



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 728 OF 2012

KENYA SHOE & LEATHER WORKERS UNION..... CLAIMANT

VERSUS

H.R. STRATEGIC PARTNERS LTD.....ESPONDENT

JUDGMENT

By memorandum of claim dated 2nd May, 2012 and filed in court on the same day, the claimant **Kenya Shoe and Leather Workers Union** alleges unlawful/wrongful termination of its member Mr. Vuncarl Oyugi the grievant and prays for the following orders:

- | | | |
|--|---|------------------------|
| 1. One month notice in lieu | - | Kshs.8,000.00 |
| 2. 4 days worked | - | Kshs.1,230.00 |
| 3. 4 years unattended leave | - | Kshs.25,846.15 |
| 4. Gratuity @ 15 days for the 5 years | - | Kshs.23,076.92 |
| 5. 12 months compensation for loss of employment as provided for in Section 15 of the Employment Act 2007 and Industrial Court Act 2011 | - | Kshs.96,000.00 |
| Total | - | Kshs.154,153.00 |

The Respondent H.R. Strategic Partners Limited filed its Memorandum of Reply dated 18th July 2012 on the same date. In the reply the Respondent admits employing the Grievant as a casual labourer upto 4th October 2011. The Respondent avers that the Grievant was lawfully terminated after being warned and afforded an opportunity to defend himself. The Respondent further alleges that there is no Recognition Agreement between the Claimant and the Respondent and that the Respondent is a stranger to the proceedings. The Respondent prays that the claim be dismissed with costs.

The case was first mentioned before Hon. Justice Paul Kosgei (retired) on 2nd May 2012 in the absence of both Claimant and Respondent. The case was then fixed for further mention on 27th July 2012.

The case was mentioned by Hon. Justice Isaac E.K Mukunya (retired) on 27th June 2012 when Mr. David Omolo appeared for the Claimant and Mr. Kandie appeared for the Respondent. The Respondent was directed to file statement of response on or before 18th July 2012 and the case fixed for hearing on 29th November 2012.

The case came before me for hearing on 29th November 2012 when Mr. Isaiah Odhiambo appeared for the Claimant but there was no appearance for Respondent. I heard the case in the absence of the

Respondent and delivered judgment on 2nd April 2013. The ex-parte judgment was however set aside on 24th July 2013 upon application by the Respondent and the case fixed for hearing inter parties on 15th November 2013 .

The Claimant called the Grievant **VUNCARL BOOKER OYUGI** who testified that he was employed as Shoemaker on 1st January 2007 at a salary of Shs.6000/- . His last salary was Shs. 8,000/- consolidated and was paid monthly through Equity Bank. He testified that on 20th September 2011 he fell sick and sought permission to go to hospital where he was treated and given two days off duty. He took the report to the factory and was allowed to go home and report back to work after two days. He reported back to work on 22nd September and worked until 4th October 2011 when he was called by the Supervisor at about 8.30 am and asked why he was not on duty on 20th and 21st September 2011. He explained that he was sick and was asked to produce documentary proof, which he did. The Supervisor rejected the documents he produced and demanded the main hospital card. He went back to hospital where he was advised that the card couldn't be released as the hospital keeps it for medical history. The doctor gave him a note explaining the same which he took to the Supervisor. He was told by the supervisor to go back home and come back the following day. When he reported on 5th October 2011 he was told to wait at the reception where he was handed the letter of termination. The reason for termination in the letter was absenteeism. He referred to a copy of the letter attached to his memorandum of Claim as Appendix 1. He testified the Supervisor who dismissed him by name James Njoroge is the same one who had given him permission to go to the hospital on 20th September 2011. He testified further that he was not given any show cause letter, and there was no hearing. He further stated that he had not been given any warning letter.

The Respondent called **JAMES NYAGA NJOROGE RW1** who testified that he works with the respondent as the on-site supervisor at Bata Shoe Company from 2010. His responsibility is the overall management of the Respondent's employees at Bata Site who number about 700. He handles computation of wages and discipline. The Respondent supplies employees to Bata Shoe Company and their employees work together with employees of Bata. The regulations for Bata employees apply to the Respondent's employees.

The grievant was a seasonal employee deployed as an assembler at Department 303. He was paid Shs.380 per day but paid fortnightly. He was also paid incentive. All employees clock in when reporting for work and clock out when leaving. On 21st September 2011 while perusing the clocking record he noticed that the Claimant who was working on the 3.30 pm to 11.30 pm shift had clocked in and never clocked out. RW1 asked the supervisor where the claimant was and the supervisor informed him that the Claimant had left with general workers at 5.00 pm and did not finish his shift for 20th September 2011. He asked the supervisor not to allow the Claimant back to work before clearing with him. He did not hear anything from the Supervisor until on 3rd October 2011 at 7.30 am when he noticed that the grievant had clocked in on 1st October 2011 at 11.30 pm. He went to the workstation and asked the Grievant to accompany him to his office. He then inquired from the grievant where he was on the days he failed to report to work. The grievant said he had been sick and had documents from hospital to prove the same. Since he did not have the hospital documents with him RW 1 gave him time to go and fetch them and processed a gate pass for him. The claimant came back at about 11.30 am with a card from Limuru Health Centre which had only his name and no other information about the Claimant's sick leave or treatment. RW.1 sent the Claimant back to get a sick sheet to explain his whereabouts from 20th September to 1st October 2011. The claimant returned at 4.00 pm alleging that the Health Centre could not issue a sick sheet. He then asked the grievant to sit down and gave him a pen and paper to explain in writing where he was during the period 20th September to 1st October 2011. The grievant declined saying RW1 wanted to incriminate him. RW1 told the grievant to go away while he consulted with the Human Resource office on the action to take. After consultation and taking into account previous warnings on absenteeism it was decided that grievant's employment be terminated.

RW1 testified that he did not refuse to issue the grievant a sick sheet. That sick sheets can be obtained from him or from Bata Health Centre.

RW1 had previously issued Claimant a warning letter of 29th April 2011 for absenteeism. The Claimant was by the same letter suspended without pay for two weeks.

Upon leaving employment the Claimant was paid for 4 days worked. He was also paid arrears of wages arising from gazette notice for new statutory Minimum wages in August 2011. The arrears were payable from 1st May 2011. The Claimant was a member of NSSF. H

I have carefully considered the contents of the memorandum of Claim and annexures thereto, the Memorandum of Reply and the annexures, the oral testimony of the witnesses and the Respondents written submissions.

The issues for determination are as follows:-

1. Whether the Grievant was a casual employee.
2. Whether the Grievant was unlawfully terminated.
3. Whether the Grievant is entitled to the prayers sought

1. Whether Grievant was a casual

The Respondent has in the defence alleged that the Grievant was a casual employee paid fortnightly. Casual employee is defined in Section 2 of the Employment Act as;

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”

From this definition, the Grievant who was, as pleaded by Respondent, paid fortnightly, was not a casual. The Respondent does not deny that the Grievant was in continuous employment from 4th August, 2006 to 4th October 2011. Under **Section 37** of the **Employment Act**, a casual employee who works continuously for one month is deemed to be on a monthly contract of service.

For these reasons I find that the Grievant was not a casual, but on a monthly contract of service.

2. Whether the Grievant was unlawfully terminated

The Grievant testified that he was terminated for being absent on 20th and 21st September 2011. He further testified that he sought permission from his Supervisor to whom he also submitted the sick off chit after coming from hospital. The Respondent on the other hand avers that the grievant who was absent from 21st September to 1st October 2011 was warned, afforded an opportunity to remedy his absenteeism and was given an opportunity to be heard but ignored/failed to defend himself. The Respondent did not attach any evidence to prove the averments. On the contrary RW1 testified that the grievant was asked to explain in writing but declined to do so following which a decision was reached to terminate his employment.

The termination letter does not mention that the Grievant was given an opportunity to defend himself. The letter refers generally to a habit of absentism without sick sheet and loitering in the factory when the Claimant is off duty and concludes by the sentence:-

“Following the unacceptable behaviors, you are hereby relieved all your duties with immediate effect.”

No specific incidents of misconduct are cited in the letter, nor mention of any disciplinary process. This does not reflect any hearing or opportunity given to the Grievant to defend himself.

The **Employment Act** is very specific about the procedure to be followed for termination of employment. There must be valid reason, fair procedure must be followed and the employee must

be given an opportunity to defend himself and to be accompanied by a fellow employee of his choice or a union official. All these were not complied with by the Respondent.

I find that the termination of the Grievant was a unfair both substantively and procedurally.

3. Whether the Grievant is entitled to the prayers sought

The Claimant prays for the following reliefs:-

- i. Reinstatement or in the alternative
- ii. Notice
- iii. 4 days worked
- iv. 3 years leave
- v. Gratuity @ 15 days for 5 years
- vi. 12 months compensation.

i. Reinstatement

The Grievant in his testimony did not ask the court for reinstatement. He only prayed for compensation. I also find that given the circumstances of his termination reinstatement would not be appropriate.

I therefore decline to grant the prayer for reinstatement.

ii. Notice

Having been terminated without notice, the grievant is entitled to one month's salary in lieu of notice. The Respondent stated that the Grievant was paid kshs.340/= per day. In view of the provisions of Section 37(2) that an employee who works for six days is entitled to pay for the 7th day which is a rest day, I find that the Claimant is entitled to kshs.340x30 being Kshs.10,200/=. I award him the same being payment in lieu of notice.

iii. 4 days worked

The Respondent has submitted that the Grievant was paid salary up to 4th October 2011. The Respondent has referred to its appendix 1 as proof of such payment. Appendix 1 has two pages with names including the Grievant's on both pages. The 1st page shows a figure of kshs.5,023.10 and the 2nd page a sum of kshs.1,714.00 against the Grievant's name. No explanation is given about these figures. As correctly pointed out by the Claimant the list has no heading, is not signed and does not disclose its source. It however has a stamp of Equity Bank Limited Branch with a date stamp of 14th January, 2011. It cannot therefore be evidence of payment of salary for October 2011.

I therefore find that the Respondent has not proved that it paid the Grievant for 4 days worked in October 2011 and grant kshs.1,360/= to the Grievant being payment of 4 days salary at the rate of kshs.340/= per day.

iv. 3 years leave

The Respondent in its defence did not make any comment about the prayer for leave by the Claimant. RW1 however testified that the Claimant took his leave when Bata Shoe Company was closed in August every year. No records were submitted to that effect. In the absence of proof of leave taken I presume that the Grievant did not go for leave for the 3 years as prayed by the Claimant. Minimum leave is 21 days per year. 3 years leave would be 63 days at the rate of kshs.340/= per day amounting to Kshs.21,420/=. I award the grievant the said amount

in lieu of 3 years leave.

v. Gratuity 15 days for 5 years

The Grievant was a member of NSSF. Under **Section 35(5) and (6) of the Employment Act** he is not entitled to service pay. His contract does not provide for either gratuity or service pay.

I therefore dismiss the claim for gratuity.

vi. 12 months Compensation

During conciliation the conciliator awarded the Grievant 4 months' salary as compensation for unfair termination. Neither the Claimant nor the Respondent addressed the issue of why the said recommendation would not be acceptable. The Claimant prays for 12 months compensation while the Respondent has not made any comment on the same. I find no reason to interfere with the recommendation of the conciliator and award the Grievant 4 months compensation at

30 days x 4 x 340 amounting to kshs.40,800.00

In summary, I award the Claimant the total sum of Kshs.73,780.00

The Respondent shall also pay claimants costs.

Orders accordingly.

Read in open Court this **11th** day of **April** 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Maclanta Mbala for Claimant

Samuel Kiura, Human Resource Manager for Respondent