



**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 150 OF 2013**

*(formerly NAI Cause No. 2455/2012)*

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2014)

KENYA UNION OF PRINTING, PUBLISHING,

PAPER MANUFACTURES & ALLIED WORKERS ..... CLAIMANT

**-VERSUS-**

NATIONAL PRINING PRESS LTD ..... RESPONDENT

**JUDGMENT**

The claimant herein filed their memorandum of claim on 7.12.2012 on behalf of the grievant Rodgers Ravuma. The issue in dispute is the alleged wrongful termination of Rodgers Ravuma.

It is the grievant's case that he was employed by the respondent in 2002 as a binder at a salary of Ksh 3,910/= and a house allowance of Ksh 850/=. Before this appointment, the grievant had worked as a casual for 4 years from July 1998 in the same sector earning Ksh 248/= daily paid weekly. At the time of his termination on 17.10.2011, he was earning a salary of Ksh 7,586/= per month and a house allowance of Ksh 1,175/=.

On 17.10.2011, the grievant contents that he was verbally dismissed apparently for talking on the phone and it was around 2.05 pm as he came from lunch break. He was directed to collect his dues from the accountant.

The claimant union intervened and they held a meeting with the respondent on 25.10.2011 to deliberate over Mr. Rodgers Ravuma's dismissal. They failed to agree. On 4th November 2011, the union reported a trade dispute to the Kisumu District Labour Office. No agreement was reached. This prompted the claimants to report a formal trade dispute tot he Minister for Labour on 23.1.2012. A conciliator was appointed who called the parties to a joint conciliation meeting. A report was made by the conciliator - **App 4** recommending the reinstatement of the grievant or the reduction of the dismissal to normal termination with 6 months compensation for loss of employment. In cross-examination it appears that the grievant had 3 previous warnings before this incident.

The grievant called a witness, a union official who told court that the union has a valid Collective Bargaining Agreement with respondent and that the warnings that had been issued to grievant had expired as per their Clause 14. Further, the witness told court that whenever there was a problem between employer and employee, the shop steward was to be involved but in this case, no shop steward was involved. Furthermore he admitted that only 1 warning letter was valid in case of the grievant and that

the notice not to use phones during working period was never part of the Collective Bargaining Agreement. The respondent on the other hand filed their list of documents on 13.11.2013 through the firm of A. B. Patel & Patel Advocates. The respondents director also gave evidence in court and stated that the grievant was talking on the phone on 17.10.2011 at 2.15 pm against the company policy. He asked the grievant to explain himself but he refused and just walked away. That since grievant had previous warnings, they dismissed him and deposited his benefits with the District Labour Officer.

Upon considering evidence of the parties plus the accompanying submissions, the issues for determination are:-

1. **Whether the grievant committed an offence to warrant summary dismissal.**
2. **Whether due process was followed before grievant's dismissal.**
3. **Whether the grievant is entitled to prayers sought.**

As indicated in the Collective Bargaining Agreement between the claimant and respondent (*App 1*) **“In cases of dismissal, the Employment Act 2007 shall apply.”**

S. 44(4) of the Employment Act 2007 lists instances that are justifiable as lawful grounds to constitute summary dismissal and these includes:-

**“(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work,**

**(b) during working hours, by becoming or being intoxicated ---**

**(c) an employee willfully neglects to perform any work which was his duty to perform ---**

**(d) an employee uses abusing or insulting language ---**

**(e) an employee knowingly fails or refuses to obey a lawful and proper command ---**

**(f) in the lawful exercise of any power of arrest given by or under any written law**

**(g) an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence ---”**

Amongst the listed instances, the issue of talking on a mobile phone whilst not on duty is not listed. This may however be construed as unlawful in the context of refusing to obey a lawful order if this order has been given and has been explicitly explained.

There is no indication that talking on a mobile phone had been outlawed by the respondents and neither have the respondents demonstrated that they had issued any such command and also brought it to the notice of the grievant. In the absence of such notice, it was not proper to summarily dismiss the grievant. It is true that the grievant had previously been issued with 3 warnings in 2009 14th October, 22nd November 2009 and on 25th May 2011. The 1st 2 warnings had however expired when grievant was terminated because under Clause 14 of the Collective Bargaining Agreement:-

**“An employee who is guilty of an offence other than gross misconduct or other lawful cause of dismissal may be given a written warning which shall remain valid for a period of 12 months from the date of issue. If within the 12 months period the employee commits a similar or any other offence which does not warrant dismissal, he will be further warned in writing and entered in his employment record card and the two warnings shall remain valid for a period of 12 months period from the date of the 2nd warning ---”**

In the case of the grievant therefore, the 1st and 2nd warnings expired in November 2010. The grievant could not therefore be summarily dismissed for the reasons above. He was therefore expected to be

subjected to due process before being terminated. The process expected is as provided under S.41 of the Employment Act 2007 which states that:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

Since the grievant was not given the hearing expected before being terminated, his termination was unjustified and unfair and therefore null and void.

In the premise, I find that the grievant is entitled to the following prayers which I therefore grant:-

1. **Gratuity payment of 13 years equivalent to 15 days per each year worked =  $15/30 \times 7580 \times 13 = 79,590/=$**
2. **Salary for days worked in the month of**  
  
**October 2011 – 17 days = 4,295/=**
3. **House allowance for 17 days = 482/=**
4. **Notice pay of 1 month = 7,580/=**
5. **12 months pay as compensation for wrongful termination;  $12 \times 7,580 = 90,960/=$**

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**TOTAL PAYABLE = KSH 182,907**

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6. **Claimant be issued with a certificate of service. Respondents to pay costs of this suit.**

**HELLEN S. WASILWA**

**JUDGE**

**17/9/2014**

**Appearances:-**

Njeri for claimant present

Respondents absent

CC. Wamache