REPUBLIC OF KENYA

High Court at Nakuru

Cause 25 of 2012

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

-VERSUS-

BILASHAKA FLOWERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th April, 2013)

JUDGMENT

The claimant, **Kenya Plantation and Agricultural Workers Union** filed the memorandum of claim dated 08.04.2011. The respondent, **Bilashaka Flowers Limited** filed the memorandum of response on 08.08.2011. The claimant has concluded a valid recognition agreement with the respondent through the Agricultural Employers Association which is an employers' association in which the respondent is a member. The recognition agreement is marked **BF1** and the collective agreement **BF2** on the memorandum of claim. The claimant filed this case on behalf of its members and the grievants in this case namely; Loyford Ntwigah Julius, Veronica Auma Opondo, Francis Shivachi Shigutwa, Benson Mwangi Njui, Charles Gitahi, Mallab Ngesa and George Sambela. The claimant prayed for orders as follows:

a) **That the respondent's managing director be produced in court in person for violation of the workers constitutional right to association, Article 36 and fair labour practices, Article 41(2) (b) and (c) and violation of the ILO Workers Representative Convention 135.**

b) **That the court do find that the respondent action of locking out the grievant as being unlawful.**

c) **That the court do find the respondent guilty of not providing the grievants with protective clothing, procedures and appliances as provided in section 101 of the Occupational Health and Safety Act,2007 as provided in section 110 of the Act.**

d) **The respondent is ordered to stop interfering with the trade unionism of the grievants and their involvement in trade union activities.**

e) **The respondent is ordered to end the lockout forthwith.**

f) **That the respondent is ordered to pay the grievants their wages for the days spent in the lockout.**

g) **In the alternative that the respondent is ordered to reinstate the grievants as per section 49(3) as read with section 50 of the Employment Act, 2007.**

h) **The respondent is ordered to pay costs of the case.**

The respondent prayed that the claim be dismissed with costs.

The case came up for hearing on 14.03.2013 when oral evidence was made and on 10.04.2013 when the parties made oral submissions. The claimant's witnesses were Charles Gitahi Njenga **(CW1)** and George Sambela **(CW2)**. The respondent's witnesses were Jozef Zuurbier **(RW1)** the respondent's managing director; Daniel Lidio Erot **(RW2)** being the supervisor in greenhouse No.4; and Paul Kahiga Muteru **(RW3)** being the respondent's production manager.

In view of the evidence on record, the facts of this case are as follows;

It is not disputed that the grievants were employees of the respondent. The respondent was at all material time engaged in the business of growing and exporting flowers. CW1 was employed to transport cut flowers from the farm to the grading hall and he was serving as the elected chief shop steward.

It was about 10.30am on 25.02.2010 when he received a telephone call from George Sambela (CW2), the shop steward in greenhouse No.4 conveying that the staff in that greenhouse had a complaint about being required to work whereas the flowers were wet following the spraying of a likely hazardous substance. The workers complained that the period allowed as per the board outside the greenhouse had lapsed but the flowers were still wet and therefore, in their opinion, dangerous to resume work in that greenhouse.

CW1 in his capacity as chief shop steward called the human resource officer and his supervisor released him to attend a meeting at the human resource officer's office. At the meeting the production manager was also present. In the meantime work was not progressing in the greenhouse as the staff declined to enter in view of the wetness. At the meeting the managers took the view that the allowed time had lapsed and the staff had to work even if the flowers were still wet. The shop stewards present took the view that the workers were right as it would be dangerous to work in view of the wetness. A stalemate ensued at the meeting and a further meeting was scheduled for 3.00 pm with the managing director. The meeting ended at about noon and by then the flowers in the greenhouse had dried up. The shop stewards advised the staff and they agreed to resume work. In the opinion of the respondent's management, useful working time had been wasted.

At 3.00 pm the managing director met the shop stewards. The meeting took an hour. The grievance was not resolved and instead three shop stewards were given suspension letters being **BF3** on the memorandum of claim. The suspended shop stewards were Charles Gitahi, Mellab Ngesa and George Sambela Alusiola. The suspension letter stated as follows:

"Dear all,

RE: Suspension

On 25th February 2010, you instructed 14 Green house 4 workers and 13 Green house 1 workers to boycott work which they did from 10.30am to 12.00pm. On talking to you we have realized that your instructions were based on faulty misinformed grounds and in complete disregard of agreement reached in our meeting of 23rd Feb 2010 at the Labour Office Naivasha.

Our position is that you have unilaterally instigated an illegal work stoppage contrary to spirit of agreement at the labour office. We see that you have ulterior motive of inciting unrest in the

Company.

Hence we hereby suspend you in accordance with CBA clause 16(a) pending further consultations at the labour office on 26th Feb 2010.

Yours faithfully

For: Bilashaka Flowers Ltd

Signed

Eric W Njenga

Human Resources Manager

Signed

Jozef Zuurbier

Managing Director"

CW1 admitted that on 08.02.2010 the workers had gone on an illegal strike because the relevant strike notice had not been issued. However he did not ask the workers to go on strike on 08.02.2010 or on 25. 02.2010. The grievants were subsequently addressed the termination letters dated being **BF4** on memorandum of claim.

CW2 was the shop steward in green house 4. He stated that he received the suspension letter but the dismissal letter was never delivered to him. He worked in the green house and on 25.02.2010 at about 10.30 am the supervisor asked the staff to enter the green house. The flowers were wet and the smell of the chemical that had been sprayed was strong. The supervisor noted the complaint and stated that he was helpless. He telephoned the chief shop steward and conveyed the grievance. He attended the meeting with the human resource officer and later with the managing director. He testified that he was suspended from work due to discharging his duties as a shop steward. He had acted upon the workers grievance in his capacity as the shop steward.

RW1 stated that the respondent supported union activities and all union dues were deducted and remitted. The workers were dissatisfied with implementation of the quality scheme relating to announcement of the spraying time. He stated that the labour officer advised that the public health officer be consulted for advice on the implementation. He produced R2 being the minutes of the meeting held with the Ministry of Labour. They showed that consultations were to be done about the safety and health issues. He also produced minutes of the meeting of 8.02.2010 marked R1 which showed that protective clothing and masks were to be provided as per the CBA and reentry after spraying was to be as per the WHO standards. The management was in charge of the operations of the respondent and he recalled the strike of 5.03.2010 during which the shop stewards were absent and a return to work formula was agreed upon as per **appendix 3** on the memorandum of response. The three shop stewards had been suspended on 25.02.2010. The witness stated that the shop stewards had failed to follow procedures on dispute and grievance resolution. There had been three irregular work stoppages. It was his evidence that the shop stewards had incited staff only on 25.02.2010 and they were not implicated on 5.03.2010. On 25.02.2010, it was a fertilizer that had been sprayed and the witness did not have any evidence of the incitement on 25.02.2010. He did not know the person who had incited the workers on 5.03.2010.

RW2 was the supervisor in green house 4. He is the one who asked staff to reenter after the lapsing of the reentry time as was shown on the board at the entrance. He stated nobody fainted upon reentering but the shop steward CW2 asked them to get out because the reentry time had been short. Only CW2 was present at the green house and not the other shop stewards.

RW3 stated that he was the production manager and the folia feed sprayed on 25.02.2010 had been allowed 10.45 am as reentry time. He confirmed that the leaves had to be dry before the reentry. In his opinion, the staff had no grievance and they left the green house upon incitement by the shop steward CW2. He confirmed the shop steward melab Ngesa was never at the greenhouse.

In view of the pleadings, evidence and submissions made the court makes findings as follows: The reason for dismissal was stated in **BF 4** on the memorandum of claim as either absenteeism on 5.03.2010 or instruction to workers to boycott work on 25.02.2010. The respondent has not established that either of the reasons existed at the time of termination. There is no evidence to show that the affected staff were given notification of the alleged misconduct and given an opportunity to defend themselves at a hearing. The hearings by way of meetings appear to have been general and about the grievances that the staff may have wanted to express.

Thus the court finds that the terminations were unfair for want of, notification and hearing as envisaged in section 41 and, want of proof of reasons as required in section 43, of the Employment Act, 2007. While making that finding, the court considers that the notification must be clear that the employee is facing a case of poor performance or ill health or misconduct that may conclude in the termination of the employment. It is the opinion of the court that it is not sufficient to engage in meetings whose agenda is general and without prior such notice and allege the employee had been notified and heard as it was the case in the present situation.

It is the court's opinion that the respondent and the employees in this case were merely engaged in a grievance management process which the respondent erroneously presumed to have served as a disciplinary process. Unlike the grievance management process which looks at improving the employment relationship, the disciplinary process aims at concluding in imposition of a punishment including termination of the employment. The court finds that it is unfair labour practice to convert grievance management process into a disciplinary process more so without making that intention clear to the affected employee so that he or she can mount individual strong defence in that regard.

The court further finds that the grievants had a valid grievance relating to the chemical that had been sprayed. There is no doubt that the chemical was a fertilizer and with potential harm if the flowers were to be handled while still wet. RW2 stated that he was the production manager and the folia feed sprayed on 25.02.2010 had been allowed 10.45 am as reentry time. RW2 was the supervisor in green house 4 and he is the one who asked staff to reenter after the lapsing of the reentry time as was shown on the board at the entrance. He did not state the reentry time marked on the board and the time he asked the staff to reenter. The evidence by the claimant witnesses was that by 10.30 am the grievance had erupted and the meeting with the human resources officer and the production manager was gearing up.

The evidence tallies the pleading at paragraph 4, that all workers resumed duties at green house 4 at 10.30 am. On a scale of probabilities, the court finds that the reentry time was 10.45 am as testified by the production manager and the staffs were in fact asked to reenter by 10.30 am contrary to the reentry time.

In making that finding, the court considers that there had been health and safety issues that the respondent had agreed to take to consultation with the public health officer and the respondent had at the material time agreed to uphold proper reentry time and to provide protective gear. The clear conclusion from the evidence and the flow of events is that there were simmering serious grievances including on the issue of reentry times which the court finds to have come to boil in the instant case.

Clause 5 of the collective agreement being BF2 on the memorandum of claim provided that an employee shall raise grievances first in accordance with the company grievance handling procedures which shall be made available. In event the grievance is not settled, provisions of the recognition agreement would apply. The respondent did not show the grievance handling procedure it had made available as at the material time. Clause 3 of the recognition agreement being **BF1** provided that concerned employees would raise grievances first, with the immediate superior and if no resolution is reached, with the right to appeal to higher levels of management. The court finds that the grievants complied with that agreed procedure and further finds that they were entitled to raise the complaints as the same were genuine and could not constitute a reason for removal or punishment as provided in **section 46(h) of the Employment Act, 2007**.

This court stated in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** as follows,

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair

labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."[1]

The court upholds that opinion and finds that in the present case the respondent had at the material time agreed to ensure proper reentry times after spraying and to consult on the health and safety matters. It is not clear that the respondent had taken steps to remedy the situation as agreed and the grievants had raised genuine complaints. It was unfair for the respondent to punish them instead of resolving the issues amicably.

The final issue for determination is the remedy the court should award in this case. During submissions, the claimant submitted and prayed for compensation in view of unfair termination. In the circumstances, the court finds that the rest of the prayers were abandoned. The court finds that the grievants are each entitled to twelve months gross salaries at the rate of their respective gross monthly salary at the time of termination. The claimant is entitled to the costs of the case.

In conclusion, judgment is entered for the claimant against the respondent for orders:

a) **A declaration that the termination of the service of the grievants by the respondent was unfair.**

b) **The respondent to pay each of the grievants twelve months salary at the rate of their respective gross monthly salary at termination plus interest at court rates from the date of the judgment till the date of full payment.**

c) **The claimant to file in court and to serve respondent within seven days the computation of the amount in (b) and for recording the quantum in court on a convenient date to be fixed.**

d) **The respondent to pay the costs of the case.**

Signed, dated and **delivered** in courtat **Nakuru** this **Friday, 12th April, 2013.**

BYRAM ONGAYA
JUDGE

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[1] Page 35 of court record in the Judgment, Industrial Cause No. 44 of 2011 at Nairobi.