



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 960 of 2012

KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT

VERSUS

HR STRATEGIC PARTNERS LTD.....1ST RESPONDENT

(Before Hon. Lady Justice Maureen Onyango on 6th December, 2012)

AWARD

By a memorandum of claim dated 6th June 2012 and filed in Court on the same day, the Claimant KENYA SHOE AND LEATHER WORKERS UNION alleges that the Respondent HR STRATEGIC PARTNERS LIMITED wrongfully dismissed the grievants STEPHEN MUTISO NZAU AND DISMAS MAKORI MOMANYI.

The Claimant submits that the Grievants were employed on 6th March 2005 and 1st July 2009 respectively under payroll No.340106 and 303098 respectively. They were dismissed unlawfully on 27th and 30th January 2012 respectively for no valid reason. Mr. Mutiso was earning Kshs.10, 036 while Mr. Makori was earning Kshs.8, 840 per month at the time of dismissal.

The Claimant prays that the grievants be re-instated to their previous employment or in the alter notice the dismissals be reversed to redundancy and the grievants be paid terminal benefits as follows:

(a) STEPHEN MUTISO NZAU

1. Two months notice in lieu – Kshs.20, 072.00
2. 7 years severance @ 15 days – Kshs.40,530.00
3. 147 days unattended leave – Kshs.70, 142.00
4. 12 months maximum compensation for loss of employment – Kshs.120, 332.
5. Certificate of service

TOTAL = Kshs.251, 076.00

(b) DISMAS MAKORI MOMANYI

Tow months notice in lieu – Kshs.17, 680.00

3 years severance @ 15 days – Kshs.15, 300.00

63 days unattended leave – Kshs21, 420.00

12 months maximum compensation for loss of employment – Ksh.142, 460.00

Certificate of service

TOTAL = Kshs.196,860.00

Total

The Claimant did not call any witnesses. They relied entirely in the submissions made in the memorandum of claim and the documents filed their.

The Respondent in the Memorandum of Reply dated 20th July and filed in Court on 27th July 2012 admits that the grievants were employed by the Respondent but on casual basis. They were never given letters of appointment. They worked intermittently. They were dismissed for gross misconduct.

Stephen Mutiso Nzau was on various occasions absent without permission and was suspended and or warned on 14th September 2010 and 28th October 2010.

Dismas Makori Momanyi was notorious for sneaking out of his place of work as he did on 18th November 2011 and was involved in skirmishes with guard at employers gate.

The Respondent called one witness SAMUEL IRERI KIURA, the Respondents Human Resources Manager who submitted that the 2 grievants were seasonal employees employed on casual basis. They were paid forthrightly through the bank. They were laid off when demand was low and during annual maintenance. He submitted that statutory deductions were made from the wages of the grievants. They are not entitled to notice of 2 months. The dismissals were lawful. They prayed that the Claimants case be dismissed.

From the pleadings and documents attached to them and from the evidence of the Respondents witness, it is clear that the grievants were not casuals. They were paid forthrightly and had been in employment over a period of time definitely before October 2010 based on correspondence attached to the pleadings.

A casual employee is defined in Section 2 of the Employment Act as “a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at the time.”

Section 37 of the Employment Act provides for conversion of casual employment to long term contract where the employer works continuously for 1 month or intermittently for an aggregate of 3 months.

From the evidence on record both employees contracts had converted to term contracts. Their employment was therefore subject to termination with notice as provided in Section 35 (i) and to other benefits such as rest days, and such terms as he would have been entitled to under the Employment Act if not initially employed as a casual employee. This is provided for in Section 37 of the Employment Act.

The contracts of the employees should have been in writing as provided in Section 9 and the employer should have kept the records required to be kept by employers under section 10 and 74 of the Act.

The evidence and submissions of the Respondent reveal an employer operating outside the provisions of the law.

The Respondent alleges that the grievants worked intermittently yet has not produced his records which he admits to having in the form of clocking in records to assist the Court in arriving at a fair judgment. Instead he puts the Claimants to strict proof of information that are not accessible to the Claimant. The Court has power under section 16 of the Employment Act to presume all the particulars that are implied in every contract of service.

The Respondent has not specifically denied the items prayed for by the Claimant. Specifically the Respondent has not denied that they did not comply with the provisions of Section 41 of the employment Act before terminating the employment of the grievants. There is no evidence that the grievants were given a hearing before they were dismissed or any opportunity to defend themselves. The letters of summary dismissal issued to the grievants and attached to the Claimants memorandum as Appendix 1 both of which are dated 27th January 2012 speak for themselves. They read as follows:

1st letter

Stephen Mutiso Nzau

Department 340

The Bata Shoe Company

January 27 2012

Dear Sir,

RE: Summary Dismissal

On Monday the 23rd of January, you reported to your workstation at 7 pm instead of your official reporting time of 3.30pm. on the 25th of January you again absconded duty and when called to explain you claimed to be too tired.

It has also been noted that you are notorious in this regard as you have been issued with three warning letters previously.

This behavior cannot be, and will not be, tolerated anymore.

You have therefore, with immediate effect, been summarily dismissed.

Please sign this letter to confirm that you have read and understood its contents.

Samuel Kiura
HR MANAGER.

2ND LETTER

Dismas Makori Momanyi

Department 303

The Bata Shoe Company

January 27 2012

Dear Sir,

RE: Summary Dismissal

On the 25th of January, you reported to your workstation at 5 pm instead of your official reporting time of 3.30pm.

You then proceeded to lie to the guards on duty that you had been recalled to the factory outside your normal working hours due to pressure of work.

When the guards asked you to leave, you insisted on arguing with them and causing commotion at the factory gate.

Please note that this is gross misconduct that automatically leads to summary dismissal. You have therefore, with immediate effect, been summarily dismissed.

Please sign this letter to confirm that you have read and understood its contents.

Samuel Kiura

HR MANAGER

From the foregoing I find that the dismissal of the grievants was unfair. I now turn to the terminal benefits. The Respondent has not denied the prayers for terminal benefits. The document attached as Appendix 1 to Respondents Reply memorandum shows that Stephen Mutiso Nzau's wages for 2 weeks was Kshs.7, 094 while Dismas Makori Momanyi earned Kshs.5, 437 every 2 weeks. They are therefore entitled to the following:

1. Notice

Although the Claimant has prayed for 2 months notice, they have not specified the basis for the demand. I award 2 weeks notice in line with the provisions of Section 35 (1) (b) as read together with Section 36 of the Employment Act. Stephen Mutiso Nzau is entitled to Kshs.7, 094 while Dismas Makori Momanyi is entitled to Kshs.5, 437, this being payment of 2 weeks wages in lieu of notice.

2. Severance pay

The grievants were not declared redundant. They were dismissed summarily. There is therefore no basis for the claim in severance pay.

I will substitute this with a claim for service pay as the Respondent has not submitted records to show that the grievants were members of National Social Security Fund on any other gratuity or retrained scheme.

The Claimant submitted that Stephen Mutiso Nzau worked for 7 years while Dismas Makori Momanyi worked for 3 years. This is not denied by the Respondent.

I therefore award them 15 days service pay for every year worked. This will be as follows:

Stephen Mutiso Nzau (7, 094 X7) Kshs.49,658
Dismas Makori Momanyi (5, 437X3) Kshs.16, 311

3. Annual Leave

The Claimant has prayed for annual leave of 147 days for Mutiso and 63 days for Makori. The Respondent did not deny the same. I award as prayed on the item at Kshs.70, 142 for Mutiso and Kshs.21, 420 for Makori.

4. Compensation

Having found that the grievants were unfairly dismissed, and taking into account their length of service I award 6 months compensation to Mutiso and 4 months compensation to Makori. This adds up to Kshs.43, 496 for Makori.

5. Certificate of service

Both grievants had worked for more then 4 weeks and are entitled to a certificate of service as provided for under Section 51 of the Employment Act.

I therefore award as follows for each of the grievants:

Stephen Mutiso Nzau Kshs.212, 022 and certificate of service Dismas Makori Momanyi Kshs.86, 664 and certificate of service.

The same should be paid within 30 days fairly which the Claimant may move Court for execution of the decree.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI THIS 6TH DECEMBER, 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

David Omolo, Assistant National Organizing Secretary for Claimant.

Ms. Kandai for Mr. Kendie for Respondent.