



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 153 OF 2013

TAILORS & TEXTILES WORKERS UNIONCLAIMANT

VERSUS

AFRICAN COTTON INDUSTRIESRESPONDENT

JUDGMENT

BACKGROUND

The claimant brings this suit against the respondent alleging unlawful and wrongful termination of Fredrick Okoth (grievant's) services and claiming ksh.466,511.13 as terminal benefits. The respondent has denied liability contending that the termination of the grievant's service was for justified reason and after due process. The suit was heard on 23/9/2013 when the grievant testified as CW1 but the respondent called no witness.

CLAIMANTS CASE

CW1 stated that he was employed by the respondent in April 2005 as a general worker at respondents' warehouse. He worked up to 30/12/2011 when he was dismissed summarily for causing an accident while driving a forklift. On that day, the supervisor instructed CW1 to drive the folk lift because the driver was absent. CW1 had a driving licence and he used to drive the forklift whenever instructed by the supervisor to do so.

After the accident the personnel manager called CW1 to the office and told him to write a letter after which the CW1 was told to go home. On 9/1/2012 he returned to the office only to be given a dismissal letter. He was never given a disciplinary hearing before the dismissal. He reported the mater to his union (claimant) who reported to the labour office. No settlement was reached at the labour office because the respondent did not reinstate the grievant as agreed.

CW1 faulted the short term fixed contract introduced by the respondent contending that they could not undo the binding CBA between his union (claimant) and the respondent. He maintained that the salary he was earning did not include house allowance as provided under the CBA. He confirmed that he has never secured another job after the impugned summary dismissal.

On cross examination he confirmed that his last contract was lapsing on 31/12/2011 and that he was paid his salary for December 2011. He also confirmed that he received dismissal letter on 9/1/2012 but the effective date was backdated to 31/12/2011. He confirmed further that on 30/12/2011 he was asked to explain in writing about the accident. He admitted that his employment contract provided for basic salary

of ksh.7416 and house allowance of ksh.1309. He prayed for leave for the period 1/9/2011 to 31/12/2011. He admitted that he never complained about unpaid house allowance before. After the close of the hearing the parties filed written submissions.

ANALYSIS AND DETERMINATION

The issues arising from the pleadings, evidence and submissions are:

- a. **whether or not the contract between the respondent and the grievant was governed by the CBA between the claimant and the respondent.**
- b. **Whether the termination of the said contract was wrongful and unfair.**
- c. **Whether the reliefs sought ought to issue.**

In answer to the first issue the court is alive to the fact that the respondent did not call any witness to support her defence that the CBA between the claimant and herself did not apply to the grievant. Instead a letter dated 6/9/13 was filed followed by written submissions which recognized that the grievant was covered by the CBA. To that extent the court does not need to go further in considering the issue of whether or not the CBA applied to the grievant. The court will therefore consider the CBA in resolving the dispute herein.

As regards the second issue of wrongful and unfair dismissal, there is no evidence to rebut the CW1's allegation that on 30/12/2011 he drove the forklift with the instructions from his supervisor. The defence did not also rebut the CW1's evidence that he was a qualified driver with a valid driving licence. The reason for dismissal was therefore not valid and justifiable.

In addition, there is no evidence adduced by the defence to rebut the CW1's evidence that he was dismissed without being accorded a hearing. Even if he was told to explain in writing about the accident, that cannot substitute the requirement of a disciplinary hearing as prescribed under Section 41 of the employment Act. After considering the reason for the termination and the procedure followed, the court is satisfied that the dismissal of the grievant was unfair with respect to Section 41 and 45 of the Employment Act.

The termination was also wrongful because respondent did not serve notice or pay salary in lieu of notice as provided for under the CBA. The notice required to lawfully terminate the grievants' employment was 2 months because he had served for six years according to the CW1's evidence and the submission by the defence.

The last issue to consider is the remedy available to the grievant. I view of the earlier finding that the termination was wrongful and unlawful, the grievant is awarded two months salary in lieu of notice. The defendant has proposed in her submissions $ksh.10,116 \times 2 = 20232$. The claimant prays for ksh.19,193.45 which I award to grievant although lower than expected. The grievant is also entitled to arrears in house allowances. The CW1 did not however adduce any evidence to prove that he was entitled to house allowance of ksh.2700/ from 2005 when he started working. If the CBA is the evidence relied on by CW1, the same is not full prove because it became effective only on 1/9/2010. Without any evidence to the contrary, the grievant will only benefit from ksh.2700 house allowance arrears for the period covered by the CBA starting 1/9/2010 to 9/1/2012. The same total to 15 months as proposed by the defence submission. The court awards $ksh.2700 \times 15$ months – 40,500/.

As regards leave days accrued, the grievant claims 20 days but in his testimony CW1 clarified that the leave was for the period between 1/9/2011 and 31/12/2011. That amount to 9 leave days according to the CBA of which the defence submits it should only be compensated against the basic pay as opposed to the gross salary. The claimant did not respond to the said submission by the defence but the court is none the less not satisfied that compensation for leave, should be done only by applying the basic pay. No law or judicial precedence was cited. Consequently the court will apply the gross salary as per the CBA being $ksh.12161 \times 9/30 = 3648.30$.

The grievant is also entitled to service gratuity as per the CBA for the 6 years served at the rate of 18 days per year. The defence proposes that the same be assessed with respect to basic pay only and not the gross salary. The claimant did not object to that. The basic pay as per the CBA was ksh.9461 hence $ksh.9461 \times 6 \times 18 / 30 = 34,059.60$.

The grievant is also entitled to 12 months gross salary for unfair termination as prayed. His gross salary at the time of dismissal was $ksh.12161 \times 12 = 145,932$. However the claimant prayed for ksh.100,140 and that is what he is awarded. The claimant will also get certificate of service for the six years served.

DISPOSITION

As a consequence of the reasons above, judgment is entered for the claimant on behalf of the grievant against the respondent for the payment of

- a. **2 months salary in lieu of notice19,193.42**
- b. **arrears of house allowance for 15 months.....40,500.00**
- c. **leave for 9 days 3,648.30**
- d. **service gratuity for 6 yeas gross34,059.60**
- e. **12 months gross salary for unfair dismissal.....100,140.00**

197,541.32

The claimant will also have costs and interest.

Signed, dated and delivered this 6th day of December 2013

ONESMUS MAKAU

JUDGE