



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NO. 1762 OF 2011

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS
.....**CLAIMANT**

-VERSUS-

SHIVAM ENTERPRISES LTD.
.....**RESPONDENT**

Mr. Nyumba for Claimant

Mr. Koech for Respondent

JUDGMENT

The claim was filed on 24th October, 2011, the issue in dispute being victimization of **Ms. Mercy M. Kariuki** on account of her trade union membership and ensuing termination.

The Respondent responded to the Memorandum of Claim on 14th December, 2011.

On the 22nd May, 2013, when the matter came for hearing the parties entered a consent in the following terms:

The Respondent to pay to the grievant:

0. *Kshs.23,000/= in lieu of one month's notice;*
0. *Kshs.23,000/= in lieu of leave days;*
0. *Kshs.23,000/= being salary for the month of May, 2011; and*
0. *Kshs.50,423/= being severance pay.*

The total terminable benefit payable is Kshs.119,423/=.

The parties agreed that the court should only consider whether or not the termination of the grievant's services was unlawful and unfair.

Mercy Kariuki the grievant testified under oath and told the court that she was employed by the Respondent on 1st October, 2007 as an accountant and worked continuously as such until the 31st May, 2011 when her services were terminated by the Respondent.

She produced the letter of termination of the same date which reads:

“.....management has decided to terminate you from your job as the management has found you coming late most of the days even after being given several verbal notices and you promised you will manage to come in time but all in vain which management is not happy with.”

The letter was written by the General Manager of the Respondent **Mr. Yogesh Patel**.

She told the court on 31st May, 2011 she was summoned by Mr. Yogesh Patel to his office and was given the letter of termination.

That she was not given any opportunity to explain her case. This took her by surprise and in her view the termination was unlawful and unfair.

She was alone at the time and was not allowed representation by a union official as she was a member of the union.

She added that she had no prior warning for any misconduct before the date of termination.

She however told the court that when Thika Highway was under construction several employees came late in the morning for 10 – 20 minutes. There was an agreement at the time that any employee who came late would be deducted salary for the time not worked. These deductions were effected across the board.

She explained that she was targeted and victimized on account of being a member of the union. She had joined the union in November, 2009. The issue arose in May, 2011 when a recognition dispute arose between the union and the Respondent.

The matter went to court on the issue whether the union had acquired fifty plus one percent of the unionisable employees. The matter was still pending when the employment of the grievant was terminated. The court subsequently ruled that the union had not acquired the requisite membership.

The general manager personally attempted to get the grievant to leave the union. He did this verbally. The grievant resisted and she believes this was the reason why her employment was terminated.

She added that her colleagues, Nicholas Muindi, John Makokha and Jackson Njuki were coerced to withdraw from the union and their employment was terminated when they resisted.

Those who withdrew from the union were not targeted for termination.

The Claimant produced about eight letters written by the employees in June, 2011 withdrawing their membership from the union. The letters are marked annex 11 to the memorandum of claim.

The witness told the court that it was not a mere coincidence that all these employees withdrew from the union when the recognition dispute was pending in court. She urged the court to find that those who refused to succumb to the coercion by the Respondent were victimised including her and therefore she should be compensated for unlawful and unfair termination of employment.

The Respondent denies that it coerced employees including the grievant to resign from the union. Respondent further denies that the grievant was victimised for failure to resign from the union.

The general manager, Mr. Yogish S. Patel testified under oath and told the court that the grievant's employment was terminated for late coming. That he had verbally warned her severally and had started deducting her salary whenever she came late with the hope that she would change but she did not.

The witness added that the grievant gave several excuses for coming late such as traffic jam, sick child and so on.

He also accused her of destroying accounting documents such as salary vouchers which she had prepared upon termination.

He added that he was ready and willing to pay her terminal benefits including the salary for May, one month's notice, service pay and leave pay.

He denied under cross-examination that he had terminated her employment once he found out that she had joined the union and had refused to resign from the union when he asked her to do so.

He also said that he was aware, employees resigned from the union at the time but he did not know why they did so.

The Respondent produced the judgment of Hon. Mr. Justice Rika in **Cause No. 756 of 2011** between the Claimant union and the Respondent.

The court noted that the Honourable Judge had observed that the Respondent had 59 unionisable employees out of which 35 were members of the union. That 10 had revoked their membership and none was called to support the idea that the resignations were voluntary. 5 had left their employment and therefore only 25 members remained.

For that reason, the court determined the recognition dispute in favour of the Respondent.

This ruling collaborates in material respects the testimony by the grievant that employees who were members of the union were coerced to resign from the union and those who declined had their jobs terminated.

This is the fate that befell the grievant. The fact that she was not paid any terminal benefits upon leaving is testimony of the acrimonious relationship between the parties at the time.

The claimant may have come late to work on various occasions but it is common cause that there was an agreement that any employee who came to work late would be deducted their salary and this agreement was implemented with respect to the grievant and other employees.

The grievant had no warning letter in her file and none was produced by the Respondent. The court presumes that she had a good record at work in the circumstances.

Employees have a statutory and constitutional right to join a union of choice at the work place and the court takes a serious view of the conduct by the Respondent to victimize employees for joining the union.

The court finds that the reason for terminating the services of the grievant was not only invalid but same amounted to a violation of a constitutional right of the claimant to freedom of association.

Accordingly, the grievant has satisfied the onus placed on her by **Section 47 (5)** of the **Employment Act** in showing that her employment was unlawfully terminated. The Respondent has on the other hand failed to show that the reason for terminating her employment was justified within the meaning of **Section 45 (2) (a)** and **(c)** of the Employment Act.

Accordingly the termination was substantively unlawful and procedurally unfair.

This case warrants maximum compensation to the Claimant as provided under **Section 49 (1) (c)** of the Employment Act. The court therefore awards the Claimant 12 months' salary as compensation for the unlawful and unfair termination in the sum of Kshs.276,000/=.

The court also awards terminal benefits to the Claimant as follows:

- i. *Service pay at the rate of 15 days for 3 years and 8 months worked (15 x 23,000 x 3.8) = 50,423,000/=;*
- ii. *Payment in lieu of leave in the sum of Kshs.23,000/=;*
- iii. *Salary for the month of May in the sum of Kshs.23,000/=;*
- iv. *1month salary in lieu of notice in the sum of Kshs.23,000/=;*

Total award: Kshs.395,430/=;

- v. *The Respondent to issue the Claimant with service certificate immediately and;*
- vi. *Costs of the suit to be borne by the Respondent.*

It is so ordered.

Dated and delivered at Nairobi this 27th day of August, 2013

MATHEWS N. NDUMA

PRINCIPAL JUDGE