Unilever Tea Kenya Limited v Kenya Plantation & Agricultural Workers Union (Civil Appeal E015 of 2020) [2025] KECA 830 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 830 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E015 OF 2020

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

UNILEVER TEA KENYA LIMITED ..... APPELLANT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS UNION ..... RESPONDENT

(An Appeal against the Judgment and decree of the Employment & Labour Relations Court at Kericho (Marete J.) dated 17th May, 2017 in ELRC No. 10 of 2014)

JUDGMENT

1. The respondent, Kenya Plantation & Agricultural Workers Union filed its Memorandum of Claim on 22d July 2014 at the Employment and Labour Relations Court at Kericho (ELRC) on behalf of Simon Sang (hereinafter referred to as "the grievant"). In the claim, it sought, inter alia, an order directing the appellant, Unilever Tea Kenya Limited, to reinstate the grievant and pay him for the period within which he was dismissed. In the alternative, the respondent sought that the grievant be paid 12 months' salary and compensation in lieu of notice.

2. For context, the grievant was employed by the respondent on or about February 2002 as a casual employee for about six months, after which he proceeded on leave. Upon resumption, he was employed on permanent basis, albeit without being issued with a letter of contract of employment. The grievant was issued with a show cause letter on 28th September 2013 and was summarily dismissed on 5th October 2014 for gross misconduct pursuant to section 44(4)(c) and (e) of the *Employment Act* and clause 24 of the applicable Collective Bargaining Agreement (CBA), under what the respondent termed in the claim as unclear reasons.

3. In response, the appellant submitted in its Memorandum of Defence that clauses 24 and 30 of the CBA provided for summary dismissal. The appellant stated that, following a complaint against the

grievant for failing to adhere to company procedures for recording employee overtime, colluding with an employee to redistribute their work hours and enabling them to take equivalent time off without the management's knowledge, Misuse of authority by refusing to credit overtime hours as a leverage for sexual favours, touching an employee without her consent; investigations were conducted, followed by a fair disciplinary process. The grievant failed to mitigate the case against him and was summarily dismissed for gross misconduct. His internal appeal was unsuccessful, and conciliation efforts referred by the Minister ended in a stalemate.

4. Following trial, he ELRC held that the appellant had not demonstrated, on a balance of probabilities, that the decision to summarily dismiss the grievant was lawful and fair. The Court awarded 12 months' salary as compensation for unlawful termination, and ordered the reinstatement of the grievant without loss of privileges.

5. While the appellant raised nine grounds in its Memorandum of Appeal dated 21st October 2020, these were condensed into three main issues in the submissions filed on 13th March 2024:

    a. whether the learned Judge erred in law in awarding the grievant compensation for unfair dismissal and reinstatement and

    b. whether the learned judge erred in law in reinstating the grievant.

    c. It is on the basis of these issues that the appellant has made its written submissions.

6. On the first issue, the appellant faults the trial judge for failing to differentiate and separate the three specific grounds of misconduct cited (failure to adhere to company procedure of recording employee overtime, collusion with a team member to falsify work hours and the grievant's admission to inappropriate physical contact with a colleague); for finding that the testimony of the appellant's key witness was hearsay and inadmissible; and that the learned Judge failed to give reasons for his determination in making sweeping statements as to the veracity of the testimony without interrogating their probative value. The appellant asserts that it followed the lawful procedure for summary dismissal under the *Employment Act*.

7. On the second ground, the appellant argues that the trial court should not have awarded both compensation for unfair dismissal and reinstatement as these two prayers were sought in the alternative. The appellant contends that the court should have only granted one of the remedies and the judge misdirected himself and acted beyond his jurisdiction in awarding the two reliefs.

8. Regarding the third issue, the appellant submits that the judge failed to consider the serious nature of the allegations against the grievant, particularly the claim of sexual harassment, and the potential psychological impact on the alleged victim if reinstatement were ordered and they continued working in the same environment.

9. In conclusion, the appellant prays that the judgment of the ELRC be set aside and the appeal be allowed as prayed in the Memorandum of Appeal. Being a first appeal, the appellant posits that this Court has the power to hear the appeal on matters of law and fact. It is not lost to us that the appellant has cited several authorities in support of the arguments advanced in its submissions which we have perused and considered, without need to reproduce in our summary above.

10. The appellant's position was buttressed before this Court through the appellant's advocate, Mrs. Opiyo who adopted the filed submissions. Learned counsel further indicated that the grievant is no longer in the appellant's employ.

11. Despite proper service, as evidenced by the affidavit of service on record, the respondent did not participate in this appeal. It neither filed submissions nor appeared at the oral hearing. Nevertheless,

this being a court of record, we have had recourse to the pleadings and submissions filed on its behalf before the ELRC.

12. From the foregoing, we discern that the appeal can be disposed of on the basis of the following issues:

    a. Whether the summary dismissal was lawful;

    b. Whether the learned judge was correct in awarding both reinstatement and compensation.

    In framing the above issues, we are mindful that the grievant is no longer in the appellant's employment.

13. As an appellate court at the first instance, and as rightly noted by the appellant, Rule 31 of the Court of Appeal Rules 2022 remains instructive. The mandate of the Court is to re-evaluate the evidence and make our own findings on those made by the trial court. In exercise of this appellate jurisdiction, we remain cautious not to interfere with the trial Judge's findings unless we are satisfied the same was either unsupported by evidence or was outrightly erroneous.

a. Whether the summary dismissal was lawful

14. The trial court considered this aspect by finding that there was a case of wrongful, unfair and unlawful termination of employment, partly on the basis that the appellant's key witness did not directly witness the events in question, and that the sexual harassment policy relied on was outdated. The learned judge concluded as follows:

> "We need not belabour. The circumstances of this case point out to a case of wrongful, unfair and unlawful termination of employment. The testimonies of the parties and their written submissions are world apart in separation. However, pertinent issues arise at all these stages: what was the impact of tendering an outdated sexual harassment policy by the respondent? Was it due and applicable in the circumstances of this case? Was due disciplinary process substantially and procedurally pursued in accordance with the law by the respondent? I answer all these in the negative. I therefore find a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent and I hold as such"

15. It is common ground that summary dismissal is open to an employer for gross misconduct. This is both under section 44(4) (c) and (e) of the *Employment Act* and Clause 24 of the CBA, provided due process is followed, including giving the employee a chance to respond to allegations.

16. While the trial court identified pertinent questions, it failed to evaluate the respective positions and supporting evidence before reaching its conclusion. The record shows that the grievant was issued with a show cause letter citing four grounds. He responded in writing, attended disciplinary hearings and exhausted internal appeal mechanisms.

17. In his testimony, the grievant confirmed receipt and response to the show cause letter, attendance at the disciplinary hearing, and signing of meeting minutes. He also confirmed that union officials attended the meetings. As part of the disciplinary record, there was testimony of sexual harassment involving the grievant against one Mercy, which testimony was corroborated by a colleague, one Paul Onditi at the disciplinary hearing held on 2nd October 2013. With these facts, it mattered not whether there was a sexual policy in place or not as sexual harassment remains an offence in Kenya; and indeed the grievant was found liable. In the same breadth, additional allegations concerning falsification of overtime and unauthorized work absences were raised and discussed during the disciplinary process, with some admissions by the grievant.

18. In our view, the trial court blatantly erred in dismissing the evidence of DW-1, Joyce Rop, as hearsay. She was the assistant factory manager, familiar with the events that transpired, and directly involved in disciplinary proceedings. She consequently authored the show cause letter and participated in meetings whose minutes were signed by the grievant.

19. The grievant was found to have inappropriately touched a female employee without her consent and used language of a sexual nature. This conduct falls within the definition of sexual harassment under Section 6 of the *Employment Act*. The trial court failed to assess the weight of this evidence, and by ignoring corroborative testimony and relevant admissions, arrived at an erroneous finding. See Barclays Bank of Kenya Ltd v Evans Ondusa Onzere [2015] KECA 173 and Wagude v R (1983) KLR 569, which underscore the duty of trial courts to evaluate all evidence.

20. A relevant dictum is the case of Choitram & another v Nazari (Civil Appeal 8 of 1982) [1984] KECA 47 (KLR) where it was stated that admissions of fact need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral.

21. Had the trial court taken into consideration the evidence disclosed in cross-examination, we have no doubt that it would have found justification for the dismissal. We agree with the appellant that it is its duty to ensure perpetrators of sexual harassment are brought to book appropriately, in accordance with the law, in order to protect its image and reputation and more importantly to safeguard the dignity of victims. We think the appellant advanced enough evidence and reasons to justify the summary dismissal of the grievant.

22. We must also make it clear, that there is no legal requirement that victims of sexual harassment testify in person. What matters is the sufficiency and credibility of the evidence in support of the allegation. Here we have evidence on record to demonstrate that the grievant sexually manipulated an employee and that she was too traumatised to be presented before court. In our view, the trial court did not consider the weight of the allegation and the overwhelming evidence against the grievant. With respect, the trial court took a light and lenient view of the evidence presented before it.

23. The sum total of our review of evidence and facts is that the learned judge erred in drawing the conclusion against the summary dismissal. To the contrary, we are persuaded that the dismissal was justified under the circumstances and the trial court's finding in this regard has to be set aside.

b) Whether the Reliefs Were Properly Awarded

24. Having found the dismissal lawful, we need not consider the merits of the remedies awarded by the ELRC. These remedies were grounded on the erroneous finding of wrongful termination.

25. Consequently, we allow the appeal and make the following orders:

    a. The appeal is allowed;

    b. The judgment delivered in Kericho ELRC Cause No.322 of 2014 on 17th May 2016 is set aside in its entirety;

    c. The appellant to have costs of both this appeal and the Employment and Labour Relations Court.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2025.

M. WARSAME

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JUDGE OF APPEAL

FJ. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

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JUDGE OF APPEAL