



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 151 OF 2013

TAILORS & TEXTILE WORKERS UNION.....CLAIMANT

VERSUS

SUMMIT FIBRES LTD .....RESPONDENT

## **J U D G M E N T**

### **BACKGROUND**

The claimant brings this suit against the respondent alleging that his employment was wrongfully and unlawfully terminated and claiming for ksh.712,065 as his terminal dues. The respondent has denied that the terminal was wrongful and unlawful. In the alternative the respondent has contended that the case was conciliated upon by the labour officer and she has since deposited the amount ordered by the conciliator in the labour office.

When the matter came up for hearing on 20/8/2013, the parties agreed on two issues for determination and filed written submissions on the same for the court to decide. The issues agreed for determination are:

- a. **whether reinstatement should be ordered.**
- b. **If reinstatement is declined, whether the conciliator's report should be adopted with or without amendments.**

### **CLAIMANT'S SUBMISSIONS**

The claimant has submitted that the termination was in breach of Section 35,41,43,45 and 46 of the Employment Act and was therefore invalid. The claimant observed that the conciliator's report found the termination to have been wrongful and unfair. The claimant therefore prayed that the court orders reinstatement because the period taken after the termination is less than 3 years and the grievant was willing to continue.

The claimant made alternative submission that, if reinstatement is declined, the court does adopt the findings of the conciliator but proceed to enhance the assessed dues. In particular the court was urged to increase the compensation for the unfair termination to the maximum 12 months provided for under Section 49 of the Employment Act. Because the reason for the termination was not proved and it concerned the grievant's rights to union which are protected by Article 41 of the constitution and Section 46 of the Employment Act.

## **RESPONDENT'S REPLY**

The respondent submitted that the termination was after due process where the grievant was accorded an opportunity of being heard before dismissal. The reason for the termination was that the grievant was engaging in union activities during working hours. The respondent therefore submitted that reinstatement was not the right remedy to give in this case and instead prayed for the adoption of the conciliators report as the final judgment of the court.

The respondent cited several decisions from this court and Court of Appeal in opposing the prayer for reinstatement.

## **ANALYSIS AND DETERMINATION**

### **whether reinstatement should be ordered**

The claimant submits that this is a good case for reinstatement because it is less than 3 years since termination and it is the grievants wish to continue serving. The respondent has opposed the reinstatement arguing that the grievant had persisted in his misconduct. This court agrees with the defence in that under Section 49 *supra* reinstatement should only be ordered in very exceptional cases. The present case is not one of them. The claimant has not proved that this case fits within Section 49(4) (b) (c) and (d) of the Employment Act.

The question to ask in my view is whether the reinstatement would be proper if the employee was the one terminating. If would amount to servitude to order reinstatement of an employee, then reinstatement should altogether be denied. The court will therefore decline to order reinstatement herein especially due to the lost trust by the respondent who believes that the grievant is a busy body and an inciter at the work place.

The court will therefore award damages to remedy the termination. In so doing the court is neither reviewing nor sitting on appeal with regard to the conciliator's report. The report was merely exhibited to show that some statutory procedures were complied with before and the parties agreed on its findings that the termination was wrongful and unfair. The parties then asked the court to either adopt the award with or without amendments.

The conciliator did not give any reason for awarding the grievant 6 months salary for unfair termination. This court will award the maximum 12 months salary. The reason for that award being the length of service by the grievant and the fact that he may never get another formal employment due to age factors. Going by the conciliators report, 6 months salary works to ksh.62,034.00. The claimant did not calculate any figures in her submissions to show that she was not satisfied with the award by the conciliator save to urge me to increase the compensation for the unfair termination to 12 months as already granted above.

## **DISPOSITION**

The court enters judgment in favour of the claimant against the respondent that the respondent is to pay the grievant **ksh.264,276.95 + 62034=326,310.15**. the said sum will attract interest at courts rate from date of termination.

The claimant will also have costs of the suit plus interest. A certificate of service shall also be issued to the grievant forthwith. The court appreciates the effort of the Labour office in conciliating over the matter.

**Signed dated and delivered this 6th day of December 2013.**

**ONESMUS MAKAU**

**JUDGE**