REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 303 OF 2013

ALI JOHA TSUMA ….....CLAIMANT

VERSUS

CORRUGATED SHEETS LTD ….....RESPONDENT

J U D G M E N T

INTRODUCTION

This is a claim for compensation for wrongful summary dismissal of the claimant by the respondent on 1/10/2012. The respondent has denied liability and maintained that the dismissal was lawful after the claimant repeated wrong doing for three times within 12 months for which he was seved with 3 warning letters. According to the respondent the Collective Bargaining Agreement which constitutated the contract of employment, entitled her to summarily dismiss the claimant if he received three warning letter for wrong doing within 12 months period.

The case was heard on 15/5/2014 when the claimant testified as CW1 and Hussein Bashir Mwoyuya testified on behalf of the respondent as RW1.

CLAIMANT'S CASE

CW1 was employed by the respondent in 1992 as a Bundling Machine Attendant. He was engaged without any written contract until he was given a letter of offer dated 29/3/2007 which he produced as exhibit 1. His salary was ksh.12,565 plus allowances. He produced payslips for May and October 2012 as exhibit 2a &b. On 1/20/12, he wa served with a letter for summary dismissal dated the same date which he produced as exhibit3. The reason for the dismissal was bundling more than required pieces. He was accused of bundling 24 pieces instead of the required 16 pieces of iron sheets. The excess was 8 pieces per bundle.

According to him he bundled 16 pieces but the following day that is when he was called to the store with 2 of this collegues and found that the bundles had 24 pieces. The same day 1/20/2014 the personnel told them that their employment was over. CW1 was paid nothing even after visiting the office one month later. CW1 then instructed counsel to recover dues through a demand letter dated 30/5/2013. (exhibit 4) and later this suit.

On cross examination by the defence counsel, he confirmed that he was employed by letter dated

29/3/2007 and he signed on the same. He also confirmed that there was a CBA which was explained to workers by the shopsteward. As a Machine Attendant he was job Group 2. According to CW1, the CBA provided for 1st and 2nd warnings if the same wrong was repeated in th same year. It also provided that if the same wrong is repeated for the 3rd time within the same year, one could be dismissed. However if 3rd warning was not given within a year, all the earlier warnings lapsed. CW1 admitted that he was served with a first warning on 10/11/2011 for bundling 5 pieces less. He also admited that he was given the second and last warning letter dated 24/1/2012 for bundling 5 pieces less again. He apologized for each of the said two incidences in writing.

CW1 confirmed that the dismissal letter dated 1/10/2012 gave the reason for dismissal as repeating wrong doing and it referred to the first and second warning letters datd 10/11/2011 and 24/1/2012 respectively. He admitted that he was called to the store and confirmed that the bundles had excess sheets by 8 pieces. He admitted that the error was done on 26/9/2012 when the shopsteward wrote an apology letter without CW1's instructions. He confirmed that he was a member of NSSF and that under the CBA he was entitled to one month notice before termination.

On re-examination by his counsel CW1 confirmed that the CBA cited by the defence was concluded on 6/10/2012 after he had already been dismissed. He conteded that the reason for the second warning was reading a labour guideline paper which he had permission to read it from the storeman. In conclusion he maintained that he did not bundle excess pieces and conteded that at the store there was possibility of intererence in case a customer required less pieces than a bundle.

DEFENCE CASE

DW1 is a junior clerk in the respondent's personnel office. His duty is to prepare records for workers and keep attendance register. When he joined the respodnent in 2008, he found CW1 there. CW1 was doing the duty of bundling sheets in the Bundling Section for iron sheets and then take them to the store.

RW1 confirmed that CW1 was given an appointment letter. RW1 stated that the CBA provided for notice before termination depending on the length of service. He explained however that before dismissal one had to be given 1st and 2nd warning letters then dismissed if he repeated a third wrong in one year. RW1 prodced the CBA, first warning letter dated 10/11/2011, and second warning letter dated 24/1/2014 as exhibit D1, 2, and 3 respectively. He explained that Clause 19 of the CBA provided for dismissal if one repeated wrongs related to ones duties 3 times in one year.

RW1 confirmed that CW1 wrote apology for taking a paper and readng without persmission from the personnel. The paer was related to labour minister guidelines. According to RW1, claimant admitted his wrongdoing and received warnings and as such the dismissal was proper. RW1 maintained that in summary dismissal, notice was not needed.

On cross examination by the climant's counsel, RW1 confirmed that he was not the CW1's supervisor. He further confirmed that the CBA was signed after claimant's dismisal. He confirmed also that there was an earlier CBA which he did not produce as exhibit. He admitted that the claimant's payslip for October 2012 reflected overtime only and no salary. He further admited that the warning letters were not copied to claimant's union as required under Clause 19 of the CBA. He conteded that the claimant was required to count the sheets per bundle but he made bundles with excess or less sheets.

RW1 did not know how long CW1 worked for the respodnent because he found him there. Rw1 confirmed that there were 3 shifts per day and each has a coil report of the bundles but he could not produce the coil report for the days in issue.

On re-examinaiton he clarified that the CBA was effective from 1/9/2012 but he stated that Clause 20(b) of the CBA recognized that the CBA started I 1988.

After the close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

a. **Whether the dismisal of the claimant was based on the CBA dated 6/10/2012.**
b. **Whether the dismissal was wrongful or unfair.**
c. **Whether the relief sought ought to issue.**

Application of the CBA dated 6/10/2012

The respodnent believes by dint of Clause 20(b) of the CBA dated 6/10/2012, the CBA applied retrospectively to 1988. CW1 conteded that by the time the CBA was signed, he had already beean dismissed. The court has perused the CBA and confirmed that the parties agreed that effective date to be 1/9/2012. If the parties intended it to be backdated to 1988, nothing would have easier than to put it in writing. The court has no jurisdiction to add anything to the parties contract but only to interprate and enforce it as it is.

In the present case the court's interpretation of Clause 20(b) of the CBA is that the said clause is only explaining the effective date of the gratuity scheme and not the CBA. The clause is only saying that any claim for gratuity under the scheme cannot go beyond 1988. The said limitation is however of no relevance to this case because the claimant was employed after 1988. Having found that the agreed effective dated was 1/9/2012, the next question that arises is whether the said CBA was ever registered by this court in order for it to become enforceable. Section 59(5) of LRA provides that a CBA becomes enforceable and shall be implemented only upon registration by the Industrial Court but the effective date is determined by the parties. In addition Section 60 of the LRA provides that not every CBA concluded by the parties are registered by the Industrial Court. That begs the question whether any evidence was led to prove that the CBA produced by the defence was ever registered, and if so, when. The answer is obviously no. The foregoing not withstanding, the court will resolve the question of the applicability of the CBA to this case by making an asumption that the CBA was registered.

The foregoing assumption means that the CBA applies to the claimants contract of employment on two levels. Firstly, it applies to all his terms of service, except gratuities, from the effective date as agreed by the parites under Clause 31 thereof being 1/9/2012. Secondly the CBA applies to the claimant's contract of employment with respect to gratuity from the date of his empoyment in 2007 by dint of Clause 20 of the said CBA.

Wrongful or unlawful dismissal

The claimant stated that the dismissal was wrongful because on the material day, he made bundles of 16 pieces but on the following working day (1/10/2012) he was called to the store with his two colleagues to confirm that they had bundled 24 pieces instead of 16 pieces. On the same day the personnel dismissed them without any dues.

On the other hand, the respondent had justified the dismissal on ground that the claimant had received two warning letters before he repeated the same wrong and as such she entitled to dismiss the claimant under Clause 19 of the CBA. In view of the earlier finding above that the CBA produced as exhibit d.1 is only applicable from 1/9/2012, it follows that the warning letters issued prior to that date cannot be considered while justifying the dismissal herein. The only other evidence to consider is the employer's letter dated 29/3/2007 produced by the claimant which however did not provide the termination clause. The letter merely stated that all other terms and conditions were as per the CBA. No other CBA was produced by either party especially the respodnent who under Section 74 of the Employment Act is duty bound to keep the employment records for all her workers. Consequently the

court has to resort to the Employment Act to reslove the dispute.

Section 45 of the said Act bars an employer from unfairly terminating an employee's employment. A termination of employment according to Section 45(2) *supra* becomes unfair if the employer fails to prove that the reason for the termination is valid and fair and that the termination was in accordance with fair procedure. The court has no doubt that the reason for dismissal was unsatisfactory peformance of duty. That the claimant had persisted in making iron sheets bundles with less or excess pieces dispite receving warning letters from the employer. In this courts view the reason for the termination was both valid and fair. It was valid because the claimant admitted that the material bundles were containing excess pieces than required. The reason was fair because it related to the employees capacity and also based on the employers operational requirements as it was likely to affect her integrity to the customers or lead to financial loss.

The court however has issues with the procedure followed. The respondent did not follow the disciplinary procedure set out under Section 41 and 45 of the Employment Act or, simply serve a termination notice as per Section 36 of the Act. Even if the employment contract (appointment letter) provides for none of the above procedure of terminating it, the Employment Act must be complied with because by dint of Section 3,7,and 8 of the said Act, the Act applies to all employment contracts in Kenya.

Section 41 of the Act bars the employer from dismissing an employee for misconduct, incapacity or improper performance under Section 44 of the Act before according him a hearing. The hearing involves inviting the empoyee with a co-worker of his choice or a shop floor union representative to a hearing. The employer then explains to the two, the reason for which he contemplates to dismiss the alleged offending employee in a language he understands. Thereafter, the employee and his companion if any are given opportunity to air their defence after which the employer decides whether to dismiss the employee or not. The provision is crafted in mandatory terms and therefore gives no discretion to the employers on the disciplinary procedure. Section 45(5) (e) of the Act calls upon the court to consider the existence of any previous warnings issued to the employee in deciding whether the procedure followed in his dismissal was unfair. After considering the evidence in this case, the court finds that the respodnent did not follow the mandatory procedure under Section 41 of the Employment Act and the summary dismissal was therefore rendered wrongful and unfair within the meaning of Section 45 of the said Act.

Relief

Under Section 49 of the Employment Act, any employee who is unfairly or wrongfully terminated is entitled to payment in lieu of notice, accrued employment benefits plus compensation for upto 12 months gross pay. The court awards the claimant one month salary in lieu of notice because according to te CBA (exhibit d.1) produced by the defence any employee who served for less than 10 years was enttled to one month notice. He pleaded for Ksh.11565 and that is what he will get although his ssalary was higher than that under the said CBA.

He will also get gratuity for 4 years worked between March 2007 and October 2012. Clause 20 of the CBA (exhibit d.1) entitled the claimant to get 18 days pay for each completed year of service based on ksh.12720 salary based on the new CBA. He however pleaded for 15 days pay based on ksh.11565 salary per month for 4 years which total to ksh.23,130 The claimant prayed for 12 months salary for unlawful dismissal. The court however awards him 6 months gross salary at the rate pleaded of ksh.11565 per month being ksh.69,390 because with due diligence the claimant could secure a similar paying job within that period.

DISPOSITION

For the reasons and findings stated above, the court enters judgment for the claimant in the sum of ksh.104,085 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 18th day of July 2014.

O. N. Makau

Judge