REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 32 of 2012

TAILORS AND TEXTILE WORKERS UNION.............CLAIMANT

-VERSUS-

SPIN KNIT LIMITED...RESPONDENT

JUDGMENT

This is the judgment in the case of the claimant **Tailors and Textile Workers Union** and the respondent **Spin Knit Limited**. The claimant filed the memorandum of claim on 21.09.2011 on behalf of its member **Peter Manwa Obwogi**, the grievant. The respondent filed the memorandum of reply on 27.07.2012. On 6.12.2012 both parties were represented in court when the court made an order for hearing of the case at Nakuru on 26.02.2013.

On 26.02.2013, **Mr. R. M. Muthanga** representing the respondent in this case did not attend court. **Mr. Wycliffe Omondi** representing the claimant attended court ready to proceed with the hearing on the basis of the documents on record. In view of unexplained absence of the respondent, the court directed the hearing to proceed ex parte.

The claimant has prayed for judgment against the respondent in favour of the grievant for:

a) **accrued house allowance----------Ksh.2,200.00;**

b) **leave for 2 years--------------------Ksh.11,600.00;**

c) **gratuity------------------------------Ksh.19,699.60;**

d) **notice---------------------------------Ksh.17,400.00;**

e) **salary arrears-----------------------Ksh.29,000.00;**

f) **leave traveling allowance----------Ksh.4,700.00;**

g) **night shift allowance 2 years----Ksh.20,000.00;**

h) **acting allowance 2 years ---------Ksh.17,400.00;**

i) **twelve months compensation ---Ksh.69,600.00;**

j) **certificate of service;**

k) **costs and interest; and**

l) **Total-------------------------------Ksh.191,599. 60.**

The respondent pleaded that the claim was unjustified and prayed that it be dismissed as the respondent had paid the grievant the correct terminal dues.

The parties have concluded a recognition agreement being appendix 1 on the memorandum of reply and is not disputed that at the material time they were bound by a valid collective agreement being appendix 1 on the memorandum of claim. **Appendix 3A** on the memorandum of claim is a letter dated 4.07.2008 confirming that the grievant was employed as a machine operator effective 2002 at a gross salary of Ksh.5,691.00 per month. The letter stated the terms of employment as casual. Appendix 2 on the memorandum of reply is a letter of casual appointment of the grievant signed on 4.12.2006 and the grievant electing to be paid his wages every six days and undertaking that the casual appointment in no way qualified him for permanent employment. His daily wage was stated as Ksh.229.00. It further stated that his duties had been explained to him by the management.

By the letter dated 23.10.2008 being **appendix 4** on the memorandum of claim, the respondent summarily dismissed the grievant on account of unacceptable written explanation for failing to report to the shift supervisor on 14.10.2008 any mechanical fault on the yarning machine. The letter further charged that the grievant on that date while working on the 3rd shift, 455 spindles of yarn were damaged causing a great loss to the respondent. The respondent treated that as gross misconduct and dismissed the grievant effective 23.10.2008. He was to be paid his final dues, if any, upon clearing with the company.

The pertinent issues for determination and the court's findings in this case are as follows:

1. The first issue for determination is the effective date of employment of the grievant. The court finds that the effective date of appointment of the grievant was effective 2002. The court in making that finding has taken into account **appendix 3A** on the memorandum of claim being the letter dated 4.07.2008 confirming that the grievant was employed as a machine operator effective 2002 at a gross salary of Ksh.5,691.00 per month.

2. The second issue for determination is whether the termination was unfair. The court finds that the termination was unfair. The claimant was dismissed without any notice hearing and as the court has held in previous similar cases, affording the employee a hearing even in cases of gross misconduct is a mandatory statutory requirement. Thus, in **SHANKAR SAKLANI -VERSUS- DHL GLOBAL FORWARDING (K) LIMITED, Industrial Court Cause No. 562 of 2012 at Nairobi,** this court stated thus,

"Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract."

This court has upheld that opinion in subsequent cases including **Naomi J. Morogo – Versus – Valley Hospital Limited**, in which the court stated, thus

"**In making this holding, the court has been guided by the provisions of Article 47 of the constitution which provides that every person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, the Article provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The court finds that in the instant case the Claimant's livelihood which depended on her employment was at stake. The decision to terminate her employment obviously had serious adverse consequences and the Respondent was bound under the provisions of Article 10 on national values and principles of governance to uphold the Claimant's right to fair administrative action."**[1]

In this case, it was submitted for the claimant that the reason for termination was not genuine because the grievant had already reported the damage on the machine in issue in the disciplinary case that the respondent preferred against the grievant. The court was referred to appendix 6 on the memorandum of claim being a letter dated 13.06.2011 by the respondent and addressed to the District Labour Office. In that letter the respondent had enumerated the events leading to the termination of the grievant as follows:

"a) On October 14, 2008 while performing his normal duties during 3rd shift at the Ring Frame Machine No. 3 Mr. Obwogi failed to report to his supervisors the damage of the yarn due to the machine's mechanical problem.

b) Initially, Obwogi had been made aware that the machine had a problem of spoiling the yarn and therefore he was under instructions to report to his shift supervisor any malfunctions, immediately, since this machine was behaving inconsistent and was under observation. The above instructions were given to all machine attendants.

c) On October 23, 2008 a meeting was held concerning this matter and Mr. Obwogi admitted in the presence of the union chief shop steward that he never informed any senior person on duty the about the malfunction of the said machine. Thus, he was irresponsible by leaving his shift without reporting the said incident to his immediate supervisor as required by company rules and regulations."

It was submitted for the claimant that the respondent knew that the machine malfunctioned and it was unfair to charge the grievant for failure to report the fault which was known to the respondent as relevant reports had been made. Of defective operational systems and policies, this court stated in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** as follows,

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."[2]

The court upholds that opinion and finds that in the present case the respondent maintained a faulty machine even after reports of the same had been made. Thus as submitted for the claimant the reason for termination was not valid as envisaged under **section 43 of the Employment Act, 2007**. It was unfair and unlawful as the respondent was not entitled to visit adverse consequences upon the grievant arising from

the respondent’s maintenance of defective operational systems, namely, a reported faulty machine. The court further finds that the grievant is entitled to twelve months gross salaries as compensation for the unfair termination being **Ksh.68,292** at the rate of Ksh.5,691 per month.

3. The next issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

a) There was no evidence and justification for acting allowance as well as the house allowance and the court finds that the claimant is not entitled as prayed.

b) The claimant dropped the claim for salary arrears during the submission on the ground that the respondent had already paid the same to the grievant and the court finds that the claim has been settled.

c) The respondent has pleaded that the grievant is not entitled to gratuity as pleaded because he was a member of the National Social Security Fund. Further the respondent has pleaded that clause 27 of the collective agreement providing for gratuity applied to permanent staff with over five years service; the grievant, the respondent pleaded, was a casual worker and therefore not entitled under the clause. There is no dispute that the claimant was a member of the Fund. The court has also found that the grievant was employed effective 2002 and terminated in October, 2008 at a time when the Employment Act, 2007 had come into operation. Section 2 of the Act provides that **“casual employee”** means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time. The grievant was engaged without break since 2002 and was paid initially every six days and at some point up to termination date, on monthly basis. **Subsection 35(5)** entitles an employee to service pay for every year, terms of which shall be fixed. **Subsection 35(6)** precludes application of the section where an employee is, *inter alia*, a member of the Fund. In this case the grievant was a member of the claimant and bound by clause 27 on gratuity. It is the court’s considered opinion that where an employee is entitled to more than one provision for gratuity or service pay, the employee shall be deemed to be entitled to the most favorable provision. In this case the parties in clause 27 of the collective agreement agreed to fix rates of gratuity and the respondent was alert to the grievant’s membership to the Fund and the obtaining statutory obligations. The court finds that the gratuity as fixed by the agreement of the parties was deliberately intended to confer the employees’ better separation payment in addition to the benefits from the Fund. The court holds that **subsection 35(6) of the Act** does not preclude parties to an employment contract from negotiating, agreeing to and enforcing service pay that is better and more favourable than is protected under section 35 of the Act. Accordingly the court finds that the grievant is entitled to **Ksh.19,699.60** as prayed for and on the basis of clause 27 of the collective agreement.

d) The court finds that in absence of any denial of the claim for payment in lieu of 2 years annual leave and leave travel allowance, the grievant is entitled to a sum of **Ksh.16,300** as prayed for.

e) The claimant is entitled to the prayer for a certificate of service.

The respondent pleaded that the grievant had been a party in civil suit **No. 472 of 2009** in the Chief Magistrate’s Court at Nakuru which was dismissed which was dismissed on 3.05.2011 for want of prosecution. The court finds that that suit did not operate as bar to this cause as it was not heard on merits and at the time of filing that cause, the Industrial Court in existence, as was then established, and not the magistrates court had jurisdiction to hear and determine the dispute as per **subsection 47(3) of the Employment Act, 2007** and **section 12 of the Labour Institutions Act, 2007** (now repealed). In view of the findings, it is the holding of the court that the doctrine of ***res judicata*** will not apply in this case where the previous proceedings were not before a court with competent jurisdiction to hear and determine the dispute in issue.

Finally the court finds that the alleged discharge voucher being appendix 12 on the memorandum of reply was inconclusive as the respondent subsequently admitted as much by agreeing to pay more beyond the intended final discharge. By its conduct the respondent waived the conclusive effect of the discharge which thereby served no useful purpose in the circumstances of this case.

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

a) **a declaration that the termination of the employment relationship was unfair;**

b) **the respondent to deliver to the grievant the certificate of service;**

c) **the respondent to pay the grievant a sum of Ksh.104291.60 plus interest at court rates from the date of judgment till full payment; and**

d) **the respondent to pay costs of the case.**

Signed, dated and **delivered** in courtat **Nakuru** this **Wednesday, 27th February, 2013.**

BYRAM ONGAYA
JUDGE

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[1] Pages 6 to 7 of the Judgment, Industrial Court of Kenya cause No. 3 of 2013 at Nakuru formerly Nairobi Cause No. 588 of 2012.

[2] Page 35 of court record in the Judgment, Industrial Cause No. 44 of 2011 at Nairobi.