



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1752 OF 2011

BETWEEN

STEPHEN MIHANGO MWANGI 1ST CLAIMANT

WINNIE MUTHONI KARIUKI.....2ND CLAIMANT

NELSON WAINAINA NJUGUNA.....3RD CLAIMANT

VERSUS

EASTLEIGH MATTRESSES LIMITED RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimants

Mr. Macharia instructed by Macharia Gakaria & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The three Claimants filed a joint Statement of Claim on 17th October 2011. The Respondent filed its Statement of Response on 9th November 2011. The 2nd Claimant gave evidence on behalf of all the Claimants, and closed the Claimants’ case on 12th March 2012. The Respondent dithered in presenting its case, adjourning hearing on several occasions, and failing to attend Court on 13th March 2013 when the Court marked the proceedings as closed.
2. The Respondent applied for reopening of the hearing and was granted a chance to present its evidence. On 1st October 2013, the Respondent called its Branch Manager Mfangano Street Nairobi, Mr. Samuel Warui Kahara, who gave evidence with the proceedings finally coming to a close on this date. The dispute was last mentioned on 20th May February 2014, when the Parties confirmed the filing of their Closing Submissions and were advised Award would be read on notice.
3. The 1st Claimant Stephen was employed by the Respondent as a Supervisor, with effect from 17th

February 2004. He earned Kshs. 16,000 all- inclusive. He was dismissed from employment on 8th November 2010.

4. The 2nd Claimant Winnie Muthoni Kariuki was employed by the Respondent as a Shop Assistant on 7th July 2007, at a monthly basic salary of Kshs. 9,000 and house rent allowance of Kshs. 1,350. She was dismissed on 2nd November 2010.

5. The 3rd Claimant Nelson Wainaina Njuguna was employed by the Respondent on 11th February 2004 as a Cashier, at a monthly salary of Kshs. 16,000 which excluded house rent allowance. He was dismissed on 2nd November 2010.

6. All the Claimants allege the decision to dismiss them was not based on valid and fair reasons. They were not given the opportunity to show cause, why disciplinary action should not be initiated against them. They seek orders against the Respondent for the following:-

STEPHEN MIHANG'O MWANGI

- i. 1 month salary in lieu of notice at Kshs. 16,100;
- ii. Leave pay of Kshs. 16,100;
- iii. Leave traveling allowance at Kshs. 2,000 for 6 years totaling Kshs. 12,000;
- iv. 8 days worked in November 2010 at Kshs. 4,954;
- v. Salary underpayments at Kshs. 312, 000;
- vi. Off duty at Kshs. 77,280;
- vii. Public holidays worked at Kshs. 76,207;
- viii. Overtime at Kshs. 579,600;
- ix. 12 months' salary in compensation for unfair dismissal at Kshs. 193,200; and
- x. Certificate of service to issue.

The total claimed by Stephen comes to Kshs. 1,287,441

WINNIE MUTHONI KARIUKI

- i. 1 month salary in lieu of notice at Kshs. 10,466;
- ii. Leave pay at Kshs. 10,466;
- iii. 2 days worked in November 2010 at Kshs. 805;
- iv. Maternity leave of 3 months at Kshs. 31,398;
- v. Off duty at Kshs. 45,084;
- vi. Public holidays worked at Kshs. 13,283;
- vii. Overtime at Kshs. 188,390;
- viii. 12 months' salary in compensation at Kshs. 125,593; and
- ix. Certificate of service.

In total, Winnie seeks to be paid the sum of Kshs. 425,487 by her former Employer.

NELSON WAINAINA NJUGUNA

- i. 1 month salary in lieu of notice at Kshs. 17,498;
- ii. Leave pay at Kshs. 17,598;
- iii. Leave traveling allowance at Kshs. 12,000;
- iv. 2 days worked in November 2010 at Kshs. 1,346;
- v. Salary underpayments at Kshs. 8,394;
- vi. Off duty at Kshs. 94,760;
- vii. Public holidays worked at Kshs. 82,825;
- viii. Overtime at Kshs. 629,942;
- ix. 12 months' salary in compensation at Kshs. 209,980; and

x. Certificate of service.

In sum, Nelson wishes the Respondent to pay to him Kshs. 1,074,256. The Claimants pray they be paid costs and interest.

7. The Claimants reported the dispute to the Labour Office at Nyayo House Nairobi, who invited the Parties for conciliation. The Respondent refused to submit to the process. The Claimants' Advocates wrote a demand letter to the Respondent before coming to Court. The Respondent wrote back alleging that the Claimants failed to abide by rules and regulations, and that the Claimants absconded duty, after they were involved in irregular use of the Reward Card System. The Claimants deny that they absconded. They were not given the opportunity to answer to the allegations.

8. Winnie explained the Respondent had Reward Card System for its Customers. A Customer at one point made a purchase, but did not have his loyalty card. The 2nd Claimant requested the Customer that the loyalty points be credited to her. She was dismissed for this. There was no notice or hearing. The 3rd Claimant Nelson forwarded Winnie's card for crediting. The 1st Claimant Stephen was Winnie's Supervisor and was similarly dismissed over the incident.

9. Winnie testified she was not paid any terminal benefits; she did not go on leave; she worked on public holidays without compensation; she reported at 6.45 a.m. and left around 9.00 p.m. daily; and was denied maternity leave. It was not true that she and her colleagues, deserted duty to avoid ongoing investigations.

10. Upon cross-examination, Winnie testified that the Reward Card was given by the Respondent to its customers. Points were awarded for purchase of goods in excess of Kshs. 100. She did not do any shopping herself, on 2nd November 2010. It was her Father's card that she gave for crediting. It was the Respondent's Driver, Stanley Chege Mbuthia, who shopped. It is not true that a Cashier could not credit his/her card with points earned from a Customer's shopping. The card is an incentive, to attract Customers. She was summoned by the CEO Mr. Kamau and told she had credited points irregularly. She did not know if the issue was reported to the police. Dismissal was not on account of her pregnancy; it was based on the irregular crediting of loyalty points.

11. General overtime pay was remitted as shown in the pay slip. She applied for maternity leave, but did not have the application form in Court. She did not deliver the letters of demand issued by the Labour Office, to the Respondent; her Co-Claimants told her the letters were delivered. She had not applied for the job. She was related by blood to the Respondent's Chairman late Stanley Chege. She did not seek Chege's intervention when the incident arose. She did not have her own loyalty card, and would not be allowed to use such a card. She testified on redirection that she was not called to defend herself. There were no rules relating to use of the cards. There was a shopping that actually took place. She and the Co-Claimants were never summoned by the police. Her relationship with the Respondent was work related; it had nothing to do with family. The Claimants pray the Court to uphold the Claim.

12. The Respondent concedes the Claimants were its Employees. They worked in the positions indicated in their Claim. They did not earn the monthly salaries shown in the Claim. They deserted duty after they were caught engaging in conduct which was prohibited by the Respondent. They were involved in a syndicate where Employees would award themselves, their relatives or acquaintances points, after Customers made the purchase. They are not entitled to the claims sought. They were in breach of the rules and regulations at the workplace. They left work of their own volition to avoid investigation.

13. Samuel Warui Kahara, Branch Manager Mfangano Street, testified that the Respondent issues cards to Customers through which they earn points for every Kshs.100 worth of purchase. The Customer applies for the card by filling in a Form. This Form has terms and conditions for use of the card. The card

is only to be used by the person to whom it is issued. It is not transferrable, and cannot be used to earn points for 3rd parties. The Members of Staff of the Respondent are not allowed to have these cards. This was widely known to the Employees. This is done so that Employees do not divert Customers' points to their own cards. The accumulated points are redeemable through shopping. If one shops using points that have not been acquired through his own progressive shopping, this would amount to stealing from the Respondent.

14. On 2nd November 2010, a Senior Member of the Staff Stanley Chege sent another Member of Staff Joseph Mulwa to buy for him 2 mattresses worth Kshs. 11,000, from the Respondent Supermarket. The sale receipt indicated a Reward Card had been swiped, crediting it with the points from Chege's purchase. Chege informed the Management, who carried out investigation.

15. Mulwa explained he contacted the 3rd Claimant enquiring if he had a Reward Card. The 3rd Claimant in turn approached the 2nd Claimant, who gave the Reward Card that was credited with the points from Chege's purchase. The 2nd and 3rd Claimants admitted their roles in the irregular transaction. They wrote statements admitting this. The 2nd Claimant informed the Management that even Supervisors such as the 1st Claimant had a Reward Card. The matter was reported to the police. The 2nd and 3rd Claimants left the premises on hearing the matter had been reported to the police. They never returned.

16. The 2nd Claimant is not entitled to annual leave or maternity leave. She deserted duty. She was employed on 7th July 2007, and her year would commence on 8th of every month. She left work on 2nd November 2010 and had only worked for 4 months for the year 2010/ 2011. She admitted overtime was paid as shown in her pay slips. The Claim for overtime pay and public holidays worked has no merit. The 3rd Claimant was employed on 11th February 2004. His year runs from 11th February of every year. He had only worked 7 months in 2010. He is not entitled to annual leave pay. He was not underpaid. Overtime due was paid to him as captured in his pay slip.

17. The 1st Claimant held a Reward Card in the name Rhoda Ndung'u, which had been used several times. This again was contrary to the rules and regulations in place. He similarly deserted work upon realizing police investigations were underway. He was paid all his dues as shown in the pay slip. He did not come to Court to prosecute his case.

18. Kahara told the Court on cross-examination that he was employed by the Respondent on 30th August 2010. He was initially employed as a Bank Office Clerk. He knew all the Claimants, but would not tell when they were employed. He did not know their terms and conditions of employment. Joseph Mulwa, who was sent by Chege to buy the mattresses, is not a party to this Claim. The Claimants deserted when they realized the Respondent had uncovered irregularities in crediting of loyalty points. They were not given a hearing because they deserted. The Respondent did not write to the Claimants to find out why they were not reporting to work. They were not dismissed. The Respondent suffered reputational damage for the irregular transaction. Chege complained verbally about the use of his mattresses to credit loyalty points to a 3rd Party. The Claimants recorded statements admitting their offences.

19. Business opened at 7.00 a.m. and closed at 8.30 p.m., sometimes extending to 9.30 p.m. to allow Customers time to clear. Employees had lunch and tea breaks. Kahara did not approve any leave, and would not tell if any of the Claimants had outstanding leave days. The business was open 7 days a week and on public holidays. Pay slips would capture overtime paid during the holidays. There was no document given by the Respondent to the Court, showing holiday payments made.

20. Employees were granted 2 days of rest every month. The Respondent had in place an attendance register which it did not make available at the hearing. Payments were made from the Head Office. Kahara would not tell if the Claimants were paid for days worked in November 2010. The Claimants were not given their Certificates of Service. He did not know if the amounts claimed are justifiable.

21. The terms and conditions of use of Reward Cards were pinned on the Respondent's notice boards.

Details of the Cardholder were taken on application. The Card used was in the name Peter Kariuki. Kahara did not have evidence to show this was the 2nd Claimant's father. The record of the transactions did not have the name Kariuki. The Claimants admitted they were involved in irregular card transactions. The Respondent reported fraud to the police but Kahara does not know how far the investigations went. Police claimed they were not able to trace the Claimants. The Respondent had supplied details of the Claimants to the police.

22. The investigations, Kahara testified on redirection, were triggered by the action of Chege Mbutia, Respondent's Driver. Employees were not supposed to have Reward Cards. The Claimants did not report to work after the investigations commenced. Their pay slips showed overtime was paid. They did not give their Employer notices of termination. Regulation 4 of the Reward Card indicated the Card was not transferrable. The particular card was captured in the statements of the transactions. The 1st Claimant conceded he had a Reward Card in the name of Rhoda Ndung'u. The Respondent urges the Court to dismiss the Claim with costs.

The Court Finds and Awards:-

23. The 3 Claimants were employed on diverse dates and in various capacities as stated in their Claim. They all left employment on 2nd November 2010 in controverted circumstances. The Claimants allege their contracts were terminated without any valid and fair reasons, and without notice or hearing. The Respondent states the Claimants deserted work after they learnt of ongoing investigations against them, for irregular use of Reward Cards.

24. The Court is inclined to accept the evidence of the Claimants that their respective contracts were terminated by the Respondent. They did not desert duty. The Respondent's explanation that the Claimants absconded was unpersuasive. The matter was reported to the Police by the Respondent. There was no explanation what became of the police process. The Claimants were within the Respondent's sight, and both Parties were invited for conciliation meetings at the Labour Office, shortly after termination. The Respondent had details of the Claimants. The 2nd Claimant was a part of the family which owns the Respondent business. These were not Employees who were irretraceably at large, as stated by the Respondent. They were available for a formal disciplinary process, and for any intended police investigations.

25. The Respondent did not avail to them any form of hearing, taking the stance that the Claimants had deserted. As suggested above the Claimants were available through the Labour Office at the very least, and could have been charged and heard on the offences relating to the irregular use of the Reward Cards, or even that of desertion. The Court finds that the Respondent terminated the Claimants' contract contrary to the procedural protections granted under Sections 41 and 45 of the Employment Act 2007. Termination was unfair on account of procedure.

26. There was adequate evidence given by the Respondent to substantively justify termination. All the Claimants were involved in irregular crediting of loyalty points. Reward Cards were meant to belong to Customers, not Employees. The terms and conditions of holding the Cards were well known to the Members of Staff of the Respondent. To subvert the rules and regulations, the 1st Claimant held a Reward Card in the name of Rhoda Ndung'u which was constantly in use. He was implicated by the 2nd Claimant, and confessed to having such a Card. The 2nd and 3rd Claimants were involved in crediting the Card held by the 2nd Claimant, which was in the name of Peter Kariuki, with points taken from Driver Stanley Chege Mbutia's purchase of 2 mattresses worth 11,000. Notably, all the 3 Claimants wrote statements admitting the accusations.

27. The reward system was aimed at attracting and retaining Customers. The points were redeemable, meaning the Customer was allowed to exchange the accumulated points for commodities. The restriction placed against Employees holding Reward Cards was to avoid a situation where Employees would credit their own Cards at the expense of Customers, resulting in reputational damage to the Respondent. The Claimants schemed to subvert well known regulations and rules relating to the use of the Reward Cards.

They apportioned themselves points on Chege's purchase, without as much as seeking Chege's views, and contrary to the terms and conditions of use. The 1st Claimant was a Supervisor, and in a position of knowledge. Yet he involved himself in the irregularity, retaining a Reward Card crafted in the name of Rhoda Ndung'u. These were clearly valid and fair reasons to justify termination. Termination was based on valid reasons and was fair, in accordance with Section 43 and 45 of the Employment Act 2007.

28. The Claimants pray for 12 months' salary each for unfair termination. ***The Court shall grant them 3 months' gross salary for the procedural violation. Stephen Mihang'o Mwangi shall have Kshs. 48,300; Winnie Muthoni Kariuki Kshs. 31,398; and Nelson Wainaina Njuguna Kshs. 52,494, in compensation for unfair termination.***

29. They claim 1 month notice pay. ***The Court allows each Claimant 1 month basic salary in notice pay, in the following sums- Stephen Mihang'o Mwangi Kshs. 14,000; Winnie Muthoni Kariuki Kshs. 9,000; and Nelson Wainaina Njuguna Kshs. 14,000.***

30. The Respondent did not avail to the Court the annual leave records for the Claimants. Mr. Kahara testified he would not know if the Claimants went on annual leave, or were paid in lieu of leave. ***The Claimants are each granted 21 days' of annual leave at Kshs.13,003 for Stephen Mwangi Mihang'o; Kshs. 8,453 for Winnie Muthoni Kariuki; and Kshs. 14,133 for Nelson Wainaina Njuguna.***

31. The Claimants were not able to justify their claim for leave traveling allowance. No evidence was given to support the claim. No contract or wage order was shown to justify their claim for leave traveling allowance at the rate of Kshs. 2,000 per year. This claim is declined.

32. The claim for salary for days worked in November 2010 is merited. ***Stephen Mwangi Mihang'o is allowed 8 days' salary at Kshs. 4,954; Winnie Muthoni Kariuki is allowed salary for 2 days at Kshs. 805; as is Nelson Wainaina Njuguna at Kshs. 1,346.***

33. The 1st and 3rd Claimants state they were underpaid, and seek Kshs. 312,000 and Kshs. 8,394 in underpayments. They were both Supervisors. They did not give evidence or any material to the Court to support their claim for underpayments. They did not bring to the attention of the Court which wage order, for which specific year, they adopted in pursuing underpayments. The Court has no material to justify grant of this prayer.

34. The 2nd Claimant states she was entitled to maternity leave of 3 months. She was entitled to this leave under Section 29 of the Employment Act 2007. She did not show however, that she applied for leave, and the Respondent denied the application. Under Section 29 [4] she would only exercise this right if she gave the Respondent at least 7 days' written notice, which she has not demonstrated to the Court, she did. Her claim is rejected.

35. The claims for off-duty; overtime; and public holidays' overtime, were not given adequate support in evidence. The Respondent suggested the Employees were allowed 2 days of rest every month. They are shown to have overtime pay and general overtime separately, in their pay slips. These items consistently featured in the pay slips. The Claimants did not explain to the Court why additional overtime is payable. These items are declined.

36. The certificate of service is a right to all Employees under Section 51, unless the Employee has worked for less than 4 consecutive weeks. It is a statutory right, and should be given whether the Employee has left employment voluntarily, consensually or involuntarily. ***The Claimants shall have their certificates of service.*** In sum:-

[a] Termination was unfair on account of procedure;

[b] The Claimants shall, within 30 days of the delivery of this Award be paid by the Respondent the following amounts:-

1ST CLAIMANT STEPHEN MIHANG'O MWANGI

3 months' gross salary at Kshs. 48,300 in compensation; 1 month basic pay in lieu of notice at Kshs. 14,000; 21 days of annual leave at Kshs. 13,003; and 8 days' salary at Kshs. 4,954- total Kshs. 80,257.

2ND CLAIMANT WINNIE MUTHONI KARIUKI

3 months' gross salary at Kshs. 31,398 in compensation; 1 month basic salary in lieu of notice at Kshs. 9,000; 21 days of annual leave at Kshs. 8,453; and 2 days' salary at Kshs. 805- total Kshs. 49,656.

3RD CLAIMANT NELSON WAINAINA NJUGUNA

3 months' gross salary at Kshs. 52,494 in compensation; 1 month basic salary in lieu of notice at Kshs. 14,000; 21 days of annual leave at Kshs. 14,133; and 2 days' salary at Kshs. 1,346- total Kshs. 81,973.

[c] Certificates of service be issued forthwith; and

[d] No order on the costs.

Dated and delivered at Nairobi this 1st day of July 2014

James Rika

Judge