



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1186 OF 2012

KENYA UNION OF PRINTING PUBLISHING

PAPER MANUFACTURERS AND ALLIED WORKERS.....CLAIMANTS

VERSUS

JAM GRAC INVESTMENTSRESPONDENT

AWARD

By a Memorandum of Claim dated 2nd July 2012 the Claimant union alleges that the Respondent **JAM GRAC INVESTMENTS** wrongfully terminated **SIMON MUTINDA MUTUKU** the grievant herein.

The Claimant submits in the Memorandum of Claim that it is a registered union representing employees engaged in printing, publishing, stationeries, advertising, cardboard, paper manufacturing, bookshops, photographic and engraving industries, plastic printing on polythene and allied industries, and plate makers.

The Respondent offers services of packing and wrapping printed newspapers to **NATION MEDIA GROUP**.

The Grievant **SIMON MUTUKU MUTINDA** was employed by the Respondent as a newspaper packer in 2002 and was dismissed on 30th December 2012. Mr. Mutuku had worked for more than 9 years without a warning. The Claimant prays for the following orders.

1. **RE-INSTATMENT** of the Grievant without loss of benefits as provided for by the Industrial Court Act.
2. **ALTERNATIVELY**, the Claimant’s seek 12 months gross salary compensation for the grievant for wrongful dismissal and loss of employment with as follow;
3. Twelve months compensation for wrongful termination @6,999 x 12= 83,988.00
4. a. Underpayment of the year 2006 (19.70 x 26 x 12) = 6,146,40
- b. Underpayment for the year 2007 (49.40 x 26 x 12) = 15,412.80
- c. Underpayment for the year 2008 (39.40 x 26 x 12) = 12,292.80
- d. Underpayment for the year 2009 (51.05 x 26 x 12) = 15,927.60
- e. Underpayment for the year 2010 (78.15 x 26 x 12)= 24,382.80
- f. Underpayment for the year 2011 (115.40 x 26 x 12) = 36,004.80

SUB TOTAL Kshs.194,155.20

5. Severance pay @ 15 days for every year worked $15 \times 335.40 \times 9 = 45,297.00$

GRAND TOTAL (Kshs.239,452.20)

The respondent filed a Memorandum of Response on 12th September 2012 and an Amended Response on 11th January 2013. In the Amended Response, the Respondent denies that it is a registered company capable of being sued and that it employed the claimant in 2006 as a casual. The Respondent pleads that it employed the claimant on 22nd August 2011 as a temporary employee and that the claimant was lawfully terminated for deliberately packing excess copies of newspapers for personal gain. The respondent prays that the claim be dismissed.

The case was heard on 19th December 2012, 19th February and 25th March 2013. The claimant was represented by Mr. Kivale while the Respondent was represented by Mr. Kinga. The claimant testified on his behalf while the Respondent called two witnesses, KAMAU MUTURA (RW1) the proprietor for the Respondent and LIVINGSTONE NGABA MACHARIA (RW 2) a supervisor with Nation media group.

The claimant testified that he was employed by the Respondent in 2008 to count, collect and pack newspapers. The work was in the premises of Nation Media Group. He was paid Shs.6,600/= per month. He worked continuously from 2008 and had never been found with any offence. On 29th December 2011 he was counting newspapers. He made a mistake and counted 80 newspaper in a bundle instead of 75. He realized the mistake and told the person collecting to bring back the bundle so that he could make correction. The bundle was brought back and he corrected it. The bundle was sold. The supervisor of Nation heard about it and told the Claimant not to work anymore that day. He was told to go to Nation Centre to see Security Manager Mr. Kosgei who asked him to explain what happened. After explaining the Security Manager said he will wait for a statement from the supervisor of Nation Mr. Ole Kalele. The statement from Mr. Ole Kalele confirmed that the Claimant had made a mistake in counting newspapers but it was corrected and the papers sold. Mr. Kosgei called the claimant's boss Mr. James Mutura and told him to pay the claimant for work done on that day. Mr. Mutura called the claimant and asked him to go and collect his money. Mr. Kosgei also told Mr. Mutura to let the claimant continue with work as this was a common mistake. The claimant went back and worked for 3 days. He then took his off days. When he reported back from his off days he was informed that he is not allowed to go back to work. He was not given any letter. He was paid for days worked. He asked court to order for his compensation.

Under cross examination by Mr. Kinga the claimant stated he was a registered member of NSSF and NHIF. The cards showed when he was employed. He signed a contract with Mr. James Mutura of Jam Grac Investments for employment from June 2011 to May 2012. He was employed by Nation Media Group in 1994. James Mutura employed him after Nation Media group. James Mutura used to work for Nation Media Group. Jam Grac Investments company was started in 2002. His contract was performed at Nation Group premises. He was never told by Nation Media Group never to go back there. He was not allowed in later. He denied talking to a Mr. Ombati or receiving Mpesa from Ombati on that day. He however admitted that he received money earlier from Ombati for helping with some demolition work. He denied that he was a casual employee.

In re-examination the claimant stated as follows; that he did not know the driver who delivered the bundles of newspapers he counted and packed or where the bundles were taken, that many people made mistakes which were corrected. He stated he was never given a termination letter. He used to be paid monthly through a bank account. He was paid in cash when he was a casual. He was employed as a casual into 2000 and not 2006 as stated in the Reply Memorandum. He stated the employer deducted shs.200 for NSSF but never remitted. His claim was for payment from 2000 to 2012.

RW1 MR. JAMES KAMAU MUTURA testified as follows. He is the owner of Jam Grac Investments, the Respondent. He employed the claimant as a casual in 2002. The claimant was employed on contract

on 1st June 2011. As a casual worker the claimant was paid fortnightly. The claimant worked on full time basis. The claimant counted newspapers from Nation Media Group premises on Mombasa road. Sometimes he did insertions. After counting the papers were tied, wrapped and taken to the dispatch table. The claimant was not supposed to take the newspapers to the dispatch table.

On 29th December 2011 the claimant was counting newspapers and instead of 75 copies he was increasing by 5. The supervisor by name Machira noticed that some of the claimant's parcels were bigger than others. He called for one and on counting found an excess of 5 copies. Mr. Macharia called the person in charge of the whole process Kennedy Ambundo who recalled the parcels which had gone for loading. The parcels recalled had an extra 5 copies. The matter was referred to security services. Manager of Nation media Mr. Kosgei who directed that the claimant should not be allowed to enter the premises of Nation Media Group ever. The claimants salary was shs.6,800/= which was the minimum wage in Mavoko county council. The Claimant was paid salary for December 2011 and nothing else. He denied that the claimant was unlawfully terminated or underpaid. He prayed for dismissal of the claim with costs.

Under cross examination RW1 stated that before 2002 the claimant was working as a casual for nation Media group. The claimant worked for the Respondent as a casual until 2012. Every casual was topped after 3 months. Payment was made fortnightly. He stated that he was not deducting NSSF. He paid the claimant shs.6,800/= but deducted 2000 to be paid as completion bonus, that he paid salary per minimum wage of Matoko county council and did not underpay. He was instructed by Nation Media group not to allow the claimant into their premises. His contract with Nation provided that he will get rid of any person Nation Media group feels should not work in the premises. The claimant worked for 3 days before he was stopped from working.

RW1 asked the claimant to get clearance from Kosgei and the claimant went back and informed him Kosgei had said he had no case to answer. He did not attend the meeting with the union because he has no agreement with the union. He did not issue a letter of termination. The claimant had no previous case of misconduct. He did not consider giving the claimant a in warning.

PW2 LIVINGSTONE NGABA MACHARIA testified that he worked at Nation Media group and Jam Grac Investments. He was employed in 2007 as a supervisor. He worked at Mombasa Road printing premises of Nation Media Group. He had known the claimant whose job was counting newspaper for almost 10 years. On 29th December 2011 in the evening he reported to work at around 7 pm and work started at 8 pm. The claimant was counting newspapers. While going round he found a bundler on claimant's table which looked bigger than normal. He called the supervisor in charge Ken Ambundo who directed that all claimant's bundles be recalled. 3 bundles were returned and upon recounting all the 4 bundles were found to have 5 extra copies. 80 instead of 75 papers. Mr. Kosgei the Security Manager called Mr. Ambundo . Mr. Ambundo said claimant was not allowed into the premises any ever. the claimant was therefore not able to work as his work was done only in Nation Media group premises.

In cross examination he stated that they recounted the packs with Mr. Ambundo and confirmed 20 extra copies from the 4 bundles. He did not know how many bundles had been packed that evening. That was the first time in the claimant to ever pack . The claimant admitted the over packing.

I have considered the pleadings and the annexures thereto, the oral testimonies, the written submissions by both parties. I have also considered the relevant sections of the law.

I find that the claimant suffered unfair termination as he was never given an opportunity to defend himself. I also find that the claimant was underpaid as reflected in the statutory minimum wages orders attached to the written submissions of the claimant.

I therefore make the following orders in respect of the prayers by the claimant,

1. RE-INSTATEMENT

The circumstances under which the claimant's employment was terminated cannot permit re-instatement. This is because the Respondent operates within Nation Media Group premises which as pleaded by both claimant and Respondent and confirmed by all the witnesses, had barred the claimant from entering the premises. It is not possible to re-instate him if he will not be capable of accessing his work station. Nation Media Group is not a party to this claim and no orders can be made against them herein. For this reason an order for re-instatement cannot be made. The claim is therefore dismissed.

2. COMPENSATION

Having been unfairly terminated and having worked for the Respondent from 2002 as admitted by RW1, I find that the Grievant is entitled to full compensation as prayed by the Claimant.

I therefore award the claimant 12 months salary as compensation in the sum, of Kshs.83,988.00.

3. UNDERPAYMENTS

Having found that the claimant was underpaid, I award him the underpayment of Kshs.110,167.20.

4. SEVERANCE PAY

The claimant was unfairly terminated. He was not declared redundant. I therefore dismiss the claim for severance pays.

5. CERTIFICATE OF SERVICE

The claimant is entitled to Certificate of Service as provided in section 51 of the Employment Act.

6. COST

There shall be no orders for costs.

In summary therefore Judgment is entered for the Claimant against the Respondent as follows;

1. Kshs.194,155.00.
2. Certificate of Service.

Orders accordingly.

Read in open Court this 20th day of June 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Njeri Teresa for Claimant

