



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, MUSINGA, & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 70 OF 2017

BETWEEN

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....APPELLANT

AND

KISII BOTTLERS LTD.....RESPONDENT

(Being an appeal from the Judgment/Decree of the Employment and Labour Relations Court of Kenya at Kericho (D.K. Njagi Marete, J.) delivered on 31st January 2017)

in

E.L.R.C Case No. 86 of 2016.)

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of *Marete, J. the Employment and Labour Relations Court, (ELRC) Cause No. 86 of 2016* where the appellant, a trade union, filed a suit against the respondent for and on behalf of one of its members, *Thomas Osano Magangi*, (grievant).
2. The appellant claimed that on 1st March 2003, the grievant was employed by the respondent as a Mirror Inspector; that on 9th October 2015 the respondent issued the grievant with a show cause letter; the grievant responded on the same day; the respondent suspended the grievant from his employment with half salary pending investigations; that following a disciplinary hearing on 16th October 2015, the grievant was dismissed from his employment vide a letter dated 18th November 2015 for reasons that the grievant had absented himself from work for two days, and after being served with a show cause letter by his supervisor, the grievant confronted the Production Manager in anger while spewing bitter words.
3. The appellant contended that the grievant was sick over the period when he was absent from his place of work and had availed documents in support of his illness and therefore the respondent's action was unlawful.
4. The appellant prayed for a declaration that the grievant's dismissal was unjustified and unlawful; unconditional restatement of the grievant, in the alternative, payment of the grievant's full salary for the duration of suspension; compensation for unlawful loss of employment, general damages at Kshs.1.2 million for denying the grievant medical benefits, and costs of the suit.
5. The respondent denied the grievant's claim and said that his dismissal was justified in law since he had not obtained an official sick sheet to confirm his indisposition, and for his rude conduct after suspension.
6. In its judgment, the trial court held that the termination of the grievant's employment was not unfair or unlawful because "*a scrutiny of the respective cases of the parties and the evidence in support of the same brings out a case of lawful termination of employment. This is because the respondent abundantly adduces evidence of absence from duty on 5th October 2015 and insubordination of the claimant on 9th October 2015. He only reported far much later and he was drunk and uncoordinated.*" With that the appellant's case was dismissed in its entirety.
7. Being aggrieved by that decision, the appellant preferred an appeal to this Court stating, *inter alia*, that the learned trial judge erred in law

and fact in finding that the grievant absented himself from work; in finding that the termination was lawful; in basing his discretion on irrelevant matters; and for failing to consider the appellant's evidence and submissions.

8. When the appeal came up for hearing, **Mr. Atela**, the appellant's Assistant Secretary General appeared for the appellant. He relied on the appellant's written submissions which he briefly highlighted. Equally, the respondent relied on its written submissions which were highlighted by its learned counsel, **Mr. Nyamurongi**.

9. This being a first appeal, the Court has to reconsider the evidence, evaluate it and draw its own conclusions, but bearing in mind that it neither saw nor heard the witnesses and should make due allowance for that. See ***James Odera T/A A.J. Odera v John Patrick Machira & Company Advocates [2013] eKLR***.

10. We shall start by considering whether the learned judge erred in law by failing to hold that the grievant was absent from work due to illness. On this issue, it was submitted that the show cause letter dated 5th October 2015 raised the issue of absenteeism only, and that is what the appellant responded to, but the dismissal letter indicated the reasons for his summary dismissal as absence from duty for two days without permission and rude confrontation to the Production Manager, a charge he was not given an opportunity to defend himself of. It was further submitted that the learned judge erred in holding that the grievant reported to work drunk and uncoordinated, allegations that had not been made against the grievant in the show cause letter. In any event, the grievant was actually sick and made effort to notify the respondent, it was argued.

11. The appellant further submitted that the disciplinary process was not fair within the provisions of **section 41** of the **Employment Act, 2007** because the grievant was not represented at the hearing; that the respondent failed to avail the minutes of the disciplinary hearing or proceedings, and also failed to disclose to the grievant the outcome of their investigations but only chose to dismiss him.

12. On all the above grounds, we were urged to allow this appeal.

13. On the other hand, the respondent's counsel submitted that there was sufficient evidence that the grievant was absent from work for two days without his employer's permission; that as a result the grievant was lawfully dismissed, having been given an opportunity to show cause why disciplinary action could not be taken against him and the proffered explanation having been found unsatisfactory.

14. Regarding the reliefs that had been sought by the appellant, counsel submitted that in the circumstances under which the grievant was dismissed, none of them could have been awarded to him. He therefore urged the court to dismiss the appeal with costs.

15. From the evidence on record, on 1st October 2015 the grievant was treated at a local dispensary and was allegedly given two days sick off. Although it was alleged that the grievant sent one **Josephine Nyakundi** to deliver the treatment notes to the respondent, there was no evidence that was done. **Daniel Oluoch, (DW1)**, testified that by the evening of 5th October 2015 when he wrote the show cause letter, he had not been notified of the grievant's illness. The grievant did not explain his absence until he returned to work.

16. In the circumstances, we find that the grievant was under an obligation to seek from the respondent leave of absence and in the event of sickness, he was required to send for a sick sheet from his employer, but did not do so. The show cause letter and the subsequent dismissal were therefore warranted.

17. That notwithstanding, we do not think that the respondent adhered to the mandatory procedure as prescribed under **section 41(1)** of the **Employment Act** in terminating the grievant's employment. The section states as follows: -

"41. (1). 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."

18. There was no evidence by the respondent that apart from the dismissal letter the grievant was given any explanation for the disciplinary action in the presence of another employee or a shop floor union representative, which is a mandatory requirement. Where that is not done, the termination of employment is deemed unfair; see **section 45(2)** of the **Employment Act**.

19. Although the appellant sought reinstatement of the grievant to his position, it is trite law that the said remedy can only be given in very exceptional circumstances. See ***Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR***. This remedy was therefore unavailable to the grievant.

20. Equally, the prayers for full salary for the duration of suspension and general damages at Kshs.1.2 million for denial of medical benefits could also not be awarded.

21. However, considering that the termination of the grievant's employment was effected in an unprocedural manner which makes the termination unlawful, he is entitled to compensation. The factors that a court must consider in the exercise of discretion on a claim for unlawful or unfair termination of employment are set out under **section 49(4)** of the **Employment Act**.

22. Having considered the circumstances under which the termination of the grievant's employment took place; the fact that the grievant had worked for about 12 years and considering the grievant's conduct, where he absented himself from work and in subordinating his production manager, we think that an award of three (3) month's salary would be sufficient compensation for unprocedural termination of the grievant's employment, and we so award.

23. As the appellant has partially succeeded, we award one third of the costs of this appeal as well as in the trial court. It is so ordered.

Dated and delivered at Nairobi this 6th day of November, 2020.

M. K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR