



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KERICHO
CAUSE NO. 21OF 2019
KENYA PLANTATION & AGRICULTURAL
WOKDERSUNION (KPAWU).....CLAIMANT
VERSUS
FINLAYS TEA (K) LIMITED...RESPONDENT
JUDGEMENT

1. The claimant brings this suit on behalf of Mr. William otochi Sande (herein after referred to as the grievant) seeking the following reliefs:

- a. The dismissal of the grievant be reduced to a normal termination;**
- b. Severance pay at 15 days per year for 9 years;**
- c. Leave for the said period dismissed;**
- d. Leave travelling allowance for the period of dismissal;**
- e. Payment of damages for unlawful, illegal and unfair dismissal;**
- f. Costs of this suit plus interest.**
- g. Any other relief that the Court shall deem fit and just to grant.**

2. The respondent filed defence on 21.5.2019 denying the alleged unfair termination of the grievant's contract of employment. On the contrary, 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 was disposed of by written submissions based on the pleadings, witness statements and documentary evidence on record.

Claimants' Case

4. The claimant's evidence is contained in the grievant's written statement dated 21.3.2019 in which he stated that he was employed by the respondent in 2008 as a General Worker but later he was Transferred to the Engineering Department as a Painter.

5. On 23.1.2017, he was assigned work at Kitumbe Factory with other colleagues which required them to use company transport. As a requirement, he filled a job card and it was approved by his Line Manager and he gave his colleague, Mr. Pascal to go ahead to the boarding area while he was assembling the working tools. When the claimant arrived at the boarding area, he found that Pascal had left with the first vehicle.

6. The claimant proceeded to board the next vehicle but the transport coordinator ordered him to alight. He deemed the order to amount to harassment even after explain that he had a valid card which went with Pascal. On advice from other colleagues in the car, he called Pascal and put the phone on a loud speaker for the coordinator to hear the conversation. Pascal told him that he had handed over the card to the Transport Coordinator. After the phone call the coordinator checked and confirmed that the card had indeed been handed one to him and then allowed the vehicle to go.

7. On 26.1.2017, the claimant was served with a show cause letter by his Line Manager and the transport coordinator. The letter charged him with behaving in a disrespectful manner to the Transport Coordinator on 23.1.2017 when he asked for a job card.

8. On 1.2.2017, he attended a disciplinary hearing which was attended by the Administrative Manager, his Line Manager and the transport coordinator. On 2.2.2017, he was served with a dismissal letter. He appealed against the dismissal by his letter dated 3.2.2017 and a hearing was held on 16.2.2017. The appeal was dismissed and the claimant lodged a trade dispute with the Minister for conciliation.

9. The conciliator convened a meeting and according to the claimant, the parties failed to agree and the conciliator referred the parties to court for determination.

10. The claimant maintains that the reason for the dismissal was not valid because the grievant did not commit any of the misconduct set out in the dismissal letter. It submits that the grievant being union representative at the shop floor, it suspected witch-hunt in the dismissal. It also submitted that the employer did not consider that the grievant had served for 9 years without any warning letter. Therefore it urged the court to find that the respondent has not proved that the dismissal was grounded on a valid reason as required under section 43 and 45 of the Employment Act.

11. For emphasis, it relied on several court of Appeal and this court's decisions including **Kenfreight (EA) Limited v Benson K. Nguti [2016] e KLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company limited [2014] e KLR** where it was held that employer should not terminate employment contract without a valid and fair reason and without according the employee a fair hearing.

12. The claimant maintains that it has proved its case in the required standard and therefore the reliefs sought on behalf of the grievant are merited.

Respondent's case

13. The respondent's case is contained in the witness statements by the Transport Manager, Mr. Wesley Kipkemoi Ngetich, Administrative Manager Mr. Samson Busieney, Mr. David Owuor and Mr. David Koech.

14. Mr. Ngetich stated that on the material day, he released motor vehicle KAZ 311 G to go to Kitumbe and the completed loading KBL 511W. He then got KCF 187X to transport workers when the grievant arrived. When he asked the grievant to give him vehicle requisition card as required, the grievant told him that it was with his Mr. Oketch behind him.

15. After a waiting for a while, he asked the grievant where Oketch was because it was running late and the grievant replied that the card could be brought later. However, he asked the grievant to alight since he was not allowed to board without the card. The grievant refused to alight and shouted back that he has the right to board stating that Pascal who left for Kitume earlier had his card. One of the Masons on board, Mr. Barogo, requested him to just leave the grievant.

16. Mr. David Owuor and Mr. David Koech were on board KCF 187X on 23.1.2017 in the morning and they witnessed the exchange of words between the grievant and the transport coordinator. They stated that the said exchange of words arose after the grievant forced himself into the vehicle without transport requisition card.

17. Mr. Samson Busieney stated that on 23.1.2017, the grievant behaved in a disrespectful manner to the transport coordinator by shouting at him when he asked for job card and approval to board the vehicle. As a result, the grievant was taken through a disciplinary hearing in the presence of a witness after which he was found guilty of gross misconduct under the CBA and he was dismissed. He was also paid his terminal dues after clearing with the company.

18. In its submissions, the respondent reiterated that the claimant behaved in a manner that discredited a person placed in authority by the employer by wilfully refusing to obey command and uttering words that are insightful in front of other employees. He also boarded a vehicle without the required card from his supervisor and when he was ordered to alight, he refused and felt that it was his right to board the company vehicle without the job card.

19. The respondent maintained that it had proved on a balance of probability that the dismissal of the grievant was fair within the meaning of section 43 and 45 of the Employment Act. For emphasis it relied on the case of **Pamela Nelina Lutta v Mumias Sugar Company Limited [2017] e KLR** where the court underscored that fair procedure and valid reason are the two elements of fair termination of employment contract.

Issues for determination

20. It is not in contest that the grievant was employed by the respondent until 2.2.2017 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

21. It is now a statutory requirement in Kenya that an employer should not terminate contract of employment except for valid and fair reasons. The foregoing is provided for in section 45(2) of the employment Act. Under section 43 of the Act, the employer has the burden of proving the reason for the termination in any legal proceedings brought to challenge the legality of the termination.

22. The respondent contended that the grievant breached section 25(d) and (e) of the CBA, labour laws and conditions of service. The dismissal letter dated 2.2.2017 captured the reasons for the dismissal as follows:

“As explained to you during the disciplinary meeting, you disobeyed lawful instructions to alight from the vehicle for lack of an approved vehicle requisition when asked to produce. You behaved in an insulting manner to the person placed in authority over him by the company by shouting at the Transport Coordinator and being rude to the management.”

23. The grievant denied all the above offences and maintained that he only told the transport manager that his job card went with his colleague who had left in the first vehicle. He then called Pascal and put the phone on loud speaker for the transport coordinator to hear. Pascal said he gave the card to the coordinator and when the coordinator checked he saw the card and released the vehicle to go.

24. There is evidence on record that the grievant had exchange of words with the transport coordinator. The transport coordinator confirmed in his statement that on the material day he asked the grievant for his job card and he told him that he had given Pascal and he had left in the first vehicle. That corroborates the claimants evidence that he already had a valid card to board the vehicle only that it was in the possession of his colleague.

25. The coordinator did not deny that he heard the phone conversation between the grievant and Pascal. He also did not deny that Pascal said that he gave the grievant's job card to the him. Further the coordinator did not deny that after the said call he checked and confirmed that he had already received the grievant's job card and then released the vehicle.

26. Mr. David Owuor, one of the defence witnesses, said that the coordinator was not angered by the grievant and he just left to do his work.

27. Having considered the evidence and the submissions, I find and hold that the respondent has failed to prove on a balance of probability that the grievant committed any of the offences set out under section 44(4) of the Employment Act or section 25 of the CBA to warrant summary dismissal. Section 25 of the CBA is identical to section 44(4) of the Act.

28. The refusal by the grievant to alight from the vehicle did not amount to insubordination under section 44(4) (e) of the Act because in my view it was not a lawful and proper command considering that the grievant had a valid job card authorising him to board the vehicle. A person in authority must exercise that authority fairly and not capriciously. In the circumstances of this case, the court is satisfied that the Transport Coordinator did not act fairly and that the alleged shouting or refusal to alight from the van was more to do with self-defence than a deliberate move to discredit the Transport Coordinator.

29. Again the alleged insulting behaviour and rudeness to the management have not been proved. None of the defence witnesses stated that the grievant used such words or was rude to the management. The said offences were not mentioned in the show cause letter. As already observed above, the witnesses just stated that the grievant shouted at the coordinator but did not state the words used.

30. In view of the foregoing matters I find and that the respondent has failed to discharge its burden of proving that there was a valid and fair reason(s) to justify the summary dismissal of the grievant as required by section 43,45 and 47(5) of the Employment Act.

31. I gather support from the Court of Appeal decision in **Pius MachafuIsindu v Lavington Security Guards Limited [2017] eKLR** where the court held that: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

Procedure

32. 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.”

33. The grievant admits that he was served with a show cause letter and later invited to a disciplinary hearing on 1.2.2017. I have not seen the letter summoning him to the hearing to know whether the claimant was notified of the new charges which were not contained in the show cause letter dated 26.1.2017. Suffice it to say however that, the grievant admits that he attended that hearing and defended himself.

34. He also appealed against the dismissal and he was heard on his appeal. Consequently, I find that the respondent has proved that the dismissal of the grievant was done in accordance with fair procedure as required by section 41 and 45 of the Employment Act.

Reliefs

35. In view of the finding herein above that the dismissal of the grievant was not grounded on a valid and fair reason, I am satisfied that the dismissal unfair and unlawful within the meaning of section 45 of the Employment Act. section 43 (1) of the Act provides that:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.”

36. For the above reason, the claimant is entitled to the prayer for damages for unfair and unlawful dismissal by dint of section 49(1) of the Act. Under 24 of the CBA he is entitled to two months' salary in lieu of notice because he had worked for over 5 years. He is also awarded 4 months' gross salary as compensation for the unfair termination considering his long service without any warning letter.

37. The claim for leave and leave travelling allowance lacks proper particulars and consequently, it is declined. Likewise, the claim for severance pay is declined because the separation was not through redundancy. The proper relief would have been gratuity but it was not sought. Parties are bound by their pleadings and it is not the duty of the court to improve pleadings merely because the claimant has prayed the court to award any other relief which the court deems fit to grant. Such prayer in pleadings in my view is not an invitation to the court to exercise discretion as the court cannot do so without giving the opposite party an opportunity of being heard.

38. In conclusion, I find merits in the claimants' suit and enter judgment in the following terms:

Notice	Kshs. 23,990
Compensation	<u>Kshs. 47,980</u>
Total	Kshs. 71,970

39. The above award is subject to statutory deductions but in addition to cost plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF MARCH, 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