



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1386 OF 2011

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VS

VAJA'S MANUFACTURERS LIMITED.....RESPONDENT

AWARD

Introduction

1. The dispute in this case emanates from the termination of employment of Joseph Itinga Wambua, the Grievant herein. The Claimant filed a Memorandum of Claim on 12th August 2011 in response to which the Respondent filed a Memorandum of Reply on 25th October 2011 and the matter was heard on 24th July 2014. The Grievant testified for the Claimant and the Respondent called its Production Manager, David Njoroge Wanjiru, David Otieno, an embroidery printer and the Human Resource Manager, Christopher Ndambuki.

The Claimant's Claim

2. According to the Claimant, the Grievant was employed by the Respondent on 1st September 2001 in the position of Printer at an initial monthly salary of Kshs. 6,278 which was progressively increased to 7,312.

3. On 16th/17th March 2010, the Grievant was working on a night shift running from 5.00 pm to 7.45 am. Wambua was instructed by his supervisor, a Mr. Njoroge to collect 196 Coca Cola body tops from the store for printing. He however inadvertently collected 450 pieces leading to overproduction by 254 pieces. As a result, the Grievant was summarily dismissed on 19th March 2010.

4. The Claimant states that the Grievant had no prior disciplinary issue and asks that the summary dismissal be commuted to normal termination. The claim is tabulated as follows:

- a. 2 months' notice pay.....Kshs. 18,424
- b. Unpaid wages (19 days).....3,937
- c. Leave pay (25 days).....7,312
- d. Leave traveling allowance.....2,400
- e. Service gratuity (10 years).....56,400
- f. Arrears(1/8/2008-10/3/2010).....3,752
- g. House allowance for 20 months.....4,000
- h. 12 months' wages in compensation for unfair termination.....87,744

The Respondent's Reply

5. In its Reply, the Respondent admits having employed the Grievant as a general work effective 1st September 2001 at a salary of Kshs. 6,278. The Grievant was deployed in the Screen Printing Section as a helper. On 16th March 2010, while on night shift, the Grievant was given a movement card for printing of 196 pieces of Coca Cola body tops. The Grievant's job entailed collecting the pieces to be printed from the store and handing them over to the printers. He would thereafter take the printed products to the next department.

6. The Grievant did not follow the instructions as given and instead collected and issued 450 pieces leading to overproduction by 254 pieces and consequential loss of Kshs. 88,392. On 17th March 2010, the Printing Coordinator, a Mr Njoroge reported the matter to a Mr. Shaheer. A disciplinary hearing was held on 18th March 2010 with the Grievant and David Otieno, an Assistant Shop Steward in attendance. The Grievant was thereafter dismissed. He was paid his terminal dues on 7th May 2010.

Findings and Determination

7. The issues for determination in this case are as follows:

a) Whether the termination of the Grievant's employment by way of summary dismissal was justifiable and fair;

b) Whether the Grievant is entitled to the reliefs sought.

The Termination

8. The Grievant's dismissal letter dated 19th March 2010 states *inter alia*:

“This has come to the notice of the management, after you were issued with a job card for Coca Cola T-shirts and also explained to you, you went ahead and issued more garments than required (two hundred and fifty four pieces in total) valued at Kshs. 88,392/-. Further to that, you did not have the courtesy of reconfirming the same from preproduction staff who also called you to enquire of any problem you might be facing. Previously, there is also another issue of twenty extra pieces valued at Kshs. 7,656.(sic)

As per memorandum of agreement on terms and conditions of service between the management and the tailors and textiles workers union clause 1.20 subsect c & e of summary dismissal which reads “(c) If an employee, willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully, and properly; (e) If, an employee knowingly fails, or refuses to obey any lawful and proper command which it was within the scope of his duty to obey, issued by his employer or any person placed in authority over him by his employer.

In that, you have subjected the company to a big loss. This is a gross misconduct on your part and the management has no alternative but to inform you, you are summarily dismissed from employment.(sic)

C.K. NDAMBUKI

FOR DIRECTOR”

9. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract , the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the

time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. In the case of *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR* this Court held that:

“The burden on the employer imposed by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate the employment of an employee”.

11. It was common cause that the Grievant issued more pieces for printing than required and David Otieno who attended the Grievant's disciplinary hearing in his capacity as Shop Steward told the Court that he asked that the Grievant be given another chance. The Respondent however made the decision to summarily dismiss the Grievant stating that he had committed a similar mistake in the past.

12. I have looked at the circumstances leading to the Grievant's summary dismissal and have formed the opinion that although the Respondent had a valid reason for terminating the Grievant's employment, there were mitigating factors that ought to have been considered in determining the nature of termination.

13. First, as shown in the Movement Card and confirmed by David Njoroge Wanjiru, the original order was for 450 pieces and 254 were printed during the day shift, leaving a balance of 196 to be printed during the night shift. The Grievant's mistake was therefore his failure to discount the pieces printed during the day. In my view, this error though causing the Respondent significant loss was not remote.

14. Second and more importantly, the Court did not find any intention on the part of the Grievant to defraud the Respondent. Consequently, I find the summary dismissal meted on the Grievant too harsh and convert it to normal termination.

Relief

15. Upon converting the Grievant's summary dismissal to normal termination, I direct the Respondent to calculate and pay him all his terminal dues, including notice pay and accrued salary arrears, as provided in the Collective Bargaining Agreement dated 18th March 2010. The said dues shall be paid to the Grievant through the Claimant within the next 30 days from the date of this award.

16. Each party will bear their own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF OCTOBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngatia (Union Representative) for the Claimant

Mr. Ouma for the Respondent