



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 21 of 2012

**KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS
AND ALLIED
WORKERS.....CLAIMANT**

-VERSUS-

**TIMBER TREATMENT INTERNATIONAL
LIMITED.....RESPONDENT**

JUDGMENT

The claimant **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers** filed the memorandum of claim on 9.02.2012. The claimant filed the claim on behalf of its member **Linet Khasiro Mabele**, the grievant in this cause. The claimant made the prayers that:

- a) **the court to find that the termination of the grievant was wrongful;**
- b) **the respondent be convicted for violation of Section 51 of the Employment Act, 2007;**
- c) **the grievant be reinstated without loss of benefits as per conciliator's recommendation for the remedies in section 49 of the Employment Act, 2007; and**
- d) **the respondent to pay costs of the cause.**

The respondent Timber Treatment International Limited filed the memorandum of response on 27.05.2012. The respondent prayed that the claim be dismissed with costs.

The case came up for hearing on 22.02.2013. The claimant relied on the documents on record and did not call a witness. The respondent called one witness, **Jane Nyakio**, the respondent's Personnel Assistant. The facts of this case are as follows.

The grievant was employed by the respondent on 8.10.2007 as a Laboratory Assistant and at her termination she was earning a gross salary of Ksh.8,262.76. On 24. 02. 2011 the grievant reported on duty and proceeded for lunch at her house during the lunch hour. She was entitled to break for lunch under her terms of service and that entitlement was not disputed. While at her house for lunch, she was called to attend to an injured casual worker in the employment of the respondent. The casual worker had sustained a serious injury on his small toe of the right foot and the grievant was called to administer first aid to restrain loss of blood while the management arranged to transport the injured to hospital.

In response to the call, the grievant rushed to the scene of the accident and found the injured staff had

been rushed to hospital. Appendix 1 on the memorandum of response being proceedings of the medical board that examined the injured staff one **Kefas Kasibwa Mukunza** aged 21 years reported that the small toe of the right foot crushed leading to total loss of the fifth toe and the board recommended 2% compensation.

In view of the occurrence, the respondent addressed the grievant the internal memorandum dated 25.02.2011 being appendix 1 on the memorandum of claim. It stated as follows:

“On 24th February, 2011 you were asked to give first aid to assist staff injured at work and you neglected to act. It has been noted that you always disagreed with your colleague Ms. Consolata Bor whenever at work place.

Please note that the company has used its resources to train you to assist on first aid in case any staff is injured around the company before being taken to hospital. Note also that the company core value is to work as a team at all time. Refer to personnel policy and procedure manual 2011 clause 2.4.

The company has therefore treated the above breach of company rules and an act of being unmindful of other people welfare. You are required to explain in writing why disciplinary action should not be taken against you within 48 hours. Meanwhile you remain suspended from your duties for one week as the company investigates on this matter.

Please handover any company material, equipment or keys to the production officer.

Yours faithfully,

Signed

SHASHIRAJ

GM-TECHNICAL”

The grievant replied by her memorandum dated 28.02.2011 being appendix 2 on the memorandum of claim. She denied negligence on her part, that she had no disagreements with the mentioned Bor, and that on the material lunch hour she had been called and she promptly attended to the call. On arrival at the scene, she explained in the letter, the injured staff had been taken to hospital under the care of her colleague, one **Sawe Job**. Thus, she further explained, she had not breached any company policy as alleged because, despite it being lunch hour, she had showed hospitality and concern by rushing to the factory to salvage the situation. She requested for fair play, equity and a discussion to resolve the issue.

By the memorandum dated 3.03.2011 being appendix 3 on the memorandum of claim, the respondent rejected the grievant’s explanation and required her to show cause why disciplinary action could not be taken against her within 48 hours. The grievant repeated her explanation in her memorandum of 7.03.2011 being appendix 4 on the memorandum of claim. She explained in that memorandum that the allegation of negligence was not true because she had left for lunch without any knowledge that a staff had been injured; that she had been assured by her colleague that the injured staff had been taken to hospital under good care; and since she trained as a first attendant she had done her work honestly and would continue to work as expected.

The claimant arranged a meeting to discuss the case on 18.03.2011 but the respondent was busy and the meeting did not take place. Another meeting was arranged on 25.03.2011 which was attended by the representatives of the claimant in absence of the grievant. There is no evidence on record that the grievant was invited to attend the meeting. By the letter dated 31.03.2011 addressed to the grievant by the respondent and being appendix 7 on the memorandum of claim, the respondent stated that the grievant had failed to attend a scheduled meeting and her services were thereby terminated with immediate effect. The termination letter stated that the grievant’s actions may have called for summary dismissal but the

respondent had , on humanitarian grounds, decided to reduce it to termination with notice so that less her liabilities to the respondent, she would be entitled to:

- a) **one month salary in lieu of notice being Ksh.11,265.70 as per clause 19(i) of the collective agreement;**
- b) **gratuity for three years served being Ksh.24,788.15 as per clause 19(iv) of the collective agreement; and**
- c) **any outstanding leave days.**

The parties appeared for conciliatory proceedings before the Ministry of Labour but no amicable resolution of the dispute was arrived at. In the meantime, the respondent addressed the grievant the letter dated 30.01.2012 produced by the respondent's witness and marked **R1**. The respondent informed the grievant that in view of the conciliatory proceedings and in an effort to resolve the dispute amicably, the respondent would pay the claimant **Ksh.130,766.20** being one month pay in lieu of notice Ksh.11,257; house allowance 3,180; gratuity for 3 years service of Ksh.33,771; 12 months wages compensation of Ksh.135,084; and less Ksh.52,525.80 comprising house rent Ksh.3,000, tax of Ksh.49,005.80, NSSF Ksh.200 and NHIF Ksh.320.

Taking into account the evidence, the documents on record and the submissions made for the parties, the court makes the following findings:

1. The respondent did not have a genuine reason for terminating the employment of the grievant. The event leading to termination, namely alleged failure to render assistance by way of first aid to an injured staff, was not proved to have been true; is not something that was in existence as misconduct attributable to the grievant at the time of termination. The grievant interrupted her lunch as a gesture of dedication to duty but by the time she arrived, the injured person had already been taken to hospital. It is not therefore true that the grievant refused to render assistance. The dismissal was unfair under **section 43 of the Employment Act, 2007** because the respondent has failed to prove the reason for the termination. Further, whereas the respondent notified the grievant the alleged misconduct and the relevant particulars, the court finds that the respondent failed to accord the grievant a hearing as envisaged under subsection 41(2). In this case the claimant union requested for and scheduled meetings with the respondent to discuss the issues. There is no evidence that the respondent took deliberate steps to invite the grievant for a hearing. The court finds that the employer does not discharge the statutory duty to hear the employee as provided for under **section 41 of the Act** unless it is shown that the employer took deliberate steps to accord the employee the opportunity to be heard. The employer under that section is required to undertake an administrative process of hearing the employee and the employer does not discharge that statutory obligation in reliance upon meetings and proceedings convened by third parties. Thus, the court finds that failure on the part of the employee to attend such meetings convened or arranged by third parties and in absence of an invitation by the employer for hearing the employee in view of alleged misconduct, poor performance or ill health does not amount to refusal by the employee to attend the statutory hearing as prescribed under section 41 of the Act. Thus, in this case, the court finds that the termination was unfair and the claimant is entitled to compensation of Ksh.130,766.20 as admitted and offered by the respondent. As the respondent did not explain the deduction of Ksh.3,000 house rent, the court finds that the grievant's entitlement is **Ksh.133,766.20**.

2. The second issue for determination is whether the grievant is entitled to reinstatement. It was submitted for the claimant that the grievant should be reinstated because the termination was unlawful and unfair. That the grievant was pregnant at all material time and she had been discriminated. Being a mother at 29 years of age, it was submitted that she should be reinstated because she was entitled to work and provide basic needs to her family. For the respondent it was submitted that there was no discrimination on account of pregnancy because, the fact of pregnancy was not known to the respondent. The court has considered the evidence and it has not been established that the grievant's removal was actuated with discrimination on account of pregnancy or participation in union activities. However, the court also finds that the grievant was blessed with an issue in the short term after

the termination and, but for the termination, she would be entitled to three months maternity leave with full pay as provided for in **subsection 29(1) of the Employment Act, 2007**.

The grievant worked for three years with dedication and a clean record. She was removed from employment without due process and unfairly. The respondent terminated the contract of employment in breach of **sections 41 and 43 of the Employment Act, 2007**. She is willing to continue in employment. She did not contribute to her termination in any manner. The grievant is a youth and there is every opportunity to secure alternative employment. To balance justice for the parties, the court finds that the grievant is entitled to reinstatement from 1.04.2011, a day after the effective date of termination to 28.02.2013, the last day of the month of this decision making a total of 22 months. The court awards the grievant **Ksh.181,780.72** at the rate of Ksh.8,262.76 monthly salary for the 22 months. The court further finds that the award sufficiently takes care of the three months paid maternity leave that the grievant was entitled to during the period of the reinstatement.

In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, **“(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;”**. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.

The court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** where it was stated thus,

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”[\[1\]](#)

In the present case, the court has considered the youthfulness of the grievant and the opportunity to get alternative employment subsequent to the partial reinstatement during the suspension and pending the conclusion of the conciliatory and subsequently these legal proceedings. Accordingly the remedy of partial reinstatement through payment of the proportionate salaries is considered a just remedy in the circumstances of this case.

The respondent's witness informed the court that the company was performing poorly and the office held by the grievant was not available to be filled by the grievant upon reinstatement. On the issue of unavailability of the office, the court upholds its opinion in **Patrick Njuguna Kariuki – Versus – Del Monte (K) Limited** where it was found that the employer must show that the Director of Employment had been notified as evidence of valid exercise, by the employer, of the power to create or abolish offices as well as the power to perform related human resource functions by the employer. In that case the court stated as follows,

“On the issues of whether the office of logistics and warehouse manager has been abolished, and whether the office is vacant, the court finds that the evidence provided at the hearing and the materials presented to support and oppose the application show that the office has neither been abolished nor filled since the claimant was appointed and subsequently removed from holding it. In considering the evidence and the submissions by the parties, the court has been guided by the provisions of the Employment Act, 2007. Sections 76 and 77 of the Act provide as follows: ‘76. (1) *This Part shall apply to an employer who employs twenty-five employees or more.*

(2) *An employer shall notify the Director of every vacancy occurring in his establishment, business or work place in a prescribed form giving the following details—*

- (a) *the employer's name and full address;***
- (b) *details of the vacant post;***
- (c) *minimum qualification required of the person seeking to be employed;***
- (d) *the place of work, and***
- (e) *the type of work, whether casual, permanent or term contract; and***
- (f) *such other information as the Director may require.***

(3) *A vacancy shall be deemed to occur on the date-*

- (a) *an employer creates a post to be filled by an employee or decides to engage one.***
- (b) *an employee terminates or has his employment terminated by the employer and the employer abolishes the post.***

77. *When a post, which has been notified to the Director as vacant, has been filled or has been abolished before being filled, the employer shall notify the employment service office of this in writing within two weeks of the filing of the post or of its abolition, as the case may be.*

In view of the provisions quoted above, the court finds that a vacancy occurred when the claimant was terminated from employment and the filling or abolition of the office required notification to the Director by the respondent as envisaged in the provisions. The court is of the opinion that the notification by the affected employers to the Director has the consequence of enabling the Government in the wider sense as including the Judiciary, the Executive and the Legislature to take charge and perform their respective functions in matters of employment. Thus, matters of creation of office, abolition of office, appointment and termination of employment are all functions that the law requires the employer to notify the Director as provided for failing which, the employer's

exercise of those functions would be brought to question. In the opinion of the court, failure to prove the notification will lend the court to a finding that the employer has not exercised the entitlement with respect to any of the functions for otherwise, the exercise would be arbitrary and outside the express statutory regulation.”[2]

Nevertheless, as found by the court, taking into account the age of the grievant and her capacity to get alternative employment, partial reinstatement through payment of the proportionate dues for the period pending determination of dispute on the propriety of the termination, will serve the ends of justice in the instant case. The court finds the grievant entitled to that extent.

(3) The final issue for determination is whether the respondent should be convicted for alleged contravention of section 51 of the Employment Act, 2007. First the court finds that the parties did not submit on that prayer and they are deemed to have abandoned it. Secondly, the court considers that the criminal process must not be merged with the process for the civil remedies as was done in the present case. The court finds that alleged crimes under the employment and labour relations statutes must be initiated and prosecuted in accordance with the constitutional and statutory provisions governing criminal proceedings. The constitutional provisions of Article 49 on rights of arrested persons and Article 50 on the right to fair hearing as well as the provisions of the Criminal Procedure Code on the drawing and prosecution of criminal charges will apply to such alleged crimes. Indeed, under **section 20 of the Industrial Court Act, 2011**, this court is entitled to act without due regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters. Accordingly, the court finds that it was an abuse of the process of the court for the claimant to have prayed for a conviction for alleged contravention of **section 51 of the Employment Act, 2007** and the claimant is not entitled as prayed.

In conclusion, judgment is entered for the claimant against the respondent for:

- a) **a declaration that the termination was unfair and the claimant is entitled to compensation for unfair termination and partial reinstatement from 1.04.2011, a day after the effective date of termination to 28.02.2013, the last day of the month of this decision, making a total of 22 months;**
- b) **the respondent to pay the grievant a sum of Ksh.315,546.92 plus interest at court rates from the date of the judgment till full payment;**
- c) **a declaration the grievant is entitled to a certificate of service; and**
- d) **the respondent to pay costs of the cause.**

Signed, dated and delivered in court at Nakuru this Wednesday, 27th February, 2013.

**BYRAM ONGAYA
JUDGE**

[1] No. 44 of 2011 at Nairobi

Page 37 of court record of the Judgement, Industrial Cause

[2] Pages 3 and 4 of the Industrial Court of Kenya Ruling delivered on 17.12.2012, Cause No. 953 of 2011 at Nairobi.