



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 580 OF 2012

LUCY KARIUKI.....1ST CLAIMANT
CHARLES KAMAU NDIRANGU.....2ND CLAIMANT
SIMON GITHUKA MUCHINA.....3RD CLAIMANT
JACKSON MACHARIA NJAI.....4TH CLAIMANT
JOHN NJUNGE WAWERU.....5TH CLAIMANT
GABRIEL KARANJA NDUNGU.....6TH CLAIMANT
KAMAU WILSON CHEGE.....7TH CLAIMANT

VS

TUSKER MATTRESSES LIMITED (TUSKYS).....RESPONDENT

AWARD

Introduction

1. The Claimants brought this case against the Respondent by way of a Memorandum of Claim dated 3rd April and filed in Court on 10th April 2012. The Respondent filed a Statement of Response on 14th May 2012 but did not attend the trial in spite of due service. The case therefore proceeded *ex parte* on 9th July 2013 with Mr. Musaviru instructed by Akoto & Akoto Advocates appearing for the Claimants. The 1st Claimant, Lucy Kariuki testified on behalf of the Claimants and their Counsel filed written submissions.

The Claimant's Case

2. According to the Claimants, they were employed by the Respondent as Shop Assistants on diverse dates. On 7th November 2011, they were suspended and on 2nd December 2011, they were dismissed allegedly for engaging in unspecified dishonest activities. They were each paid one month's salary in lieu of notice.

3. It was the Claimants' case that prior to the termination of their employment, they were not given an opportunity to defend themselves. The termination was therefore unlawful and unfair. The Claimants claimed gratuity, compensation for unfair termination of employment, salary for November 2011 and pay in lieu of leave.

The Respondent's Case

4. In its Statement of Response, the Respondent admitted suspending the Claimants on 7th November 2011 to allow for internal investigations on increased shrinkage of the Respondent's inventory at the Imara Daima Branch. Thereafter, the Claimants were dismissed on 1st December 2011 for alleged involvement in fraudulent activities.

Findings and Determination

5. The first issue for determination is whether the termination of the Claimants' employment was justifiable and lawful. The reason given for the termination of the Claimants' employment in the termination memos dated 2nd December 2011 was failure to report fraudulent and dishonest activities within the vicinity of their working area. In written statements produced by the Respondent, the Claimants denied any knowledge of the said fraudulent and dishonest activities.

6. Section 45 (2) of the Employment Act, 2007 provides that:

2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

7. Section 41 of the Act provides for due process for termination of employment on grounds of misconduct, poor performance or physical incapacity as follows:

1. Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make

8. In the case before me, the Claimants were suspended pending investigations. Lucy Kariuki testifying on behalf of the Claimants told the Court that during her suspension she was questioned by someone from Omega Risk Management. It is also on record that the Claimants were invited to make written statements on the allegations against them. There was however no evidence that the Claimants were given an opportunity to be heard in the fashion required by Section 41 of the Employment Act, 2007.

9. Therefore find the termination of the Claimants' employment unfair within the meaning of Section 45 of the Employment Act, 2007 and award them compensation individually as set out below. I also allow the claims for withheld salary for November 2011. In her sworn evidence, Lucy Kariuki testified that the Claimants were allowed 11 days leave and were paid in lieu of the balance. The claim for pay in lieu of leave therefore fails. The Claim for gratuity was not proved

and is hereby dismissed. No documents were submitted on behalf of the 7th Claimant, Kamau Wilson Chege and his entire claim therefore fails.

10. In the final analysis I make an award in favour of the Claimants as follows:

Lucy Kariuki

5 months' pay in compensation for unfair termination.....Kshs.116,530

Withheld salary for November 2011.....8,963

Total.....125,493

Charles Kamau Ndirangu

3 months' pay in compensation for unfair termination.....Kshs.69,918

Withheld salary for November 2011.....16,607

Total.....86,525

Simon Githuka Muchina

7 months' pay in compensation for unfair termination.....Kshs.176,680

Withheld salary for November 2011.....11,649

Total.....188,329

Jackson Macharia Njai

3 months' pay in compensation for unfair termination.....Kshs.69,918

Withheld salary for November 2011.....10,757

Total.....80,675

John Njunge Waweru

3 months' pay in compensation for unfair termination.....Kshs.69,918 Withheld salary for November 2011.....10,757

Total.....80,675

Gabriel Karanja Ndungu

8 months' pay in compensation for unfair termination.....Kshs.272,624

Withheld salary for November 2011.....13,107

Total.....285,731

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**