



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1352 OF 2010

BETWEEN

TRANSPORT AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA COACH INDUSTRIES.....RESPONDENT

Rika J

Cc. Leah Muthaka

Mr. Nasib Makuwa, Industrial Relations Officer, for the Claimant

Mr. Nyandieka Advocate for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant Union initiated this dispute by way of a Statement of Claim filed on 28th October 2010. The Claim is made on behalf of the Claimant's Member, Hesbon Odongo, hereinafter referred to as the 'Grievant'. It is the position of the Claimant that the Grievant was employed by the Respondent in October 1994, as a General Fitter. His first salary was Kshs. 3,150 and house rent allowance of Kshs. 600 per month. His contract was terminated at the initiative of the employer, on 14th January 2009. At the time of his departure, he earned a basic salary of Kshs.13, 620 and house rent allowance of Kshs. 2, 100. The Respondent alleged the Grievant stole soldering rods from the workplace, the property of the Respondent. The Grievant did not admit being involved in theft, and holds there was no valid ground to terminate his contract. He seeks from the Court, the following orders:-

(a) The Grievant be reinstated to work without loss of benefits, or;

(b) The Grievant be paid terminal benefits comprising unpaid wages for January and February 2009; 2 months' salary in lieu of notice in accordance with the CBA; leave arrears for 2007, 2008 and 2009;

service pay for 15 years at 16 days' salary for each year completed in service; 12 months' salary in compensation for unfair termination; and certificate of service to issue.

2. The Respondent filed its Statement of Reply on 5th January 2012. It concedes Odongo was its employee in the stated position and on the given remuneration. It is true his contract was terminated by the Respondent on 14th January 2009. The Respondent however disagrees that termination was unfair or unlawful; the Grievant was dismissed after he was caught red-handed stealing his employer's soldering rods. He was arrested and handed to the Industrial Area Police Station, where he admitted the gross misconduct and sought pardon. This was witnessed by the entire workshop staff and security personnel at the workplace. Summary dismissal was based on valid ground. The Grievant is not entitled to the prayers sought.

3. The Grievant testified and closed his case on 6th April 2012. The Respondent did not give any testimonial evidence, opting to rely on its pleadings and submissions on record. The dispute was last mentioned in Court on 24th May 2013, when it was confirmed Parties had filed their Final Arguments, and the Court advised the Award would be delivered on notice.

4. Odongo told the Court he was employed by the Respondent as General Fitter on the date and terms given at paragraph 1. On 14th January 2009, he was confronted by the Respondent's Security Guard, who alleged the Grievant had stolen Respondent's goods. The goods in question were soldering rods, which are heavy, and cannot be carried in the pocket. He was arrested and kept in police custody for 2 days. He was never arraigned in Court. He was an Assistant Shop Steward. The Respondent went on to terminate the Grievant's contract of employment without giving him a valid reason. He informed the Court he did not take annual leave in 2007 to 2009 and was not paid wages for January and February 2009. He did not receive notice pay and service pay, as granted in the Collective Bargaining Agreement concluded between the Parties. While answering questions from the Advocate for the Respondent, the Grievant stated he did not recall which Guard was on duty during the incident. The Guard on duty used to routinely search employees. He lied that the Grievant had stolen. The Police Requisition Form did not indicate that investigations were complete. The Respondent had a right to prosecute if the Grievant was shown to have stolen. There was no where the Grievant admitted theft, or sought the pardon of his employer over the incident. The Claimant urges the Court to uphold the evidence of the Grievant and allow the Claim

5. The Respondent submitted that the Grievant was caught having stuffed his employer's soldering rods in his clothes. He was arrested and forwarded to the Industrial Area Police Station for processing. He admitted the offence in the view of witnesses, and begged for pardon. His behaviour constituted gross misconduct, which the Respondent was justified in acting against under Section 44 (4) (g) of the Employment Act 2007. There was no disagreement between the parties that the incident took place, the only point of departure being that whereas the Grievant alleged he was investigated and cleared, the Respondent held that the Grievant was forgiven by the Respondent after admitting the offence and undertaking not to repeat the delinquency. The remedy of reinstatement is out of question, the relationship between the employer and the employee having irreparably broken down. The Grievant's assertion that he was locked out of the workplace was incorrect. Evidence on record does not suggest the presence of a lockout. There was no requirement the Respondent issues the Grievant notice, as this was a case of summary dismissal. The Respondent prays the Court to reject the Claim.

The Court Finds and Awards:-

6. There is no controversy that the Grievant was employed by the Respondent as a General Fitter for 15 years. His terms and conditions of employment were indisputably, subject to the CBA concluded between the Parties. It is agreed the Grievant was summarily dismissed by the Respondent on 14th January 2009, on the allegation that the Grievant had stolen the Respondent's soldering rods. He was arrested by the Industrial Area Police Station and kept in custody for 2 days. He was released without charge. The question that the Court is required to determine is whether the Respondent demonstrated valid grounds in summarily dismissing the Grievant, and whether the decision was carried out fairly, as required under Section 41, 43 and 45, of the Employment Act 2007. Thirdly, what remedy if any, should the Court grant to the Grievant?

7. There is evidence that the Grievant was suspected for stealing his Employer's soldering rods. The Respondent however did not move this beyond mere suspicion to a demonstrable and valid ground that would warrant summary dismissal. The Respondent offered no proofs, that suspicion against the Grievant was a reasonable suspicion. The Grievant offered sworn testimony that he was suspected of stealing soldering rods, which would not practically fit in his pockets. He was taken through police investigations, and released without charge. The Respondent alleged without providing evidence, that the Grievant admitted the offence, and sought pardon; he was pardoned on the understanding he would not repeat the offence. This does not seem logical, considering that the Grievant was not returned to work after 14th January 2009. When would he have the chance to indulge in more theft at the workplace, if he was summarily dismissed on 14th January 2009? This affirming and disaffirming, blowing hot and blowing cold, can hardly pass for substantive justification on the part of the Respondent.

8. Summary dismissal was not preceded by any disciplinary process at work. The incident took place on 14th January 2009. The Grievant was arrested the same day and kept at the Police Station for 2 days. He was released without charge, but was not called back to work. There was no letter given to him to show cause why disciplinary action should not be taken against him. He was not called to attend any disciplinary forum at the workplace either before or after the police action. Amazingly, the Grievant did not even receive any written communication from the Respondent on the summary dismissal decision. In view of the Court, summary dismissal was not based on valid ground and was carried out against the minimum statutory disciplinary procedures. The Grievant merits remedial assistance from the Court.

9. The Court does not view reinstatement as a reasonable and suitable remedy, given the time that has lapsed since the Grievant left employment, and considering the manner of his departure. Acrimony and suspicion marked the employment relationship at its death. There is no chance that a workable relationship, based on mutual trust and confidence could be resurrected. Trust and confidence as stated by this Court in previous judicial opinions, are the pillars upon which the employment relationship is constructed. It is more than 3 years from the date Odongo left the Respondent. The Parties have moved on, and it would not be reasonable to destabilize the equilibrium they have attained around their day to day economic and social activities, by imposing their persons on each other. The prayer for reinstatement is declined.

10. Termination was unfair and terminal dues available to the Grievant would not be affected by the allegation by the Respondent, that the Grievant was involved in gross misconduct and therefore disentitled to terminal benefits. He had worked for over 10 years. The CBA under clause 26 granted him 2 months' salary in notice pay. The Court allows this prayer at Kshs. 27,240. There was adequate response by documentation from the Respondent, on the prayer for leave for the period 2007 to 2009. The Court upholds the records provided by the Respondent and grants annual leave pay at 18.32 days, translated into Kshs.11, 076. The claim for service pay is well rooted under clause 26 of the CBA as read together with Section 35 (6) of the Employment Act 2007. It is granted at 16 days' salary for each of the 15 years completed in service, totaled Kshs. 145,107. The Grievant shall have 6 months, gross salary at Kshs.94, 320 as compensation for unfair termination. The certificate of service is a statutory right of every employee who leaves employment under Section 51 of the Employment Act, and ought to be given to the employee at the end of employment, irrespective of the manner of exit. The Respondent shall avail the certificate of service to the Grievant forthwith. In sum:-

(a) The Grievant was unfairly dismissed from employment;

(b) The Respondent shall pay to the Grievant through the Claimant, 2 months basic' salary in notice pay at Kshs 27, 240; annual leave pay at Kshs.11,076 ; service pay at Kshs. 145, 107; and 6 months gross salary at Kshs.94,320 in compensation. The total sum of Kshs.277, 743 shall be paid by the Respondent to the Grievant within 30 days of the delivery of this Award;

(c) Certificate of service be released to the Grievant by the Respondent forthwith; and

(d) No order on the costs.

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge