is 'overall' while inches is still 'inches'. He testified that he had formal education till Standard at Masendevari in Busia and that he knew how to write his name Geoffrey and can read it.

4. Mr. Masese had asked the last question in English and thus put it to the Claimant that the evidence he was giving is false as he stated he does not understand English and yet Mr. Masese had spoken to him in English. To which the Claimant stated in Kiswahili - 'It is not true'. He went on to testify that he did not refuse to defend himself as he was not given a chance. Mr. Masese put a series of questions to him to the effect that the Claimant was represented by Union officials who spoke on his behalf and that the Claimant heard what was said and also that the Claimant was untruthful in stating he was unwell to which the Claimant replied that he was at the reception and did not hear what transpired in the meeting and that his visits to St. Mary's hospital were because he was unwell.

5. In Re-Exam by Miss Akhavi the Claimant testified that he was unwell from September 2010 to November 2010 and that he had explained to the company and they gave the Claimant the cash for treatment which they deducted from his salary each month. He stated that he arrived at the office at 10.00 a.m. and was told to sign his attendance and that the union officials were to come. When the officials came that is when he was given letter. He said that the letter was not read out to him and there was no explanation. He was not given chance to know what was done. The union officials did not tell him what he had done wrong. Regarding the medical documents he stated that he used to get the documents from hospital and surrender them to the Respondent. That marked the close of the Claimant's case.

6. Mr. Masese applied for an adjournment and further hearing scheduled for 26th September 2013. At that hearing Mr. Masese appeared for the Respondent while Mr. Makokha appeared for the Claimant. The Respondent called Mr. Lazarus Wandia who worked for the Respondent Straight Line Company Limited in the Accounts Department for over 5 years. He testified that he knew about the case as the Claimant Mr. Geoffrey Nyongesa was working in the stitching department of the company and that he was aware of almost everything that transpired at work in regard to the dispute before the Court. He said that the Claimant's duty was to stitch garments as he was a stitcher and that the company has more 10 stitchers in that department. The stitchers sit in a row and there are 3 rows and each has his own desk, as well as a stitching machine and that they are given pieces of cloth to stitch garments out of. He testified that he was part of the management team. His duties are in the Accounts Department and sometimes he would have to get into the management side to know what was going on the floors. He testified that he has a supervisory role. He testified that the Claimant was given duty by a Director Bupendra Patel on 14th February 2011 and the Claimant was supposed to clean his area. When the tailors are stitching some off-cuts fall off, papers, dust and the Claimant was therefore asked by the Director to make the area clean but did not obey those instructions. He was asked by the supervisor to dispose of the off cuts in a paper box on 24th February 2011 and he refused to do so and in fact he tore the paper box and the supervisor reported the matter to management. The Claimant was warned on the same. He testified that incident was reported immediately and the Claimant was called down to the office and the discussion took place near where the witness was seated. The discussion involved the Claimant, the supervisor and one of the Directors. On 28th February, a senior member of management Mr. Felix, who is currently not there had the duty was planning and ensuring there is smooth running of the company in production was conducting timings to see how long it would take to complete a garment. He undertook the exercise on all the tailors except Mr. Nyongesa the Claimant herein as he did not co-operate especially by failing to answer questions asked. The Claimant was asked "how long do you think it will take to stitch the fleece?" and while stitching for example, "how long do you think it will take to stitch the hand?" He testified that Mr. Felix was from outside the country, he was a 'white' man and that all the staff at that level could understand English. He stated that he was not aware that the Claimant could not speak English. He used both Kiswahili and English to communicate with the Claimant. He testified that the Claimant could understand English. He was candid in stating that he would not be aware of the particular steps taken while dismissing the Claimant but that he knew of the result of summary dismissal. He said that he was aware the Claimant was a member of the

union, the union was informed and the officials came in for a meeting on 2nd March 2011. The said meeting was in the offices at the company premises and the Claimant did not come for the meeting. The Claimant was invited for the meeting but he did not attend. He stated that the Claimant was not locked out of the meeting. The witness attended the meeting and they discussed the Claimant's conduct and the next step to be taken. He testified that the union officials noted the fact that the Claimant was on the wrong and they had nothing to object to and the management took the action to summarily dismiss the Claimant. He was not aware of any other issue but could recall there was a time the Claimant was absent from work for more than a month without a valid reason and when the Claimant came back he said he was sick. He did not avail any other document other than the sick sheet. The sick sheet is from September 2010 till 11th October. He did not communicate between 3rd and 10th October. He was quiet. That is the only misconduct the witness could remember. He testified that the company contributes to NSSF Fund and that it is true the Claimant was not ready to comply and did not show respect to the supervisor and management a behavior that could not be tolerated. He said that the company took the right decision.

7. In Cross Exam by Mr. Makokha the witness testified that he works in the Accounts department and raises invoices, monitor movement of stocks and carries out the duties of supervision. His role is to make sure in all departments everything goes as planned in the company which has over 70 employees. He stated that there is an immediate supervisor on the floor and the witness is supposed to be aware of what is going on the floor though he is not the Claimant's supervisor. Regarding 14th February 2011, on that particular day when the particular instructions were given the witness admitted he was not there. There are employees who undertake cleaning including the area the Claimant worked but cleaning was one of the Claimant's duties. The Claimant had a duty to ensure the working area is clean. If something falls, the dirt, off-cuts, the dust it is their duty. They are to ensure nothing falls on the ground. The cleaner for the company was only one and his job was to only clean the office. For the work floor it is the duty of stitchers to maintain cleanliness at their workstation. He said that there would be a problem if the items on floor were left on the ground. He admitted that he was not there when the supervisor told the Claimant to put the dirt in the paper box. He testified that he is aware the Claimant could understand English though he is not aware of the Claimant's level of education. Mr. Felix was around for a period of one year. He testified that there is limited noise from the machines and the company environment has been audited by NEMA. He said that the level of noise is not one that can cause someone not to hear instructions. He added that when an employee refuses to obey instructions he can be warned verbally or in writing. He however could not confirm whether the Claimant was given a warning letter and the Respondent had not produced a warning letter. He was not aware of any letter issued for the incident of 14th February and neither was he aware of any warning letter issued on 20th February. He was also not aware if the Claimant was invited in writing for a disciplinary meeting. He had no letter inviting the Claimant for the meeting and there were no minutes of the disciplinary meeting. He testified that the Respondent not aware Claimant was undergoing treatment in September and when the Claimant reported back he produced the sick-sheet document. He added that according to the sheet the Claimant was not given off and the doctors did not recommend the Claimant be off duty. The company paid for the Claimant to be checked by the company doctor and the Claimant was found to be ok. However the company did not issue the Claimant with a warning for this misconduct. He stated that for termination of staff of over 10 years 3 months' pay or notice in lieu. He testified that an employee may be given a written warning and that what the Claimant did amounted to gross misconduct. He stated that Respondent was not obliged to give him a warning, it was not a must to do so. He also testified that it is not a must for one to be present when offence is committed for one to know of it. He could know of it after it is reported. The reason why the Claimant was sent for a second medical was to ascertain if the Claimant was really sick. They had a conversation and were not convinced of his illness and the Claimant was sent to hospital and all checks found him normal. He said that the union came for the meeting because of the misconduct of the Claimant. When the company was sure the Claimant's claims were not genuine he was summarily dismissed and thus the Respondent did not pay notice. That marked the close of the defence case. Parties agreed to file written submissions. The Respondent filed submissions on 22nd November 2013 while the Claimant filed submissions on 21st January 2014.

8. The Claimant's submits that the issues to be queried are

- i. Did the Claimant refuse to obey lawful orders from his superiors thereby justifying the employer to summarily dismiss the employee?
- ii. Was the employee availed a lawful and fair procedure before dismissal?
- iii. Was the employee paid all his due entitlements?

9. The Claimant's submissions on the three issues were that the Claimant was dismissed though he had done nothing wrong. The Claimant submits that the superiors whose orders were disobeyed were not called nor were the employees who witnessed the incidents. Further no investigations were carried out and no report was filed about the outcome of any enquiry. The Claimant submitted that the lawful and fair procedure is that the law mandatorily requires an employer to avail the employee the charges on the basis of which termination is bound to issue. This, it was submitted, could be in the form of a notice to show cause or an actual charge sheet. The Claimant submitted further that the Claimant is entitled to a hearing where the employee is entitled to representation by, if he chooses, a union official or by a fellow employee and be given a chance to challenge the evidence and witnesses lined up against him. Finally it was submitted that the Claimant was entitled to a fair verdict of the process and the Respondent did not avail the Claimant any of the safeguards provided in law.

10. The Respondents submissions recapped the evidence adduced by the Claimant and the Respondent. The Respondent submitted that it was justified to dismiss the Claimant for disobedience of lawful orders at the workplace. The Claimant was stated to be guilty of gross misconduct and was thus fit for dismissal. The Claimant it was submitted was given a hearing before the dismissal. He was afforded an opportunity to explain why his services should not be terminated for his gross misconduct. On terminal benefits, the Respondent submitted that the Claimant is not entitled to notice pay as he was summarily dismissed on valid grounds. Regarding service pay, the Respondent submitted that the payslip exhibited by the Claimant showed that he was a contributor to NSSF and therefore not entitled to payment of service in line with Section 35 of the Employment Act.

11. I have carefully evaluated the evidence adduced, the pleadings as well as the submissions made by either side. The evidence on record is that the Claimant was dismissed after an incident where a Mr. Felix was involved. It is not disputed by the Claimant that he has called to a meeting and that he was accompanied on 2 occasions by the union representatives. He admits that he was called in and told by his employer, an Asian, that he would be dismissed. He was aware of the issues facing him and even briefed the union officials who represented him. He therefore, contrary to his submissions was afforded an opportunity to defend himself. The defence need not be the kind that we see in criminal trials. It could be by letter, it could be by authorised representative or in person. I do not see any infraction by the Respondent.

12. In the run-up to the dismissal, the Claimant was accused of misconduct, given opportunity to defend himself and he sought and obtained the representation of two union officials. The cause for the dismissal is misconduct which was not challenged by the union officials and therefore a valid reason for dismissal. While terminating an employee, the requirement of the law is that fair administrative action be availed to the employee. In this case he was given the opportunity. Though the persons who were the supervisor and senior manager were not called the evidence adduced by defence is cogent and in tandem with Claimant's testimony on what transpired. The Claimant claims he does understand English though he studied until Standard 6. I am not persuaded that a student of any Kenyan primary school at Standard 6 cannot understand English. In the cross examination of the Claimant a tactic was employed by the advocate for the Respondent who asked a question in English and the Claimant replied in Kiswahili. That proved he understood English.

13. The Claimant failed to discharge the evidentiary burden of proof and instead showed that he was dismissed procedurally and for good cause. I dismiss his suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of March 2014

Nzioki wa Makau

JUDGE