



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 516 of 2010**

**KENYA UNION OF JOURNALISTS AND ALLIED WORKERS..... CLAIMANT**

**-VERSUS-**

**BRITISH BROADCASTING CORPORATION.....RESPONDENT**

**AWARD**

The Claimant union the **KENYA UNION OF JOURNALISTS AND ALLIED WORKERS** filed a dispute against the Respondent **BRITISH BROADCASTING CORPORATION MONITORING EAST AFRICA UNIT** for the unlawful dismissal of their members **MR. LEONARD KAHARA** the 1<sup>st</sup> Grievant and **ERIC MBUGUA** the 2<sup>nd</sup> Grievant. The Claimant submitted that it has a recognition agreement with the Respondent and has negotiated a collective bargaining agreement covering a period of 2 years from 1<sup>st</sup> August 2009 to 31<sup>st</sup> July 2011. The parties did not agree on 6 clauses of the agreement and the same is pending before Court for adjudication as Cause No.21N of 2010.

The Claimant's case is that the 1<sup>st</sup> Grievant was employed on 4<sup>th</sup> April 2000 as a cook at a salary of Shs.35,846 and transport allowance of Shs.37,312 making a gross salary of Shs.73,158. He was dismissed on 24<sup>th</sup> March 2009. The Claimant tried to fix a meeting with the respondent to discuss the issue but the meetings did not materialize due to lack of commitment by the Respondent. The Claimant reported a dispute to the Minister for Labour who accepted the dispute and appointed a conciliator. The parties failed to reach agreement during conciliation thereby necessitating the reporting of the dispute to Court. The Claimant alleges that the Grievant was never given an opportunity to defend himself, and the dismissal was unfair.

They seek re-instatement or in the alternative that the dismissal is reduced to normal termination, payment of salary for March 2009, pay in lieu of notice and compensation in the sum of 12 months' salary all totaling to Shs.1,009,580.40. The respondent filed a Memorandum of Defense on 15<sup>th</sup> July 2010 in which it alleges that the Claimant was lawfully terminated as there was valid reason for termination of the 1<sup>st</sup> Grievant's employment.

The Claimant's case for the 2<sup>nd</sup> Grievant ERIC MBUGUA is that he was employed on 1<sup>st</sup> September that he was employed on 1<sup>st</sup> September 2006 as a cleaner and gardener, and was terminated on 25<sup>th</sup> March 2009 after serving the respondent for 2 years. At the time of termination the 2<sup>nd</sup> Grievant was earning a basic salary of Shs.19,054/=. In addition he was paid transport allowance of Shs.2,600 and leave pay of Shs.728/= making a gross pay of Shs.22,383/= per month.

The 2<sup>nd</sup> Grievant was aggrieved by the decision to terminate his employment and reported the matter to

the Claimant union. The union's efforts to meet with the employer to discuss the matter were unsuccessful compelling the union to report a dispute to the Minister for Labour. The Minister appointed a conciliator who was not able to settle the dispute leading to the filing of the case before Court for adjudication.

The claim on behalf of the 2<sup>nd</sup> Grievant is that the Respondent did not comply with the provisions of Section 35, 36, 37 and 45 of the Employment Act 2007, that the 2<sup>nd</sup> Grievant was not given reasons for his termination and that the Respondent employed another person to take over the 2<sup>nd</sup> Grievants job.

The Claimant prays for the following orders on behalf of the 2<sup>nd</sup> Grievant:-

- (a) Re-instatement without loss of benefit
- (b) In the alternative, payment of the following
  - (i) 12 months' salary for wrongful/unlawful termination, Kshs.268,584/=.
  - (ii) 1 months' salary in lieu of notice – Kshs.22,382/=.
  - (iii) Unpaid salary up-to and including 25<sup>th</sup> March 2009 – Kshs.18,651.70 making a total claim of Kshs.309,617.70.

The respondent in its Memorandum of Defence deny that the 2<sup>nd</sup> Grievant was unlawfully terminated. The respondent alleges that the 2<sup>nd</sup> Grievant was engaged in October 2006 on a contract for services of cleaning and gardening at an hourly rate of Kshs.55/=, that the arrangement ended on 25<sup>th</sup> March 2009 and he was paid all the dues. That in addition he was paid 1 month's salary. That he never complained about unfair termination until 8 months later when the Respondent received communication from the Labour Office. The Respondent submits that the 2<sup>nd</sup> Grievant was paid in lieu of notice, leave and public holidays, that he took all the money without complaint. The Respondent further submits that the 2<sup>nd</sup> Grievant was aware that he was an independent contractor and that he never suffered wrongful termination.

The Respondent submitted that the dispute is wrongly before this Court, is frivolous, vexatious and without merit. The Respondent urged the Court to dismiss the claim with costs.

I have read the pleadings and the Court record. The issues for determination are whether the 2 Grievants **MR. LEONARD KIHARA** and **MR. ERIC MBUGUA** were fairly dismissed or terminated.

I will consider each case separately.

#### **1. LEONARD KIHARA**

The Claimant seeks the following orders:-

- (a) Re-instatement or in the alternative
- (b) 12 months compensation
- (c) 1 month's notice
- (d) Salary up-to 24<sup>th</sup> March 2009

#### **Re-instatement**

The Grievant was dismissed from employment on 24<sup>th</sup> March 2009. He had worked for a period of 9 years. The Industrial Court Act 2011 does not permit re-instatement of an employee who has been out of employment for more than 3 years.

In any event the grounds up-to which the Grievant was dismissed was on grounds of irregularities and fraud. I find that this is not a suitable case for re-instatement.

### **Compensation**

The Claimant has alleged that the grievant was not given an opportunity to defend himself. There is no evidence that the Grievant was given a hearing in terms of Section 41 of the Employment Act 2007 and the respondent's Employee handbook at Paragraph 12.

I therefore find that the Claimant was unfairly dismissed. I however do not think he is entitled to full compensation. I have also noted that the Grievant signed a discharge from stating that he accepts the dismissal and have no further claims against the respondent and further that he was paid salary up-to the month of April which was more than one month after his dismissal.

I therefore grant him 2 months gross salary as compensation for unfair dismissal.

#### **c. 1 months Notice**

*The payslip attached as Appendix KL 1 to the Claimants Memorandum is a payslip for the month of April 2009. The letter of dismissal is dated 24<sup>th</sup> March 2009. The respondent has submitted that the salary for April constituted the notice pay. This is not disputed by the Claimants.*

*I therefore find that the Grievant is not entitled to pay in lieu of notice as the same was paid.*

#### **d. Salary up-to 24<sup>th</sup> March 2009**

*The payslip referred to above was for the full salary for April 2009. I find that the salary for March 2009 was paid to the Grievant.*

*In summary the claim for re-instatement, pay in lieu of notice and salary for March 2009 are dismissed. The Grievant is however awarded the sum of Shs.146,316 being 2 months' salary.*

## **2. ERIC MBUGUA**

The Claimant seeks the following orders in respect of Eric Mbugua:-

- a. Re-instatement or in the Alternative.
- b. 12 months compensation.
- c. 1 months' salary in lieu of notice
- d. Unpaid salary for March 2009

As in the case of the 1<sup>st</sup> Grievant, Eric Mbugua's payslip shows that he was paid salary up-to April 2009. The respondent has submitted that the salary was paid in lieu of notice. This means that the Grievant was paid full salary for both March and April yet his employment was terminated on 25<sup>th</sup> March 2009. The claim for 1 months salary in lieu of notice and salary for March are therefore rejected as they were paid.

On re-instatement, the Court reiterates that the Industrial Court Act 2011 prohibits re-instatement of an

employee who has been out of employment for more than 3 years. The Grievant was dismissed in March 2009 and 3 years lapsed in February 2012. This claim is therefore rejected.

## **COMPENSATION**

The Grievant worked for the Respondent from 1<sup>st</sup> September 2006 to 25<sup>th</sup> March 2009. He was never given a letter of termination. His original contract expired on 30<sup>th</sup> October 2007 but the respondent continued with his services without a break up to 25<sup>th</sup> March 2009. His last payslip shows that the Respondent deducted PAYE, NSSF and NHIF. These are deductions that are unique to employees. The schedule of payments annexed by the Respondent as Appendix 7A show that he was in continuous employment. The argument by the respondent that he was an independent contractor does not have merit and is rejected. His salary having been paid per month, he is deemed to have been on monthly contracts as envisaged in Section 37(1)(b) of the Employment Act 2007. He was therefore entitled to be informed of the reasons for his termination as provided for in Section 41 of the Employment Act. Such reason not having been given, I find that the termination of his employment was unfair. Taking into account the length of service which was just over 2 years, I find that 2 months' salary compensation is reasonable. I therefore award him Shs.19,782 based on the payslip for April 2009.

Judgement is therefore given to the Claimant as follows:-

<i>Leonard Kihara</i>	-	<b><i>Kshs.147,316</i></b>
<i>Eric Mbugua</i>	-	<b><i>KSHS.38,564</i></b>

The same should be paid within 30 days failing which the Claimant may apply for execution.

Orders accordingly.

Read in open Court and signed on this 1<sup>st</sup> day of February 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**OMWENGA**

In the presence of: \_\_\_\_\_ for **Claimant**

**No appearance for the**

\_\_\_\_\_ for **Respondent**