



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1161 OF 2015

MARY WANGUI NJOROGE.....CLAIMANT

VERSUS

LATHY FLORA KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant has averred that she was initially employed by the respondent as a temporary worker but was subsequently confirmed to serve on a permanent basis. Through her claim dated 4th July, 2015, she avers that the respondent summarily dismissed her from employment due to wrong labelling of flowers which were destined for Europe. Consequently, she seeks the sum of Kshs 192,000/= being notice pay, compensatory damages and service dues.
2. The respondent opposed the claim and averred that the claimant wrongly labelled three bags of Carnation variety with those of Dan Pedro variety, and the same were exported to Europe, only to be rejected by the customer, thus occasioning it huge losses.
3. The matter proceeded for hearing on 18th November, 2022 and each side called oral evidence.

Claimant's case

4. The claimant adopted her witness statement and the documents filed together with his claim to constitute part of her evidence in chief. She also produced the said documents as exhibits before court.
5. In her testimony, the claimant averred that she was summarily dismissed without being subjected to a fair hearing. She stated that her dismissal was as a result of a complaint to the effect that some flowers that had been exported by the respondent, were returned from abroad, due to wrong labelling. That at the material time, there was a student by the name Ms. Waceke, who was under her supervision. That she had trained the said student and given her directions on how to label the flowers. That following the complaint, she was asked to give a written explanation, which she did. That thereafter, she was served with a letter dismissing her from employment.
6. In cross examination, she admitted that the matter was initially presented to the Ministry of labour for Conciliation and an agreement entered into but she refused to comply with its terms as she did not agree with the same.

Respondent's case

7. The respondent's Human Resource Manager, Mr. John Mugo, testified as RW1. He also adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. The documents were also produced as exhibits before court.
8. RW1 averred that the claimant's conduct was gross as she had failed to properly supervise her juniors. That her lack of supervision resulted in the wrong labelling of flowers, which upon export were returned, thus the respondent sustained huge losses and lost a customer in the process. That the claimant actually admitted to her mistake in her response to the notice to show cause. He further averred that the claimant was accorded a fair hearing prior to her dismissal from employment. It was also his testimony that the claimant lodged a dispute at the Ministry of Labour through her union. That the conciliation process culminated in an agreement whose effect was to reinstate the claimant and pay her one month's salary. That despite the terms of the agreement, the claimant insisted on being paid full salary for the period she was out of employment, as a condition for her resumption to duty.

Submissions

9. Both parties filed written submissions upon close of the hearing, with the claimant submitting that her termination was not founded on valid reasons and that besides, the show cause letter, she was not given an opportunity to defend herself in a disciplinary hearing.

10. On the other hand, the respondent has submitted that it had valid and justifiable reasons to terminate the claimant as her poor performance at work was to its detriment. That further, it complied with the requirements of section 41 of the Employment Act prior to dismissing the claimant from employment. It invited the court to consider the findings in the case of **Kenfreight (EA) Limited vs Benson K. Nguti (2016) eKLR** and **Kenya Union of Commercial Food and Allied Workers vs Meru North Framers SACCO limited (2013) eKLR**.

Analysis and Determination

11. Having considered the pleadings before Court, the rival submissions, the documentary and oral evidence by both parties, the issues falling for the court's determination are;

i. Was the claimant's termination from employment unfair and unlawful?

ii. What reliefs if any, avail to the claimant?

Was the claimant's termination from employment unfair and unlawful?

12. The claimant has alleged that her termination was not justified and that she was not accorded a fair hearing prior to her dismissal. The respondent opines otherwise. The test whether an employee's termination was unfair is founded on two limbs, that is substantive justification and procedural fairness. I will proceed to consider the two limbs separately.

(i) Substantive justification

13. Substantive justification entails proving and justifying the reasons which resulted in an employee's termination. This principle is addressed under **Sections 43(1)** and **45(2) (a)** and **(b)** of the Employment Act (Act). In respect to this, **Section 43(1)** of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, **section 45 (2) (a)** and **(b)**, provides that a termination of employment is unfair if the employer fails to prove-

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason-

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer;....

14. It is not in dispute that the claimant was dismissed based on mislabelling of flowers that were bound for export by the respondent to Europe. It is also not in dispute that the flowers were returned back.

15. The reasons for the claimant's termination can be discerned from her show cause letter which reads in part: -

"On the 7th May, 2014, you were found to have wrongly labelled three (3) bags of Carnations- Madame Collete variety with labels for Dan Pedro from bed 101 greenhouse LT10. This is a serious mistake that results in customers rejecting the product and company having to bear the cost of the loss of business and company reputation will be adversely affected. By this you should know that any careless actions from your work and other employees have serious consequences to the company. Your action noted above therefore amounts to serious offence and gross misconduct..."

16. The same reasons were also reiterated in her letter of dismissal.

17. The claimant responded to the show cause letter and owned up to the mistake as follows;

"...The reason I labelled the bags wrongly was because hand(sic) a student whom I was training how to harvest for at least two weeks and I must also admit that I have mistake(sic) because of trusting her work. Therefore, I would like to apologize for the mistakes and will never repeat again. Firing me will not only cause problem to me but to my whole family whom depends on the work I do"

18. Essentially, the reasons for which the claimant was eventually terminated was centered on negligence in the performance of duty. As is apparent from her response to the show cause letter, the claimant admitted that she mistakenly trusted the student's work and thus prayed for leniency.

19. The respondent however exercised its discretion and dismissed her from employment. In its dismissal letter, the respondent cited loss of business and reputation.

20. As per the claimant's own admission she had trained the student for about two weeks before the incident. At the time, the claimant had

worked for the respondent for close to 6 years and hence she ought to have known what tasks to entrust a student with and what tasks she ought to undertake by herself.

21. From what it would seem, the task of labelling the flowers was quite sensitive noting that the same were not being delivered next door but abroad, where any mistake would attract adverse monetary consequences on the respondent company. As it came to be, the flowers were returned and as per RW1's testimony, the respondent lost the customer and also sustained freight charges.

22. In light of the foregoing, was the respondent justified in dismissing the claimant from its employment? Or put differently, was the sanction imposed by the respondent as an employer, reasonable in the circumstances?

23. *On the approach that a court should take in assessing the reasonableness of the action taken by an employer, it was observed as follows in the case of **British Leyland UK Limited vs Swift [1981] IRLR 91 at 93:** -*

“There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”

24. As stated herein, the claimant was someone who was experienced in her field of work hence she ought to have foreseen that any actions or omissions on her part would be costly to the respondent. She did not act prudently by entrusting the student whom she had only trained for two weeks with the labelling of the flowers for export. Besides, she stated that she had trained the student to harvest the flowers. Notably, she did not make any mention of labelling. How then did she task her with the labelling of flowers which were bound for export?

25. I find that the claimant's conduct was negligent in the circumstances hence availed the respondent sufficient and justifiable grounds to terminate her employment.

26. Having sustained the losses it alleges it did on account of the claimant's actions, its sanction against her cannot be termed as those of an unreasonable employer.

(ii) Procedural fairness

27. The claimant has averred that she was not afforded a fair hearing. The requirement for fair procedure is generally provided for under **section 45 (2) (c) of the Act. Section 41 (1)** makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.

28. The claimant was served with a notice to show cause which she responded to. Following her response, the respondent issued her with a letter of summary of dismissal where it was noted as follows; *“your explanation on the above has been received and the company has reached a decision that such conduct cannot be tolerated. As a result, your services are hereby dismissed with effect from 10th May, 2014...”*

29. In as much as RW1, stated that the claimant was subjected to a fair hearing, there was no evidence to that effect either in the form of minutes or an invitation to attend a disciplinary hearing. It would thus appear that her explanation which she rendered in written form, was all that she was afforded in terms of a fair hearing. There is also no indication that she was allowed to appear with a shop floor union representative or a fellow employee for any sort of hearing.

30. As has been held through various determinations by the Court of Appeal, an employer is enjoined in mandatory terms to comply with the provisions of section 41 of the Act. In the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR**, the Learned Judges of the Court of Appeal rendered themselves as follows: - ***“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.”*** Underlined for Emphasis

31. It was therefore imperative for the respondent to fully comply with the provisions of section 41 of the Act, failure to which the procedure employed became flawed. The claimant's written explanation was not sufficient in the circumstances and did not fulfil the requirements of section 41 of the Act.

Is the claimant entitled to any reliefs?

32. It is not in dispute that the parties subjected themselves to a conciliation process at the behest of the claimant through her union and consequently, entered into a Memorandum of Agreement dated 27th January, 2015, which provided as follows;

“The parties today agreed to resolve the above referenced matter on the following terms:

- 1. The grievant be reinstated to the same position under the same terms and conditions of employment with effect from 28th January 2015.*
- 2. The grievant to be deployed in any of the Lathy Flora farms.*

3. *Services be deemed to be continuous.*

4. *The grieved (sic) to be compensated by one month's salary”*

33. It is also common between both parties that the terms of the agreement were not fully complied with. The claimant stated that she was not satisfied with the same and instead demanded full salary for the entire period she was out of employment as a condition for her resumption of duty. Eventually she moved the court as per the instant claim.

34. Further, from the evidence before court, it was apparent that the respondent offered to pay the claimant the sum of Kshs 50,000/= in exchange of her withdrawing the instant suit but she declined.

35. In the case of **African Highland Produce Limited vs John Kisorio [2001] eKLR**, the learned Judges of the Court of Appeal held that;

“The prime factor is that he(sic), plaintiff, has a duty to mitigate loss if it is within his means to do so. Herein the plaintiff had the means to do so but did not act prudently.... It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident.”

36. Indeed, under **section 49(4) (l) of the Act** an employee is expected to mitigate his or her losses. In this regard, the court in determining the appropriate remedies to be awarded on account of wrongful dismissal and unfair termination ought to consider amongst other factors;

“any failure by the employee to reasonably mitigate the losses” and...”

37. In this case, the claimant had an opportunity to mitigate her loss by returning to work but she refused to do so. She was offered the sum of Kshs 50,000/= but she declined the offer. In the end, she failed to mitigate her losses as expected in the circumstances.

38. The claimant has sought compensation equal to 12 months of her monthly salary. However, considering the failure on her part to mitigate her losses and taking into account her contribution to the dismissal, the court will exercise its discretion not to grant any compensatory damages to the claimant.

39. As the court has found that the respondent had valid reasons to dismiss the claimant from employment but employed a flawed procedure, the termination shall be deemed to be a normal one hence the court will award her one month's salary in lieu of notice.

Conclusion

40. The upshot of the foregoing is that the claimant is awarded the sum of **Kshs 12,000** being one month's salary in lieu of notice.

41. The award, shall attract interest at court rates from the date of Judgment until payment in full.

42. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wachira

For the Respondent Ms. Chepng'etich

Court Assistant Barille Sora

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to

facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE