



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 586 OF 2010

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS HOSPITALS & ALLIED WORKS..... CLAIMANT

v

WINDSOR GOLF HOTELS & COUNTRY CLUB.....RESPONDENT

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Education Institutions, Hospitals & Allied Workers (Union) filed a Memorandum of Claim against Windsor Golf Hotels & Country Club (Respondent) on 26 May 2010 and the issue in dispute was stated as *wrongful dismissal of Johannes Francis Obinya*.
2. The Respondent filed its Response on 14 July 2010 and a Further Response on 14 October 2010. This must have been prompted by the Union filing a computation of the terminal benefits due to the Grievant on 8 October 2010.
3. The Cause was heard by Chemmutut J. on 17 March 2011 and thereafter he indicated that he would pronounce an award on notice. Chemmutut J ceased holding the office of Judge of the Industrial Court before delivering an award. Indeed this was one of the nearly 300 files which had pending awards when new Judges of the Industrial Court assumed office.
4. As a result, the Registrar of the Court wrote to the parties to appear before me on 28 September 2012 to take directions on how to proceed with the matter. Only the Union represented by Doreen Nyasio appeared. I directed the Union to serve the Respondent with a mention notice and fixed a return date of 5 October 2012.
5. On 5 October 2012 Ms. Nyasio appeared for the Union while Mr. Kimani Mungai held brief for Mrs. Mbugua for the Respondent. Mr. Kimani sought for typed proceedings to enable him prepare submissions and I granted the request and set further mention for 2 November 2012.
6. Due to reasons which are not on record the Cause was not mentioned on 2 November 2012 but was placed before Marete J. on 5 November 2012. The Respondent did not appear on this mention. The Union indicated it was ready for an award based on the pleadings. Marete J. set a mention for 12 November 2012 and directed the Union to serve the Respondent.
7. On 12 November 2012 none of the parties appeared and the matter was stood over generally. On 26 November 2012 the Union appeared in the registry and fixed a mention for 7 February 2013.
8. On 7 February 2013, only the Union was represented before Marete J. The Respondent had been served. Marete J. directed that a date be taken in the registry.
9. Because the file had been allocated to me and I had since been transferred to Mombasa, the file was transmitted to me in Mombasa and on 13 May 2013 the Deputy Registrar wrote to the parties under recorded EMS delivery to appear before me on 4 June 2013 to take further directions.
10. On 4 June 2013 the Cause was mentioned before Makau J. and Mr. Thuita appeared for the Union while Mr. Njoroge held brief for Mrs. Mbugua for the Respondent. The Union indicated that I

could prepare an award based on the pleadings and proceedings while Mr. Njoroge sought for time to take instructions. Makau J. directed that the matter be mentioned on 4 July 2013.

11. On 4 July 2013 the Respondent did not appear in Court while Mr. Osore appeared for the Union. Considering the foregoing and the fact that this matter is an old Cause, I conceded to the application by Mr. Osore to prepare and deliver a judgment based on the pleadings and proceedings taken before Chemmutut J. Further the rules of this Court allow it to prepare a judgment based on the pleadings, affidavits and submissions of the parties with their agreement.

Union's pleadings and case

12. The Grievant was employed by the Respondent in December 1991 as a gas filter and refrigeration technician. On 22 August 2007 the Grievant was summarily dismissed. The dismissal letter stated that the Grievant was found asleep at 0000 hours while on duty and therefore was dismissed in accordance with paragraph 12 of the Letter of Appointment and Clause 9(d) of the Collective Bargaining Agreement and section 17(c) of the Employment Act (now repealed).
13. According to the Union, on 18 August 2007 the Respondent's General Manager sent a security guard to look for the Grievant because he could not be raised on his radio and when he was eventually located the General Manager asked the Grievant whether he took alcohol which he denied. After this the duty manager sent him off and later on he was issued with a dismissal letter.
14. The Grievant appealed but the appeal did not succeed. Attempts by the Union to intercede also did not succeed and therefore the Union reported a trade dispute to the Minister for Labour who appointed a Conciliator but the Respondent refused to attend the conciliation thus the approach to the Court.
15. On the main issue in dispute, the Union submitted that the reasons given in the dismissal letter did not warrant dismissal because no evidence was given that the Grievant was found sleeping on duty.

Respondent's pleadings and case

16. The Grievant was employed on 1 December 1991 until 19 August 2007 when he was dismissed. On 18 August 2007 the Grievant was the engineer on duty and at about 2300 hours the General Manager noted a problem with a wine chiller and attempts to get the Grievant on radio to check out the wine chiller for over 45 minutes did not succeed. The Grievant could not be raised.
17. A security guard who heard the radio calls went to the workshop to look for the Grievant and found him fast asleep and asked him to go see the General Manager. The General Manager noticed the Grievant was drunk and ordered him to be replaced.
18. Consequently the Grievant was dismissed under section 17(c) of the repealed Employment Act.
19. At time of dismissal, the Grievant was earning Kshs 11,934/- basic salary and house allowance of Kshs 3,809/-.

Legal regime

20. The applicable statutes at the time of the dismissal of the Grievant were the repealed Employment Act, repealed Trade Disputes Act and the Collective Bargaining Agreement in existence between the parties in 2007. My determination therefore will be based primarily on these instruments.

Evaluation

21. The parties did not find it necessary or useful to annex to their pleadings the complete copy of the Collective Bargaining Agreement in existence at the material time. Only an extract with the clauses on termination of employment and warnings was exhibited.
22. Clause 9(d) of the Collective Bargaining Agreement provided for summary dismissal with written reasons.
23. Section 17 of the repealed Employment Act also enumerated the reasons which would justify summary dismissal. The Respondent sought to rely on section 17(c) of the repealed Act. This particular section relates to willful neglect to perform work or careless or improper performance of

- work.
24. The dismissal letter referred to the Grievant being found asleep. The question is whether sleeping in the workplace would amount to willful neglect to perform work. In my view the line is a very thin one. The Grievant could not be raised on the radio. He was found asleep in the workshop. He could have been given a warning. At the time of dismissal, the Grievant had one active warning letter in his file.
25. Minutes of the Joint Industrial Council of the Hotel and Catering Industry meeting held on 10 September 2008 recommended that the Grievant's dismissal be reduced into termination
26. In my view the recommendation by the Council was fair and I would also substitute the dismissal of the Grievant into normal termination.

Conclusion and Orders

27. I have already stated that only an extract of the Collective Bargaining Agreement was annexed to the Memorandum of Claim. As it is, the Court cannot tell what benefits the Grievant would have been entitled to on normal termination. The Union filed in Court a tabulation of terminal benefits without indicating whether the calculations were based on the Collective Bargaining Agreement.
28. However, it is clear that the Grievant had served the Respondent for 16 years and would be entitled under clause 9(c) to four months pay in lieu of notice, which I assess, based on the basic pay at time of dismissal of Kshs 11934/- to be Kshs 47,736/-
29. The Grievant is also entitled to the payments itemized as numbers 1 to 5 in the dismissal letter dated 22 August 2007 less any lawful deductions.
30. I therefore do substitute the summary dismissal of the Grievant into normal termination and order the Respondent to pay him

a. 4 months pay in lieu of Notice	Kshs 47,736/-
b. Wages up to 19 August 2007	Kshs 7,553/-
c. 59 days accrued leave/travelling allowance	Kshs 23,470/-
d. 38 off days	Kshs 15,086/-
e. 19 days service charge for August 2007	Kshs 7,541/-

TOTAL

Kshs 101,386/-

31. There will be no order as to costs.
32. The Deputy Registrar to transmit this file back to Nairobi after delivery of this judgment.

Delivered, dated and signed in Mombasa on this 23rd day of August 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Alex Thuita, official KUDHEIHA for Union

Musyimi & Co. Advocates on record for Respondent