



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E020 OF 2021

(An appeal from the Judgment and decree given on 18.03.2021 by Honourable Maureen Nabibya, Principal Magistrate,

on 18.03.2021 in Cnsolidated Employment Causes No.173, 174, 175 and 176 of 2018 in the Chief Magistrate

Court at Mombasa)

GOLD CROWN FOODS (EPZ) LTD.....APPELLANT

- VERSUS -

ESTHER WASILI KISAU.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The appellant filed the memorandum of appeal on 01.04.2021 through Opolo & Opolo Advocates. The appellant was dissatisfied with part of the trial Court's judgment upon the grounds that the learned trial Magistrate erred in law and fact as follows:

- 1) By finding that the claimants were entitled to be notified of the decision to terminate while ignoring the fact that that was actually done.
- 2) By awarding notice pay to the claimants and ignored to appreciate the provisions of section 44(1) of the Employment Act, 2007.
- 3) By awarding costs and interest despite finding that the termination had passed both the substantive and procedural tests.
- 4) By totally disregarding the appellant's evidence and submissions.
- 5) By disregarding factors which ought to have been considered.

The appellant prayed for judgment to be entered for:

- 1) The appeal be allowed and the judgment of the lower Court be set aside accordingly.
- 2) Costs of the appeal be awarded.

The respondent filed the cross appeal on 30.04.2021 through Wambo Muyala & Company Advocates against part of the judgment upon the grounds that the learned Magistrate erred in law and fact as follows:

- 1) By failing to hold that the respondent's termination was substantively and procedurally unfair.
- 2) By failing to appreciate that the respondent could have responded differently to the appellant's alleged procedure of termination and therefore:
- 3) By failing to appreciate that the respondent was employed on contracts which ran for one year and therefore and therefore the same was violated upon termination by the appellant.
- 4) In disregarding the respondent's evidence and submissions despite having filed the same in Court.

5) In holding that the respondents knew the reasons for termination and thus the termination was lawful.

6) In holding that the respondent attended the disciplinary meeting which meeting was held without due regard of the provisions of section 41 and 44 of Employment Act, 2007.

7) By extraneously finding that the judgment applies *mutatis mutatis* to the other respondents without due consideration of their unique responses to the appellant's procedure in termination.

The respondent prayed that the cross appeal is allowed and the lower Court's judgment set aside accordingly; and the Honourable Court awards costs of the appeal.

Counsel for the respondent opted to rely on the filed submissions while for the appellant, Counsel filed the submissions and made oral highlights.

This being a first appeal the Court has reminded itself of its role to reevaluate the evidence as may be necessary while bearing in mind that the Court has not taken the evidence first-hand like the trial Court did.

The case before the trial Court was as follows. The respondent filed the memorandum of claim dated 28.08.2018. The claimant pleaded that she was employed by the respondent in 2010 until she was allegedly unlawfully, unfairly, and summarily dismissed from work on account of participating in the company's contract staff's work boycott or strike on 28.07.2017. Her case was that she was initially employed as a helper at wage of Kshs. 375.00 per day and as at 2017 she served as a machine operator earning Kshs. 20, 625.00. Further, on 29.08.2017 the respondent summarily dismissed her from employment allegedly for being involved in the strike on 28.07.2017 but that allegation was not proved and she was not given a chance to defend herself and despite informing the respondent that she was not involved in the strike. The termination breached the provisions of the Employment Act, 2007 and she was not paid her terminal dues. Any process invoked by the respondent, if any, was tainted with unfairness hence the termination was unfair. The claimant claimed and prayed for:

- a) One-month's salary in lieu of termination notice Kshs. 20, 625.00.
- b) Salary for remainder of contractual term August to December 2017 Kshs. 103, 325.00.
- c) 12-months' compensation for unfair dismissal Kshs. 247, 500.00.
- d) Total Kshs. 371, 250.00.
- e) General damages for termination and dismissal of employment.
- f) Costs of the suit.
- g) Interest.
- h) Any other relief the Honourable Court may deem fit to grant.

The appellant filed the memorandum of response through Opolo Akinyi Advocate for the Federation of Kenya Employers. The claimant admitted the claimant was employed on fixed term contract running from January 2017 to December 2017. Further on 28.07.2017 the claimant reported on duty at 6.30am and was allocated duty by her supervisor but she refused to attend to her work station demanding salary renewal. The claimant and her colleagues were addressed by their supervisors and management to resume duty but they refused to barge. A letter to show cause was issued the same day and she was to respond in writing but she failed to do so. She was invited to disciplinary hearing on 17.08.2017 and advised to be accompanied with an employee of her choice. She attended the hearing as was scheduled. She was summarily dismissed by the letter dated 29.08.2017 and given an opportunity to appeal but she never appealed. She was paid final dues of Kshs.17, 432.00 which she acknowledged as full and final payment.

The Court has considered all the material on record and makes pertinent findings as follows.

The **1st issue** for determination is whether the trial Court erred in awarding one month pay in lieu of notice. The Court has perused the Judgement. The evidence was that the respondent admitted in her testimony that she participated in the strike, the strike was without notice to the respondent, she was given a letter to show cause but did not respond because she took the view that she would not be heard, she attended the disciplinary hearing and was summarily dismissed for participating in the unprotected strike. The Court finds that the trial Court cannot be faulted when it found that the respondent followed the procedure for summary dismissal in section 44 of the Employment Act, 2007. The trial Court then proceeded and stated,

“However, the claimant was entitled to be notified of the decision to terminate the contract which was omitted by the respondent. This was also a requirement under clause 4 of contract document.

The contract was to run from 01.01.2017 for one year whereas services were terminated on 29.08.2017. I don't find that the contract was violated in any way to validate in any way to validate payment for the remaining months. Just payment of notice would be sufficient.

The claims for unfair termination, general damages for termination of employment lacks basis since the claimant knew reasons for

termination and attended the disciplinary meeting. I will only award costs of the suit according to the award given, ie one-month salary in lieu of notice.”

The learned trial Magistrate had quoted section 44(1) of the Act which provides, “44(1) Summary dismissal shall take place when an employee terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”

Clause 4 of the letter of appointment referred to by the trial Court provides. “4. Any of the parties shall be entitled to terminate this contract by giving one-month notice in writing or pay one month’s salary in lieu of such notice. This is without prejudice to the company’s rights to terminate the employment summarily due to gross misconduct as defined in the Employment Act, 2007; in that case you are not eligible for any notice or payment in lieu of notice.”

The Court returns that both section 44(1) of the Act and clause 4 of the letter of appointment disentitled the respondent to a termination notice and pay in lieu of such notice. Further, in the circumstances, the award of costs to the respondent by the trial Court is thereby unjustified. Accordingly, the appellant’s appeal will be allowed upon the grounds and prayers made.

To answer the 2nd issue, the Court returns that even if the respondent’s submissions had been considered, the trial Court would not have arrived at a different finding that the termination was not unfair and as urged for the respondent in the cross appeal and submissions. The judgment shows that indeed the learned Magistrate found that the submissions for both parties had not been on record as at the time of the judgment and were not considered at all. However, in view of the Court’s findings on the foregoing issue No. 1 above, the Court returns that the trial Court’s findings were sound except to the extent as already found above.

The record of the trial Court shows that while the suits were consolidated by an order on 01.08.2019, only the respondent herein actually testified and the claimants in the other suits never testified. The application to consolidate dated 14.06.2019 that was allowed on 01.08.2019 is not part of the record of appeal and the order to consolidate was not extracted; and the Court is unable to tell the full extent of the consolidation order. In view of those observations, the Court is reluctant to fault the trial Court’s decision that the judgment applied *mutatis mutatis* to the other files as consolidated. The cross appeal will fail but in view of that mix-up, each party will bear own costs of the appeal and the proceedings in the lower court.

While making that finding, the Court has considered the respondent’s submission that in Kenya Plantation and Agricultural Workers’ Union –Versus- Carzan Flowers [2013] eKLR the Court upheld its earlier decision in Kenya Plantation & Agricultural Workers’ Union –Versus- Roseto Flowers, Industrial Cause No. 44 of 2013 thus, “First, it is the view of the court that a punishment including the dismissal on account of an employee’s involvement in a strike that does not comply with provisions of the Labour Relations Act, 2007 can only be imposed by the employer through a fair process that affords the employee an opportunity to know the allegations leveled and a chance for the hearing. The Labour Relations Act, 2007 does not prescribe the procedure for the disciplinary action and the court holds that such procedure is provided for in the principles of due process of justice set out in the Constitution such as Articles 47 and 50(1), the provisions of the Employment Act, 2007 and the lawful provisions of the agreement between the parties.

Secondly, the court finds that under section 80 of the Act, the primary punishment to be imposed by the employer is to deny payment to the concerned employee for the period of the strike because the section declares, such an employee “...is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike...”. While making this holding, the court further holds that the imposition of that primary punishment can only take place after the employee has been accorded due process to establish that the employee was indeed involved in the strike that did not comply with the statutory provisions. The primary punishment cannot be imposed sweepingly like by invoking the ultimatum principle which is devoid of the statutory and constitutional fair process as already elaborated and as innocent employees could easily be unfairly punished.

For avoidance of doubt, the drastic punishment of dismissal may be imposed in appropriate cases under due process but the view of the court is that the primary punishment is preferable so as to foster collective bargaining recognising that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship; it is bargaining chip invoked as a last option to strike amicable balance - the storm before the tranquillity. The purpose of the strike is seldom to trigger a separation and termination or dismissal should, in the opinion of the court, be invoked in extremely rare and obviously justified cases.

Thirdly, the court finds that under section 80 of the Act, the employee does not surrender the right and freedom not to participate, so to say, to refuse to participate, in a strike that does not comply with the statutory provisions. This principle against expulsion, disability or disadvantage for refusal to take part in a strike because it contravenes the statutory provisions imports individual responsibility of the employee in a strike situation and the collateral obligation upon the employer is to deal with staff individually in strike cases. That effect of the section effectively makes the ultimatum principle unavailable in our strike legislative framework.

Fourthly, the jurisdiction to determine the legality of a strike is vested in this court as per provisions of section 80 of the Act.”

It was submitted for the respondent that in the instant case the appellant had no justifiable reason to impose summary dismissal because a warning should have been sufficient because it was not established that the respondent was a mastermind or planner of the strike and there was no evidence that the claimant actively participated in the strike. It was also urged that the respondent resumed work after the management asked the workers to do so. The Court holds that an employer enjoys the prerogative to impose one or other punishment and unless considerations that may vitiate the manner of exercise of that prerogative in individual cases is pleaded and established (such as proportionality, uniformity or discrimination considerations), the Court will not interfere with that employer’s prerogative and no such pleading was made and established in the instant case. Second it was by the respondent’s own testimony that she participated in the strike. It might be that another employer would not have summarily dismissed the respondent and imposed a warning as proposed and yet, the Court

finds that there is no established reason to substitute the employer's discretion with that of the Court.

In conclusion, the appeal will succeed and the cross appeal will fail with orders:

1) The trial Court's award of one-month salary in lieu of termination notices and costs of the suit in favour of the respondent herein, and the other claimants in the suit, is hereby set aside.

2) Each party to bear own costs of the appeal and proceedings in the trial Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE