Kenya Plantation & Agricultural Workers Union v Unilever Tea (K) Limited (Cause 611 of 2017) [2024] KEHC 13173 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13173 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 611 OF 2017

K OCHARO, J

OCTOBER 31, 2024

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

UNILEVER TEA (K) LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. Via the Memorandum of Claim dated 18th January 2017 the Claimant sued the Respondent seeking the following reliefs;

    a. A declaration that the use of the Code of Business Principle in dismissing its employees is wrongful, unfair, and unlawful and that it amounts to victimisation;

    b. An order directing the Respondent to restrain from using the Code of Business Principle as a way of disciplining, dismissing and terminating employees from employment

    c. Costs of the cause.

2. The Respondent via the Memorandum of Defence dated 14th March 2017, responded to the Claimant's allegations stating that the Code of Business Principle, does not contravene the terms of the Recognition Agreement between the Parties.

3. When the matter came up for hearing on 2nd October 2023, the parties agreed by consent that owing to its nature, the same be disposed of based on the pleadings, witness statements and submissions. This Court shall proceed to render itself on the matter on that basis.

Claimant's case

4. The Claimant's case is brought out in the statement of claim above-mentioned, and the witness statement of Thomas Kipkemboi. The Claimant's case is that it entered into a Collective Bargaining Agreement with the Respondent in the interest of the Respondent's employees. After the agreement, the Respondent introduced a Code of Business Principle that it uses to govern the relationship with his employees. During the collective bargaining, the Respondent did not bring it to its attention that it had such a policy in place.

5. The Claimant Union states that after the negotiations, and execution of the Collective Bargaining Agreement, the Respondent started dismissing its workers summarily using the Code of Business. This in violation of Clause 2[d] of the Recognition Agreement.

6. The Respondent's action amounted to violating the Recognition Agreement by introducing other terms and conditions without following laid down negotiation procedures as provided under Clause (31) of the CBA. Additionally, the Respondent did not write to the Claimant concerning any modification in accordance with the rules and procedures of negotiation of terms and conditions of a Collective Bargaining Agreement.

7. The Code of Business Principles contains clauses prejudicial to the Respondent's employees. This includes the clause that bars an employee facing disciplinary action from calling external witness[es] to buttress his defence during a disciplinary hearing, yet the Respondent retains the right to call witnesses external that were not in its employment to testify against an employee who was facing dismissal, but such an employee was not allowed to do the same.

8. The Claimant wrote to the Respondent on 20th October 2015, requesting a meeting to discuss the Code of Business Principles as it was offensive to and being applied in place of, the CBA. During the meeting held on 4th December 2015, the parties were unable to settle the issue. The Claimant therefore reported the dispute to the Ministry of Labor.

9. During the conciliation meeting held on 3rd September 2016, the parties were unable to resolve the issue, prompting the conciliator to issue a certificate of unresolved dispute.

Respondent's case

10. It is the Respondent's case as embodied in its pleadings and the witness statement of Tumaini Kimone in his witness statement dated 21st February 2022, that it has various policy documents that govern the relationships between it and its employees, including the Code of Business Principles which was introduced in 2005. Breach of its provisions could attract the sanction of summary dismissal, which is provided for under Clause 24 of the CBA. Further, it doesn't in any way contravene the terms of the Recognition Agreement.

11. All employees of the Respondent are trained on the Code of Business Principles during their induction and are required to sign in acknowledgement of the said training.

12. Furthermore, the Respondent accords its employees fair hearing during disciplinary proceedings.

13. The said Code of Business Principles has formed part of the Respondent's policy since 2005 and the Claimant cannot allege ignorance of the existence of the policy.

Claimant's submissions

14. The Claimant raises the following issues for determination, thus; Whether the use of the Code of Business Principle by the Respondent is wrongful, unfair and unlawful? Who should bear the costs?

15. The Claimant submits that the CBA between the parties sets out the terms and conditions of employment for the Claimant's members. To buttress this submission the Claimant places reliance on the case of Teachers Service Commission vs Kenya National Union of Teachers (KNUT) & 3 others [2015] eKLR, the Court held that;

> " It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective Bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members....."

16. Clause 2(d) of the Recognition Agreement between the Union and the Respondent states:

> " Unilever Tea Kenya Limited reserves the sole right to conduct its business and, manage its operations and, for this purpose, to engage, promote, demote and terminate the services of any worker in accordance with the terms of service agreed with the Union and prior consultations and negotiations shall be applied in any proposed changes in terms and conditions of services between the parties....."

17. The Respondent should therefore conduct its business in accordance with the terms of service that were agreed upon by both parties and should consult and negotiate with the Claimant in case of any changes as per the CBA.

18. The Claimant also relied on Section 57(2) of the *Labour Relations Act*, 2007, and stated that the Respondent should have disclosed all relevant information to allow the Claimant to engage effectively in the Collective Bargaining Agreement. Therefore, in light of the non-disclosure, the Code of Business Principles fails to form part of the terms that the Union had negotiated with the Respondent and cannot, therefore, apply to the Claimant's members. Its use by the Respondent constitutes an introduction of changes/amendments to the existing terms and conditions contrary to Clause 31 of the Collective Bargaining Agreement.

19. Additionally, the Claimant submits that the Code is unfair and unlawful as it contravenes Section 41(2) of the *Employment Act*, 2007.

20. The Code of Business Principles applied by the Respondent does not allow the employee to question the complainant which is a violation of the fundamental principle of audi alteram partem which requires that everyone be given an opportunity to respond to the evidence against them. To buttress this, the Respondent relied on Article 50 of *the Constitution* of Kenya (2010).

21. The Respondent also relied on the case of Kenya Airways Pilot Associations v Kenya Airways Limited [2015] eKLR and the case of Kenya Airline Pilots Association v Kenya Airways Limited [2016] eKLR where it was held as follows;

> " The sanctity of a CBA cannot be overemphasised here. This is a binding document to the parties as it is a contract as it were. It creates rights and responsibilities and parties to it are bound by its terms. The *Labour Relations Act* recognises a CBA in section 59(5) as an enforceable agreement. Like an employment contract, a CBA and its provisions is to be

understood in its own meaning and the court will go out to uphold its terms unless a party alleges any other meaning to such terms which requires proof."

22. On the second issue, the Claimant submitted that costs follow the event and are awarded to the successful party.

Respondent's submissions

23. The Respondent raised the following issues for determination, thus; Whether the Respondent is acting in violation of the Recognition Agreement dated 28th December 2006 by implementing the Code of Business Principles? Whether the use of the Code of Business Principles is wrongful, unfair, unlawful and amounts to victimization? Whether the Plaintiff is entitled to the reliefs sought? Who should bear the costs of this suit?

24. On the first issue, the Respondent submitted that the Claimant failed to adduce any evidence to demonstrate how the implementation of any clause of the Respondent's Code of Business Principles (hereinafter "the COBP") violates the Recognition Agreement or any Collective Bargaining Agreement. The COBP does not fall under Clause 2(a) of the Recognition Agreement and is therefore not one of the negotiable items contemplated therein.

25. There is no requirement in law that an employer must discuss and negotiate its internal policies with a Union before implementing them.

26. The Respondent also submits that Clause 2(d) of the Recognition Agreement expressly affirms the Respondent's sole right to conduct its business and manage its operations.

27. On the second issue, the Respondent submits that the Code of Business Principles is not wrongful, unfair, or unlawful. Additionally, the Claimant hasn't demonstrated how the application of the Code amounts to victimization.

28. The COBP is a long-standing policy document that has governed the Respondent's affairs since October 2005. It has over time been entrenched into the parties' CBA and the individual employees' employment contracts. Further, Clause 23 (b) of the CBA states that "it is agreed that KPAWU shall impress on all its members to obey the law, and company policies.

29. The Respondent relied on the case of Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR where the Court of Appeal stated that "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

30. The Respondent further submits that the Claimant has failed to demonstrate how the stipulations of COBP militate against the Claimant's members' right to a fair hearing during disciplinary proceedings, or that at one point or the other, its members or any of them has been denied the opportunity to call external witnesses during the disciplinary hearing[s].

31. On the fourth issue, the Respondent submitted that the Claimant is not entitled to the costs of this suit as it has failed to prove its case.

Analysis and Determination

I. Whether the Respondent's Code of Business Principle runs afoul, of the Collective Bargaining Agreement between the Claimant and the Respondent.

II. Whether the Claimant should be awarded the reliefs sought.

Whether the Respondent's Code of Business Principle runs afoul of the Collective Bargaining Agreement.

32. It is imperative to state from the onset that with due respect, the Claimant's pleadings are least impressive. They aren't as clear as any Court wanting to understand clearly what the controversy herein is all about and craft issues for determination, without a struggle, could want them to be. Vitally, it isn't crystal clear as to whether the Code came into being after, or it was in existence before, the execution of the Collective Bargaining Agreement. There are contradictory averments in the statement of Claim on this pivotal issue.

33. Undoubtedly, organizations have policies, programmes and or practices which could normally order life within the organization. Depending on the enterprise's prerogative, style, area of business, and size, inter alia, they may be embodied in a single document or multiple documents. Sometimes they are in different shades and forms, Human Resource policy and procedure manual, training manual, standard operations manual etc. Seldom will Courts interfere with an enterprise's prerogative to establish an instrument[s] and have it implemented within the workplace for organizational efficiency, and workplace orderliness and harmony, not unless it is demonstrated sufficiently and to the requisite legal standards that such instrument as a whole or a section[s] of it, is unconstitutional, unlawful, and or unconscionable. It will require the person impugning the instrument not to assert that it is unconstitutional, unlawful, or unconscionable, but to go the extra mile to place forth evidence from where the alleged illegality, unconstitutionality or unconscionableness, can be established. It is with this lens that I will consider the instant matter.

34. Collective Bargaining is a process and not an event. As such, where the same has culminated into an executed Collective Bargaining agreement, it is presumed that the process and the agreement were a consideration of all the relevant material, facts, circumstances, and documents. Further, the process was carried out in good faith, and the parties intended to be bound by the terms of the executed Collective Bargaining Agreement.

35. The Respondent contended that the Code that the Claimant is challenging in this matter has been in place since 2005. This fact is not challenged by the Claimant. Presuming as I should, the parties were aware of the existence and provisions of the Code when they were bargaining, and therefore as they didn't wholly or partially through a term of the Collective Bargaining Agreement, oust the continued applicability of the Code or any part thereof, its applicability within the Respondent enterprise was maintained.

36. The Claimant hasn't demonstrated that during the negotiations it asked for this or that instrument for consideration, or disclosure of all workplace place instruments and the Respondent deliberately or otherwise, failed to provide or disclose its existence.

37. The Claimant contended that the Code, and its continued applicability at the Respondent's workplace, offends Clause 31 of the CBA. Clause 31 of the CBA provides that,

> " ...Any party desiring to amend, or modify this agreement or any part thereof shall give the other party a written notice of not less than three (3) months with the full details of the desired amendments or modifications."

38. By reason of the foregoing premises, and more specifically my finding that, the existence of the Code has been since 2005, per the Respondent's unrebutted evidence, and that the parties intended continuity of the instrument, I find considerable difficulty in understanding how then the same can be understood to be an act by the Respondent to modify or amend the Collective Bargaining Agreement.

39. Summary dismissal is a sanction that is provided for in the statute. Any Collective Bargaining Agreement or policy within the workplace speaking to the sanction must be aligned with the statutory stipulations for neither a Collective Bargaining Agreement nor a workplace policy can oust a statutory provision and most specifically by providing a less favourable term or condition than that by the statute.

40. In my view, an employee feeling aggrieved by a summary dismissal against her or him on the ground that the application of the Respondent's Code in one way or another deprived him an opportunity to defend himself adequately, can properly raise the issue in a suit where the dismissal is impugned.

41. I have no reason to find in the affirmative regarding the above-identified issue.

Whether the Claimant should be awarded the reliefs sought

42. Having found as I have hereinabove, the Claimant's claim herein becomes a candidate for dismissal. It is hereby dismissed as it lacks merit. Each party is to bear its costs.

READ SIGNED AND DELIVERED THIS 31ST DAY OF OCTOBER 2024.

OCHARO KEBIRA

JUDGE

In the presence of;

Mr. Muimi for the Claimant

Mr. Wesonga for the Respondent.