



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 1812 OF 2011

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

MWINGI MWALIMU CO-OPERATIVE SACCO.....RESPONDENT

JUDGMENT

1. The grievant in the case James Muthui Muthengi's services were terminated on 13th June 2011. The Claim was filed on 27th October 2011. The Claimant averred that the grievant was summoned by the Respondent's Executive Committee accused of various infarctions. The grievant was subsequently suspended on 12th April 2011 and the Respondent's Board met and resolved to terminate the services of the grievant. The Respondent calculated the dues for the grievant being basic salary, hose allowance, hardship allowance, medical allowance, overtime, 3 months salary in lieu of notice all amounting to Kshs. 81,048.50 after tax. The Claimant prayed for the unconditional reinstatement of the grievant without loss of benefits and an order of payment of twelve months compensation for wrongful termination. In the alternative the Claimant claimed three months pay in lieu of notice, one months pay for the interdiction, three years annual leave, pending overtime, outstanding overtime and 12 months pay as compensation as well as costs of the suit. The Claimant filed Further Documents and Amended Claim on 18th July 2012 seeking enhanced overtime payments from June 2009 to April 2011.

2. The Respondent filed a Statement in Response on 15th November 2011 and an Amended Statement of Response on 29th October 2012 pursuant to leave granted by the Court. In the Statement of Response the Respondent denied that the grievant was unlawfully dismissed or that he was entitled to the prayers sought in the Memorandum of Claim. In the Amended Statement in Response the Respondent averred that the termination of the grievant's services was lawful as it fully complied with the Terms and Conditions of Staff of the Respondent and that the grievant's misconduct warranted a summary dismissal under Clause 20.2 of the terms. The Respondent averred that the grievant was charged in Mwingi Senior Resident Magistrates Criminal Court in case 978 of 2010 which was withdrawn after the accused agreed to compensate the complainant in that case. The Respondent denied that the grievant was entitled to overtime or any other claim in the Memorandum of Claim.

3. The grievant testified that he was employed by the Respondent on 1st February 2006 as an office

messenger/cleaner. He testified that he was given a letter of suspension dated 11th April 2011 and the letter indicated that the suspension was for being rude and other issues in the letter. He was under suspension for a month. He denied being rude or abusive or stealing cement.

4. He was cross-examined and testified that there was payment of overtime. He admitted that he was a cleaner and filled the register at the security office to show he had entered the premises. He stated he had to clean the offices and thus arrived earlier than the others. He admitted that he did not work on most Saturdays as he was a Seventh Day Adventist. He testified that he did not formally ask for overtime. He declined to take the sums offered by the Respondent. In re-examination he testified that he was summoned to the meeting of the executive committee and that he was not given time to respond and was not told why he was to go for the meeting.

5. The Respondent called Charles Munyoki Vita the Chairman of the Respondent. He confirmed that grievant was employed in 2006 as a cleaner/messenger and was terminated on 13th June 2011. He testified that the termination was for theft, misconduct and general insubordination. He testified that the grievant was warned both verbally and in writing. The grievant was given a written warning on 17th November 2010 and on 11th April 2011 was given a suspension and subsequently dismissed after hearing. He testified that the terminal dues for the grievant were paid and that the grievant still owes the Respondent a balance on the loan.

6. In cross-examination the witness testified that the grievant's termination was fair and the sums paid by the Respondent were proper. He denied that the grievant was not accorded a hearing before termination.

7. Parties filed final submissions and the Claimant submitted that the grievance was not handled by the lower administrative level of the secretary manager's level but was handled by the Management committee. It was submitted that the grievant was issued with a warning letter on 17th November 2010 over involvement in a deal of buying stolen bags of cement. The Claimant submitted that the grievant was suspended on 5 counts and that the dismissal was not proper as he was not given a warning on the other issues raised in the suspension letter.

8. The Respondent submitted that the issues for determination were whether

1. Was there a fair reason to terminate the grievant's services?
2. Was there breach of procedural requirements in terminating the grievant's services?
3. Is there any outstanding overtime pay payable to the grievant?
4. Is the grievant entitled to the damages sought in the Amended Claim?

9. The Respondent submitted that under Section 45 the reasons for the termination were valid and the theft of cement was dishonesty which attracted the dismissal that was meted out to the grievant. The Respondent submitted that the due process was followed and the letters given to the grievant enumerated the charges the grievant was to face. The grievant's case was handled by a sub-committee of the Respondent and the grievant was therefore free to appeal to the management committee of the Respondent.

10. The dispute before me relates to a termination of a grievant who was accused of being involved in theft of cement while in the employ of the Respondent. The criminal case was withdrawn after the complainant in the case was paid for the stolen bags of cement and the case was therefore withdrawn under Section 204 of the Criminal Procedure Code. The grievant was suspended and subsequently dismissed for misconduct.

11. The law on termination for misconduct is settled. There must be adherence to the provisions of Section 41 and there is no evidence that this was done. The grievant was entitled to fair procedure and the failure to accord him the safeguards under the law means the termination was unlawful within the meaning of Section 45 of the Employment Act. In the premises I would hold that the grievant is entitled to compensation in terms of Section 49 as read with Section 50 of the Employment Act. As the failure

was monumental I will allow the maximum which is 12 months. The Claimant failed to prove the overtime claim as the payments made to the grievant included overtime. The grievant never raised the issue of overtime until the time he filed the suit and there was thus acquiescence on his part to the payments on overtime. In any event he enjoyed an extra off day as he never worked on Saturday. The grievant's dues were calculated and the Court confirms the calculations made. In the premises the sums which would have been due as terminal dues are not payable as these were applied to the grievant's dues.

12. The Claimant will be entitled to half of the costs for the case as the only success has been in respect of the procedure adopted in dismissal.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of June 2014

Nzioki wa Makau

JUDGE