



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1658 of 2011

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERSCLAIMANT

VS

RUCHU CHARAGE FARMERS CO-OPERATIVE SOCIETY LIMITEDRESPONDENT

JUDGEMENT

The claimant herein Mwangi Mwaniki filed his memorandum of claim on the 4th October, 2011 through his Union, the Kenya Union of Commercial Food and Allied Workers Union (hereinafter referred as Union). The issue in dispute is the unlawful termination of the said Mr. Mwangi Mwaniki by the respondent and failure to pay him his benefits as provided for in the Collective Bargaining Agreement (CBA).

The Union herein has a valid recognition agreement and a CBA with the Respondent for the period (1st October, 2008 to 30th September 2010), Mr. Mwangi herein is a member of the said Union. The claimant's case is that, Mr. Mwangi was employed by the Respondent in January, 1999 as a Watchman earning a basic pay of 1820/= and a house allowance of Ksh.425/=. The claimant further told court that on 17th February, 2009, he was suspended from duty on allegation of sneaking out of work on 14th January, 2009 at around 9 p.m. He was expected to appear before a disciplinary committee hearing on 12th February, 2009. However on 16th February, 2009 the respondent terminated the services of the claimant but backdated it to 12th February 2009. On 17th March 2009, the Respondent forwarded to the Labour Officer, the claimant's alleged benefits but failed, ignored and neglected to pay him other benefits provided for in the CBA. On 13th August, 2009 the Minister for Labour appointed a Conciliator to handle this dispute. The conciliator's attempt to counsel the parties failed and this prompted the claimant to file this dispute in court.

The claimant's contention is that he was unprocedurally and unfairly suspended from duty when the respondent chose to suspend him prior to issuing him with a show cause letter.

The claimant further contends that the suspension letter further did not give him a right to respond to the allegations leveled against him hence he was denied a fair hearing contrary to law. He further states that the said letter did not specify details of the goods allegedly stolen on the night it is alleged the claimant sneaked out of duty. Further on the suspension letter, the claimant submits that it was based on a management meeting held on 12th February 2009, which he did not attend and hence he was condemned unheard. The claimant therefore seeks to be paid dues as enumerated in his statement of claim.

The respondent on the other hand filed the statement of claim of respondent on 5th December, 2011 through the firm of Mbuyu Kamau and Company Advocates. The contention of the Respondent is that indeed the claimant sneaked out of duty on 14th January, 2009 at about 9 p.m. and coffee was stolen due to his misconduct. He was thereafter summoned to explain his whereabouts and he failed to respond to the management summons. It is then that he was suspended. The Respondent avers that the modalities adopted in dealing with this matter were within the purview of the CBA. They also submit that on 17th March, 2009, they forwarded to the District Labour Officer Muranga the Claimant's benefits as per the CBA and the claimant has no other claim against them.

Having heard both parties, the issues for determination are:

1. Whether dismissal of claimant by respondent is justified.
2. If not what remedies claimant is entitled to.

On 1st issue claimant was dismissed on account of the fact that he left his work place unattended and thieves broke in and stole the Respondent's coffee. It is alleged that this caused the Respondents great loss and this is what led to his dismissal. It may be true that indeed the claimant's action caused respondent loss. However, the claimant was never given any opportunity to be heard before he was suspended. It is a cardinal principle of law that a man should not be condemned unheard.

Article 50 (1) of the Constitution provides that;

“Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.”

This principle is also enshrined in ILO Principle 119 which provides that:

“A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation to appeal within reasonable time, against that termination with the assistance where the worker so requests, of a person representing him to a body established under a Collective Agreement or to a neutral body such as a court as arbitration, an arbitration committee or a similar body”.

Section 41(1) of the Employment Act 2009 also puts the same principle in perspective by providing that:

“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 this explanation.”

Given that the claimant was condemned unheard, I find that he was unfairly and wrongfully terminated. I convert the wrongful termination into a normal one.

He has already been paid some dues by the Respondent. I however, in addition award him as follows:

1. 1 month's salary in lieu of notice - Ksh.5,840/=
2. 12 months' salary as damage for unfair dismissal
5840 x 12 - Ksh.70,080/=

3. 11 years service pay

= 15 days salary for each year worked =

$\frac{1}{2} \times 5840 \times 1$

- Ksh.32,120

GRAND TOTAL

- **Ksh.108,040/=**

4. In addition the claimant should be issued with a certificate of service.

5. Respondent will pay costs of this suit.

Signed, dated and delivered in court at Nairobi this 18th day of December, 2012.

**HELLEN WASILWA
JUDGE**

Appearances:

Jumba holding brief for Atele

for Claimant Union

Gikandi holding brief

for Mbuyu Kamau & Company Advocates

for Respondent

Elly Jometho

Court Clerk