



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KERICHO
CAUSE NO. 23 OF 2019

KENYA PLANTATION & AGRICULTURAL WORKERS UNION (KPAWU).....CLAIMANT

VERSUS

EASTERN PRODUCE (K) LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant brought this suit on behalf of Wibrod Omollo (grievant) seeking the following reliefs:

- a. A declaration that the grievant dismissal was unfair and unlawful;**
- b. Maximum compensation by way of damages for wrongful and / or unfair dismissal,**
- c. Special loss amounting to Kshs 711,250.40/-**
- d. Costs of this suit**
- e. Interests in (b) and (d) above**
- f. Any other relief that the Court shall deem fit and just to grant.**

2. The respondent filed defence on 10.7.2019 denying the alleged unfair termination of the grievant's employment. It averred that the termination was fair because the claimant misconducted himself and he was accorded opportunity to defend himself before the termination. Therefore it prayed for the suit to be dismissed with costs.

3. The suit went to full hearing. Both parties gave evidence and thereafter filed submissions.

Claimants' Case

4. The claimant called the grievant as CW1 who basically adopted his written statements dated 15/2/2019. In brief, he stated that he was employed by the respondent in 2001 as a temporary work at (Tea Picking) and his salary was ksh.17142 per months. He was also a Shop steward of the union while a Mr. Wanjala was the Chief Steward.

5. He testified that on 23.10.2017 he was called from home by workers because there was unrest. He then spoke to the manager Mr Sitienei about security for workers. On 24.10.2017, he received suspension letter and thereafter he was invited to a disciplinary hearing on 3.11.2017. He was dismissed by the letter dated 3.11.2017 and he appealed on 9.11.2017 but the appeal was dismissed by the letter dated 11/11/2017. He was not paid any terminal dues.

6. He was not satisfied and the union lodged a trade dispute at the labour office for conciliation consolidation but the matter was not resolved. Hence file this suit.

7. On cross-examination, he admitted that his dismissal was on ground of misconduct and not performance. He contended that there was rumours that there were armed youth in the area. He admitted that the area Assistance Chief made a report naming him (CW1) and David Wanjala as the people who brought to his office the rumours about the armed youth. He further admitted that the Manager Mr Sitienei went to speak to him verbally.

6. He testified that the suspension letter restricted him to remain in his company residence and not to leave it without permission during the suspension period. He admitted that the letter also entitled him to ask for any documents from the company to assist him in his defence.

9. He admitted that he left his company house to go to the shop 10 kilometres away but returned within 30 minutes. As regards the disciplinary hearing, he admitted that the record of the hearing shows that, he said that the notice given for hearing was sufficient. He never protested that the notice given was too short to prepare. He admitted that he attended with 9 union representative called Philip Koech.

10. CW1 admitted that he was invited for hearing of his appeal on 11.11.2017 but contended that no hearing took place. He was only given a letter upholding the dismissal. He maintained that he was never paid anything after the dismissal but admitted that he was given the payslips on payee 55 of the respondent's bundle of exhibits. He also admitted that he was given warning letter related to performance and compassionate leave.

11. The respondent called its divisional Manager Mr Joseph Sitienei as RW1. He also adopted his written statement dated 10/7/2019 and bundle of 18 documents as his evidence. He testified that on 23/10/2017, he received a phone call informing him that workers were walking out of the farm and he rushed there with a corporal and guards and found the grievant and other employees leaving the field. The grievant was holding a letter from the Branch Secretary of their union.

12. CW 1 said that he was told to remove workers from the tea picking but he refused to give the letter to PW1. He further told RW1 that the reason for withdrawal of their labour was in relation to a Collective Bargaining Agreement (CBA). CW1 then urged the workers to return to work and confirmed to them that the alleged armed youth seen at his office were the night guards who had gone there to sign out after their shift.

13. RW1 testified that after the said explanation most of the workers resumed work immediately but there was still tension because of the conflicting views about the security of workers. He testified that the claimant refused to resume work for 3 hours contending that he was receiving instructions from the union.

14. RW1 further testified that the grievant also absented himself from his company residence on 30/10/2017 without permission contrary to the instruction in the suspension letter and on 2/11/2017 he was served with letter inviting him to disciplinary hearing. The grievant attended without any protest about the notice given being short. He contended that the investigation report and the witnesses' statements about the grievant's misconduct of threats and intimidations were relied on before he was dismissed.

15. He contended that the claimants had been involved in other issues of misconduct and he was served with warning letters. He maintained that the grievant was accorded a fair, opportunity to defend himself before the dismissal and he was also paid all his terminal dues.

16. On cross-examination, he admitted that he served the grievant with suspension letter on 24/10/2017, and not a show cause letter. He admitted that the suspension was indefinite. He contended that the hearing notice was made on 1/11/2017 service was done on 2/11/2017 and he hearing was held on 3/11/2017.

17. RW1 testified that Regina Chepkemboi stated in her statement (Page 34) that there was of a strike and security was on the alert. He further admitted that Simiyu Wanjala, the Shop steward stated in his statement (page 33) that he received calls from workers saying that there were armed youths seen at the office. He confirmed that Mr Wanjala called him about the alleged armed youth. However, RW1 maintained that the armed person has seen at the office were night guards signing out.

18. RW 1 contended that the letter inviting the CW1 to the disciplinary hearing cited 3 changes but without the particulars of the offence. However, he contended that the grievant did not request for the particulars. e confirmed that Mr Wanjala called him submit the matter. WRW1

19. He contended that the grievant was absent on 30/10/2017 and he did not pick phone calls. He contended that the grievant residence was at his place of work and he left without permission contrary to the requirements by the suspension letter.

20. On re-examination he stated that the suspension was not indefinite but pending the grievant's hearing. He contended that there were Shops within 20 meters from the grievant house but he went outside to Shops 10 kilometres away. He contended that 3 people were sent to look for the grievant on 30/10/2017 but he was not seen anywhere.

Submissions

21. The claimant submitted that the dismissal of the grievant was forno valid reason and therefore It was unfair. On the first allegation of threat to violence, the claimant contended that no evidence was adduced to establish that offence. According to the claimant there was strike on 23/10/2017 and the grievant was alerted that some armed people were seen standing at the school play round. He then notified the Division Manager about the situation and proceeded with his duties.

22. The claimants submitted that the evidence by RW1 was not sufficient to prove that the grievant threatened and intimidated other employees on 23/10/2017. The claimant contended that the particulars of the alleged intimidation, in paragraph 5 (c) of the written of the RW1 were never given during the disciplinary hearing or in the letter inviting him to the disciplinary hearing.

23. As regards the issue of absence from work on 30/10/2017, the claimant submitted that the grievant was serving suspension from work at the time. It contended that the suspension was indefinite and equal to constructive dismissal. It further submitted that the suspension only required the grievant to continue staying in the company house but it was not a prison sentence. It contended that during the suspension the grievant constitutional right to take a walk for fresh air was intact and as such he had every right to go to the market provided that he returned to the company residence.

24. As regards the procedure followed before the dismissal the claimant submitted that section 41 of the employment Act was not complied with because the grievant was not served with show cause letter before the commencing the disciplinary proceedings. It contended that the purpose of a show cause letter is to enable the employee explain why disciplinary action should not be preferred against him. For emphasis, I relied on **Water Ogal Auro v Teachers Service Commission [2013] e KLR** and **Mary Cheveweno Kiptui –v Kenya Pipe line Co Ltd [2014] e KLR** where the court underscored the right to fair hearing before the dismissal of an employee.

25. The respondent, on the other hand submitted that there was sufficient and reasonable grounds for dismissing the grievant under section 44 (4)(a)(c) (d) and e) of the employment Act read with clause 30 (a) (c) (d) and e) of the CBA. The respondent contended that the claimant threatened violence to employees by spreading a false rumours intimidated his Division Manager when confronted on the rumours and thereafter absented himself from work during suspension period. Such conduct according to the respondent amounted to gross misconduct and warranted summary dismissal.

26. The respondent submitted that the evidence by RW1, statements by the Corporal Mr Sammy Songok, Mr Shadrack Rotich and assistant Chief produced as exhibits are evidence that the grievant committed the misconduct that led to his dismissal.

27. As regards the procedure followed, the respondent submitted that it fully complied with section 41 of the employment Act. It contended that the grievant was accorded a hearing on 3.11.2017 where he attended with a union representative. He also appealed and he was invited to a hearing on 11.11.2017 and he attended but the dismissal was upheld. The respondent maintained that it followed a fair procedure before the dismissal and relied on the case of **Antony kala Chitavi vs Malindi Water and Sewerage Co. Ltd [203] e KLR** where the court discussed the ingredients of a fair termination of employment of an employee.

28. Finally, the, the respondent submitted that the claimant has not discharged the burden of proof of unfair termination under section 47 (5) of the employment Act and therefore the relief, sought in the memorandum of claim are not merited.

Issues for determination

29. It is not in contest that the grievant was employed by the respondent until 3/11/2017 when he was summarily dismissed for alleged misconducts. The issues for determination are:

- a. Whether the reason for the dismissal was valid and fair;**
- b. Whether a fair procedure was followed before the dismissal**
- c. Whether the claimant merits the reliefs sought.**

Reasons

30. It is now a statutory requirement in Kenya that employer shall not terminate contract of employment except for valid and fair reasons. The foregoing is provided for in section 45(2) of the employment Act.

31. The dismissal letter dated 3/11/2017 cited the reasons for the dismissal as follows:

“1. Threatening violence to Kamkong employees in teafield No. 26 on 3rd October 2017.

2. Intimidating the Divisional Manager on 23.10.2017 at tea field No. 26.

3. Absent without permission on 30.10.2017.

You werenot at you’re place accommodation nor were you contactable.”

32. The Respondent produced the record of the disciplinary hearing among other documents to support its case. Page 51 is the findings by the disciplinary committee, that: -

“a) Accused history card had some description of character of accused with relevance to this case

b) The accused failed to seek permission from Divisional Manager before leaving his place of work as indicated in suspension letter.

c) The accused was issuing orders to people out of place of work using invalid/overtaken court order cancelled by General Secretary (Francis Atwoli) suspending the strike.

d) The accused failed to obey lawful instruction to submit statement.

e) The accused disrupted company operations.”

33. Having considered the evidence and submissions by both parties, I find that the grievant did not threatened any one with violence. The

record show that on 23.10.2017 there was a strike and the grievant was called from home by workers who informed him of presence of armed youth in the school compound. He alerted the division Manger by phone. The area Chief also wrote a statement during the internal investigation in which he stated that the grievant and Mr Wanjala reported to him that there were armed youth seen in the respondent's compound.

34. There is no evidence that show that the claimant threatened other employees with violence if anything he alerted the Manager about presence of armed people in the company compound and the Manager explained that the armed people were night guards signing out in the morning.

35. As regards the other charges of intimidating the Division Manager and absenting himself from his place of work without permission, I am satisfied that the grievant did that. The evidence by RW1 and corroborated by the statements by Mr Songok and Rotich, security officers who accompanied the Manager to the farm on 23.10.2017, show that there was exchange between the Manager and the grievant. It is established that the grievant was insisting that there was insecurity while the Manage was stating that there was no such insecurity. There is proof that the grievant was using instructions from the Branch secretary of the Union and while the others workers resumed duty, the grievant refused to do so for three hours.

36. Again, the claimant admitted that he left his company residence on 30.10.2017 to go to a market outside the company farm. The market is 10 kilometres away. He explained that it was okay because the suspension letter only required him to reside in the said company residence. He contended that his right to free movement could not be taken away by the suspension letter.

37. However, RW1 contended that there was a shopping centre within the company farm and 20 meters from the grievant's house. RW1 maintained that the grievant moved from his resistance without permission.

38. I have already made a finding that the grievant misconducted himself by confronting the Divisional Manager in the presence of security personnel and other workers. He was supposed to obey lawfully command. He was also supposed to seek permission before leaving the employer's residence to shop from a market 10 kilometres away. The conduct by the grievant therefore amounted to gross misconduct under section 44(4) of the Employment Act. Consequently, I find and hold that the respondent has proved on a balance of probability that there was a valid and fair reason that justified summary dismissal of the grievant.

Procedure

39. Section 41 of the Employment Act provides that:-

“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.

40. In this case, the claimant was served with a suspension letter dated 24/10/2017 stating the reason for the action. The suspension was in order to pave the way for investigations into the misconduct cited. On 2/11/2017, he received the letter dated 1/11/2017 inviting him to a disciplinary hearing on 3/11/2017, the letter cited 3 charges and he attended with a union official. The two were allowed to make representations, which were considered and a decision to dismiss him was reached.

41. The grievant was given right of appeal and he appealed. He was invited to hearing of the appeal and he attended but the same was dismissed by the letter dated 11.11.2017. Having considered the foregoing summary of evidence, I am satisfied that the respondent has also proved that a fair procedure was followed before dismissing the grievant. He was given a fair hearing in the presence of a Union official of his choice as required by section 41 of the Act.

Reliefs

42. In view of the above finding that the dismissal of the grievant was grounded on a valid and fair reason and that a fir procedure was followed, I decline to declare the dismissal unfair and unlawful.

43. For the same reason, I decline to award the claimant salary in lieu of notice and compensation for unfair dismissal under section 49 of the Employment Act.

44. The claim for pro-rata leave also fails because of lack of particulars and evidence to prove how the figure of Kshs 274,272 was arrived at. Likewise, he claim for Kshs 5000 bus fare is also declined because it lacks particulars and evidence.

45. Finally the claim for gratuity must also fails because clause 36 of the CBA provides that:

“(c) An employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity”

In conclusion, I find no merits in the claimants' suit and dismiss it with no costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 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