



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 10 OF 2020

(CONSOLIDATED WITH CASE NO. 11 OF 2020)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION....CLAIMANT

VERSUS

UNLIVER TEA KENYA LIMITED.....RESPONDENT

(KIMUGU FACTORY)

JUDGEMENT

1. The claimant is a trade union registered to represent unionisable employees in the Agricultural Sector. It brought separate suits on behalf of Mr. Enock Korir and Mr. Joseph Selim. (herein after called grievant)

2. The Respondent employed the grievant on diverse dates as general workers. The first grievant was late transferred to the company shop as a Helper, greasing while the second grievant was transferred to Kimugu factory as a mechanic majority doing welding. They both worked until 8.12.2016 when they were dismissed for negligence and failure to observe safety procedures.

3. Aggrieved by the summary dismissal by their employer they appeal both the appeals were unsuccessful. Thereafter they lodged a trade dispute with the minister for labour for conciliation but the parties disagreed and the claimant brought the suits herein seeking the following reliefs:-

- a. (i) To unconditionally reinstate the grievants herein,
- ii. To pay the grievant for the entire period within which he was dismissed.
- iii. To pay the grievants in respect of all the leave days due to him at the time of reinstatement.
- iv. To pay the grievants leave and travelling allowance
- b. (i) Pay the grievants gratuity for the years he has served with the Respondent at the rates provided for in the CBA,
- ii. Pay the grievant house allowance from the time of dismissal until the time of the judgment.
- iii. Pay the grievants monthly salary for a period of twelve (12) months.
- iv. Pay the grievants in lieu of leave for the period dismissed;
- v. Pay the grievants leave traveling allowance for the period of dismissal;
- vi. Pay the grievants in lieu of notice of terminations,
- vii. Pay the grievants damages for unlawful, illegal and unfair dismissal;

4. The Respondent filed defence on 23.11.2020 and 23.5.2021 in this suit and the second suit respectively. The Respondent denied the alleged

unfair dismissal and averred that the dismissal was for valid reason and in accordance with a fair procedure. It contended that on 19.5.2016, the grievant negligently performed their duties without following safely LOTO procedures, and as a result, another employee was injured. He maintained that the grievants were taken through disciplinary hearing before the dismissal. Consequently, the respondent prayed for the suit to be dismissed with costs because the dismissal was fair and lawful.

5. Both sides gave evidence and thereafter filed written submissions.

Claimants' Case

6. Mr. Joseph Selim adopted his written statements dated 31.1.2020 as his evidence. In brief he stated that he joined the respondent on 1998 as a General worker but later he was promoted to the position of greaser.

7. He started that on 19/5/2016, he reported to work as usual and about 10.00am, he went together with the Team Leader to attend to a problem of overheating water pump. They finished the issue around 12.30Pm and he went back to the factory. On reaching the reception he found his colleagues on how to take cause of electrical problem. They then went to report to the person in charge. The problem was sorted out and working continued.

8. He further stated that their colleague, Mr. Ngeno came to the tea room and reported that another employee, Mr. Obare was injured. He then went home and left Mr. Obare receiving first aid.

9. On 4.1.2016, 6 months after the incident, he received a show cause letter calling him to explain why disciplinary action should not be taken against him for negligence by breaching safety procedures and LOTO compliances while handling the breakdowns on 19.5.2016. He responded by the letter dated 7.11.2016 and thereafter he received letter inviting him for a disciplinary hearing on 9.11.2016. He attended the hearing after which, he was dismissed by the letter dated 8.12.2016. He appealed on 9/12/2016 and he was heard on 24.5.2017 but the appeal was dismissed.

10. He denied any role in repairing the said breakdown contending that the repair was done by an electrician and not him since he is a mechanic. Consequently, he contended that his dismissal was not fair since all what he did was to check the machine and upon which he noticed that it was electrical problem

11. He confirmed that he greased machine for overheating because the machine runs for 24 hours. He further confirmed that after the greasing, the machine stopped. He admitted that he greased the machine while still running. He further admitted that he was trained on how to handle the machine.

12. He also admitted to being aware of the log out and tag out (LOTO) procedure but he confirmed that he never followed the same that day and around 3PM a fellow employee was injured.

13. He reiterated that he was served with a show cause letter and he responded. Thereafter he attended a disciplinary hearing with the shop steward. After the hearing, he received a dismissal letter.

14. On re-examination, he contended that he only did greasing to the water pump as usual. He clarified that the said employee was not injured immediately after the greasing, but late in the day. He further clarified that the cause of the overheating was the overnight running or overloading. Finally, he admitted that after the hearing he signed the minutes of the hearing.

15. Mr. Enock Korir, the second grievant also adopted his written statement dated 13.2.2020. He stated that he joined the respondent as a General Worker in 2001 and later, he was transferred to Kimugu factory as a mechanic. His duties involved welding and his salary remained Kshs 13,156.

16. He further stated that on 19.5.2016 he was assigned the duty of fabricating PPE cabinets, which was different from his normal duties. At about 12.29 PM his supervisor told that there was machine break down and sent to look for his colleagues to establish where the problem was and deal with it.

17. He went with 2 other colleagues and the Team Leader to check the problem upstairs. On the way, back they met with the Shift Leader who told them that he had already identified that the problem was electrical issue and he alerted The Electrician in Charge. Consequently, the grievant and his colleagues went back to their work since the problem was not within the area of work.

18. On 4/11/2016, he was served with a show cause letter charging him with negligence and breach of safely procedure and LOTO compliances while handling a breach on 19/5/2016. He responded on 7/11/2016 and on 9/11/2016, he attended disciplinary hearing with the shop steward. Thereafter he was dismissed on 8/12/2016, and appealed. However, then the appeal was dismissed.

19. He argued that the dismissal was unjustified and unfair because it was the Electrician in charge who undertook repair work. Therefore, he prayed for reinstatement without loss of benefits.

20. On cross-examination, he admitted that he received the termination letter on 8/12/2016 and filed suit on 18/2/2020 but denied that the period was more than 3 years.

21. He reiterated that on 19/5/2016, he was told to check on machine, which had stopped but on the way, he met the Assistant Factory Manager who told him that the problem was electrical and an Electrician had been called.

22. He admitted to knowing LOTO guidelines, which requires that a person repairing the machine must switch off the machine. He admitted that he never switched the machine because he never worked on the same that day as the work required an electrician.
23. He testified that the injury to the other employee happened after the grievant had left his shift but he was called back to escort the injured employee to hospital. He did not know what injured the employee or whether it was the machine, which had, break down.
24. The grievant reiterated that he was served with show cause letter and in his response he stated that he met the supervisor on the way to the machine who informed him that the machine require electrical works.
25. He admitted that during the disciplinary hearing he said that he never gave details of the break down on the machine and that he never reached the floor where the machine was situated. He further stated that he never checked whether tripping was the cause of the break down.
26. He reiterated that after the disciplinary hearing he was given a dismissal letter. Finally he admitted that he was paid all his salary.
27. On re-examination, he contended that after dismissal, he appealed on 9.12.2016 and his appeal was not heard until 24/5/2017. He maintained that his failure to check the breakdown on the machine was because he was told that problem was electrical of which he did not have the skills.

Defence Case

28. Mr. Jackson Kiprotich Limo, the respondent's Manager Kericho County testified as PW1. He also adopted his written statement, which he filed on 9/11/2021. In brief, he stated that on 19/5/2016 a workshop employee was injured by double shooting on conveyor, which moves tea from ground floor to third floor.
29. He explained that the break down occurred around 12 noon at the back show machine and it was attended by Jackson Ruto, Enock Korir, Joseph Selim and Kipngetich Ngeno.
30. RW1 contended that before starting to work on the Machine, one is supposed to de-energize it by LOTO in order to prevent hazards. That is done by disconnecting electricity which is the energy source. The disconnection is done by the team doing the repairs.
31. He stated that the Mr. Selim was an artisan doing Maintenance work. He was instructed to repairs the machine in the morning by the team leader but he did not perform the Log out Tag out and that is why the other employee was injured.
32. He contended that investigation was done and it was discovered that after the first repair of the first breakdown, the guard was not returned and LOTO was not complied with.
33. He stated that the grievants were served with show cause letter and later they was afforded a disciplinary on 9.11.2016 in the presence of the shop steward. After the hearing, they were found guilty as charged and he was dismissed on 8.12.2016.
34. He contended that the grievant understood LOTO and refereed to attendant list of a training on 7.8.2015 where the grievant was trained. He further explained that the grievant's appointment letter referred to the company policy and required the grievant to fully familiarize himself with Health and safety procedures.
35. He denied that the break down was electrical and maintained that the claim had already been allocated to work on the machine for mechanical work. He further maintained that the dismissal was done in accordance with the law and prayed for the suit to be dismissed with costs.
36. On cross-examination, RW 1 stated that he is a Chemical Engineer and he had worked for the respondent for 26 years. He admitted that the grievant were artisans and that he never interacted with them much. He said that the grievants' duties included repair and maintenance.
37. He reiterated that, on 19/5/2016 the grievant did repairs and maintenance but failed to restore a guard to the machine. Three breakdowns occurred on 19/5/2016 as per the investigations report dated 21/10/2016. However, he admitted that the report was not signed by the team, which prepared it. He further admitted that report did not indicate that it was prepared by Kiragu, Ken Odira, Diere, Ngeno Peter, Biero, Robert Twara, Caleb Matuku, Moreta and Ongera.
38. He maintained that the grievants failed to follow safety procedure and as a result, Mr. Edwin Obare was injured. He contended that the grievant admitted, in the response to the show caused letter, that they were part of the team that was governing on the machine that day.
39. On Re-examination, he contended that the grievants admitted that there were three breakdowns and the third one caused the injury to the said employee. He admitted that he was not among the investigators and authors of the investigations report. Finally, he contended that the grievants never denied being aware of the LOTO safety procedures

Submissions

40. The claimant submitted that the dismissal of the grievants was unjustified because the reason for the dismissal was invalid. It contended that the grievants were Artisans dealing with welding and did not have the skills for repairing electrical break down on the factory machine. It maintained that the respondent has not established the reason for the dismissal and urged the court to grant the reliefs sought.

41. For emphasis it relied on several precedents including **Raymond Cherokewa Mrisha v Civican Ltd [2014] eKLR, Loice Otieno V Kenya Commercial Bank Ltd [2013] eKLR**, and others where the Judges agreed that termination of employment by the employers is unfair if it is not grounded on valid and fair reason and if fair procedure was not followed.

42. The respondent on the other hand submitted that the suit is time barred because it was filed more than 3 years then after the impugned dismissal. It observed that the grievants were dismissed on 8/12/2016 and the suit was filed on 18/2/2020 without the leave of the court. Therefore, the respondent prayed for the suit to be struck out with costs by dint of section 90 of the employment Act.

43. On the other hand, it submitted that the suit lacks merits because the grievants performed their duties negligently and had admitted failure to follow the LOTO safety procedures while repairing a machine breakdown and as a result, another employee was injured. Further, the respondent submitted that the claimant was served with a show cause letter and thereafter given hearing by disciplinary committee and later by an appeal committee. Consequently, it submitted that the claimant is not entitled to the reliefs sought in the suit.

44. To support the above submissions, it relied on several precedents including **Maria Machocho v Total Kenya Ltd [2013] e KLR, Raja Shirenga Washigh v Mumias Sugar Factory Ltd [2014] Eklr, and Antony Mkala Chitavi v Malindi Water and Sewarge Ltd [2013] e KLR** where the court discussed the limitation of actions in employment cases, and the doctrine of unfair termination of employment.

Issues for Determination and Analysis.

45. There is no dispute that the grievants were employed by the respondent until 8.12.2016 when they were dismissed. The issues for determination are-

- a. Whether the suit is time barred,**
- b. Whether dismissal was unfair and unlawfully,**
- c. Whether the reliefs sought are merited.**

Time barred

46. Section 90 of the employment Act provide that:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

47. In this case, the dismissal of the grievants occurred on 8.12.2016 and the suit was filed on 18.2.20. The time taken to bring the suit was 4 years and 3 months from the date when the cause of action arose on 8.12.2016. Consequently, I agree with the respondent that the suit herein is time barred for being filed out of time.

48. Although the respondent submitted that the suit was filed without the leave of the court, I wish to observe that, the court lacks jurisdiction to enlarge the limitation period within which to commence a suit founded on employment contract.

49. The issue of limitation of time is not a mere procedural technicality but a substantive matter that goes to the jurisdiction of the court. It is now settled that jurisdiction of a court is derived from the Constitutions, Statute, or both and without it the court must down its tools.

50. It is also worthy noting that any objection to a court's jurisdiction ought to be raised at the earlier opportunity to save court's time. In this case, the respondent raised the matter during cross-examination but proceeded with the trial to the end. The issue was then raised in the submissions after close of the hearing. That error should not have occurred because the court wasted precious judicial time.

51. The foregoing notwithstanding, I proceed which I do, to strike out the two consolidated suits for being time barred. Each party shall have its own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JANUARY, 2022

ONESMUS N. MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE