



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO. 42 OF 2019

ALFRED SIGEL.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant worked for the Respondent as a tractor driver for sixteen years until 30th November, 2018 when he opted for a voluntary retirement. The Claimant's decision was informed by the fact that he had a hearing impairment which had worsened over time and as a result he had had difficulty in performing his duties.

2. The Respondent vide a letter dated 13th December, 2018 informed the Claimant that for reasons beyond their control there was a delay in effecting the voluntary retirement and that his last working date would be the 28th February, 2019.

3. The Claimant continued to work without any hitch until 29th January, 2019 when he was flagged down by two strangers who intended to siphon fuel. However, while he was engaging the strangers, some senior managers arrived and the strangers ran away. The Claimant explained to the managers that the strangers were asking to siphon fuel from the tractor and he refused. However, the managers misinterpreted his sign language and he was taken through disciplinary process which culminated in a summary dismissal.

4. The Claimant was accused of two offences, firstly, deviating from the route approved via a work ticket and secondly, that the General Manager Kericho Business Unit and Operations Manager Jamji Estate found the Claimant's tractor parked and while the claimant was talking to some strangers in a manner suggesting that he wanted to siphon fuel from the tractor for sale.

5. The Claimant denied any wrong doing and stated the reason for deviating from the approved route as blockage of the route due to an ongoing construction and that the deviation was necessary to avoid delays.

6. The Claimant was subjected to disciplinary proceedings in which he was not provided with a sign language interpreter, after which he was summarily dismissed and lost all the perks that had been prepared under the voluntary separation program. In his view, the summary dismissal was unfair seeks the following reliefs:

(i) A declaration that the Claimant being a person with hearing impairment should have been provided with a sign language interpreter from the time the proceedings against him begun as required by the Constitution of Kenya and a further declaration that the disciplinary proceedings against the Claimant were and are unconstitutional, illegal, null and void and a subsequent order setting them aside.

(ii) An order that the Claimant be paid general and exemplary damages.

(iii) An order reinstating the Respondents letter accepting the Claimant's request for voluntary separation and that the Claimant be allowed to voluntarily exit the Respondent company under the terms of voluntary separation

(iv) An order directing the Respondent to issue the Claimant with a letter of service as required by law.

(v) Costs of the claim and interest.

7. The Respondent in the Memorandum of Defence dated 16th July, 2019 stated that on or about 29th January, 2019, it learned that the Claimant was involved in activities that were tantamount to serious breaches of the Company Code of Business (hereinafter referred to as COBP) specifically the clause on *protecting Unilever's physical and financial assets and intellectual property and obeying the law.*

8. As a result, charges were levelled against the Claimant namely, using an unauthorized route not assigned via a work ticket and siphoning fuel from the Company tractor. According to the respondent, the Claimant recorded a statement dated 29th January, 2019 where he admitted to talking to unknown persons with the intention of siphoning fuel, he admitted being caught in the act by his managers and he sought forgiveness as he was a first time offender.

9. The Respondent served the Claimant with a show cause letter dated 8th February, 2019, requiring him to put in a written explanation on why disciplinary action should not be taken against the Claimant for breach of the COBP and he submitted a written explanation on 11th February, 2019. On 12th February 2019 the respondent issued the Claimant with a notice to attend a disciplinary hearing on the 14th February, 2019 and the Claimant was informed of his right to representation by a colleague or a shop steward.

10. The Claimant subsequently attended the hearing and was given an opportunity to defend himself against the allegations leveled against him. During the hearing the Claimant admitted to using an unauthorized route and talking to unknown persons. Minutes of the disciplinary hearing were recorded and signed. The Respondent considered the Claimant's representations but found the same unsatisfactory. In its opinion the claimant's actions were tantamount to gross misconduct and it summarily dismissed him on 23rd February, 2019.

11. The Claimant was informed of his right to appeal the decision, and he appealed. However, his appeal was subsequently dismissed.

12. The respondent averred that following the summary dismissal, the Claimant was no longer eligible for the Voluntary Separation Package and as such the earlier offer was retracted.

13. The Respondent further averred that it supplied the Claimant with a hearing aid during the course of his employment and as such there was no need for an interpreter at the hearings as the Claimant had a hearing aid. Further it averred that at no time during the disciplinary proceedings did the Claimant or his representative object to proceedings on the basis that he could not participate due to impaired hearing nor did they request for a sign language interpreter during the hearing.

14. The Respondent maintains that the Claimant was summarily dismissed for gross misconduct and after following a fair procedure and as such he is not entitled to the reliefs sought. Therefore it prayed that the Claimants case should be dismissed with costs to the Respondent.

CLAIMANT'S CASE

15. **CW1** Alfred Sigei the claimant adopted his memorandum of claim and statement dated 15th October, 2019 as his evidence in chief. In brief he reiterated that on 29th February, he was driving tractor registration number KTCB 064 T when he was stopped by strangers. After talking to them he realized that they wanted to siphon fuel but he refused. He was saved from the situation by the, senior managers who were passing by and when the strangers saw them they ran away.

16. Thereafter he was taken through disciplinary hearing without a sign language interpreter. He maintained that the procedure followed was not fair. He further maintained that the reason for the dismissal was not fair because he gave a plausible explanation as to why he deviated from the approved route. He contended that the summary dismissal and the forfeiture of the voluntary separation package was heartless and inhuman. He therefore prayed for the reliefs set out in the Claim.

17. On cross examination CW 1 stated that he was employed by the Respondent as a driver for sixteen years, he had a hearing impairment and that the Respondent gave him a hearing aid. He also stated that he used an unauthorized route but denied that fuel was siphoned from the tractor. He further stated that the signature on the letter dated 29th January, 2019 was not his.

18. He admitted that he received a notice to show cause but he could not recall whether he responded to the same. He further admitted that he was invited for a disciplinary hearing which he attended and was accompanied by a colleague but he could not recall whether he defended himself because he was not availed a sign language interpreter.

19. He also admitted that he was appealed against the dismissal following an advice during the disciplinary hearing but the appeal was also dismissed.

20. He stated that he had previously signed a voluntary separation agreement dated 13.12.2018 but denied that the same was nullified by the disciplinary process. He contended that after the dismissal he was not paid all his terminal dues.

21. On re-examination he stated that he never spoke during the disciplinary process as there was no sign language interpreter. He maintained that the respondent knew that he could only communicate through sign language. He maintained that was not found stealing fuel on 29th February 2019 and contended that he was not taken to any police station. He further stated that he was never involved in any disciplinary issue during his 16 years' service.

22. Richard Kignetich Mutai a member of the Kericho County Advocacy for Persons with Disability Group testified as CW2 and also adopted his statement dated 16th October, 2019 as his evidence in chief. In brief he stated that the claimant informed the Disability Group that he was summarily dismissed by the respondent without the benefit of a sign language interpreter to assist him during the disciplinary hearing. As a result, the group wrote to the company pleading for the claimant's reinstatement and reconsideration of the action taken against him but the company declined.

23. During cross examination he stated that he knew the claimant very well as a person with hearing impairment. However, he did not know whether with Hearing aid the Claimant could discharge his duties well.

24. On re-examination he stated that after the claimant was dismissed he reported the same with the advocacy group and CW 2 went to the Respondent to plead his case.

RESPONDENT'S CASE

25. Mr. Isaiah Ndirangu an in-house medical doctor for the Respondent testified as RW1. He adopted his statement dated 4th November, 2019 as his evidence in chief and supplementary documents as exhibits.

26. On cross examination RW 1 stated that on 10th February, 2017 he had examined the Claimant and found that he had a hearing impairment, he referred the claimant for further medical assistance and he was given a BTE bilateral device with volume control. However, he explained that if the volume was low or the battery was dead or low the claimant would not hear.

27. He admitted that from the time he examined the claimant and the time when he was called for the disciplinary hearing two years had lapsed. He also could not confirm whether the Hearing aid was working during the said hearing. He admitted that the initial Hearing aid had been spoiled before 2017 when he recommended for another one. Thereafter the claimant never complained that the new device had problems. He stated that after the claimant got the device his hearing had improved significantly.

28. Ms Rose Maraka a Facility Manager for the Respondent at Koruma Factory testified as RW2. She adopted her written statement dated 5th September, 2019 as evidence in chief and bundle of documents dated 16th July, 2019 as exhibits. In brief she admitted that the claimant was employed by the respondent on 1st August 2003 as a tractor driver under the terms of service set out in the collective agreement (CBA) between the respondent and Kenya Plantation Agricultural Workers Union (KPAWU).

29. She further stated that on 29th February, 2019 the claimant drove the tractor KTCB 064T along a route not approve via the Work Ticket and siphoned fuel from the tractor. She contended that the claimant wrote a statement on the same date admitting the above allegations and requested for forgiveness. Thereafter, he was served with a show cause letter on 8th February, 2019 and he responded to the same on 11th February, 2019 again admitting that he used unauthorized route and talked to unknown people.

30. She further stated that a disciplinary hearing was done on 14th February, 2019 where he attended with the Shop stewards, Mr. Thomas Obuya and Ronald Ouma but after considering the representations made reached the conclusion that the claimant's actions were tantamount to gross misconduct and dismissed him on 23rd February, 2019.

31. She contended that there was no need of sign language interpreter during the hearing since the claimant had a Hearing aid. In her view the claimant is maliciously maligning the image of the respondent by exploiting his hearing impairment. She maintained that the claimant was given a fair opportunity to defend himself before the dismissal.

32. On cross examination RW 2 stated that she was a food scientist and not an expert in HR. She maintained that the termination of the claimant's employment was lawful and in accordance with company procedures. She admitted that she was not among the three managers Peter Ngeno, Collins Bett and Florence Mitei who witnessed the incidence on 29th January, 2019 but contended that evidence was based on her interactions with the claimant and partly because she was part of the disciplinary committee. She admitted that the claimant was never availed with a sign language interpreter during the disciplinary hearing and no medical examination was done before the disciplinary hearing.

33. On re-examination RW 2 reiterated that she interacted with the claimant on a daily basis and could verbally communicate with the claimant. She further stated that during the hearing the claimant addressed the committee verbally.

CLAIMANT'S SUBMISSIONS

34. The Claimant submitted that the lack of a sign language interpreter during the disciplinary proceedings was an infringement of his rights as a person living with a disability which is enshrined in article 54 of the Constitution of Kenya, 2010 and in the Persons with Disability Act, Chapter 133 of the Laws of Kenya.

35. The Claimant reiterated that the disciplinary proceedings against him were flawed, fatally defective *ab initio* as they violated his constitutional rights as a person with disability as enshrined in article 54 of the Constitution of Kenya, 2010 which provides that: -

“(1) A person with any disability is entitled to— (d) to use Sign Language, Braille or any other appropriate means of communication”

36. The Claimant submitted that the provisions of the Constitution are coached in mandatory and compulsive terms by the use of the word 'entitled', as such the disciplinary proceedings were fatally defective since for any judicial or quasi-judicial proceedings the language or mode of communication is key.

37. The Claimant submitted that the Respondent was not consistent in the particulars of allegations levelled against him and that the evidence of the Respondents managers was contradictory.

38. Further, he submitted that the siphoning of fuel amounted to theft by servant an offence provided for under section 281 of the Penal Code. The Respondent was duty bound to report the alleged offence to law enforcement officers who were legally mandated to investigate and try criminal offences. In his view, the managers were agriculturalists, with no training in criminal justice system and their actions usurped the role of the criminal justice system thus had violated his right to a fair trial and fair administrative action.

39. The Claimant submitted that the appeal process was a farce and an academic exercise. The Claimant further submitted that he did not get the proceedings of the disciplinary committee in order to prepare for the appeal rather they were only availed in court as part of the Respondent's defence.

RESPONDENT'S SUBMISSIONS

40. The Respondent submitted that it summarily dismissed the claimant for his deliberate breach of the terms of his employment contract and the company policies, which actions amounted to gross misconduct. It further submitted that it followed due process in accordance with the Employment Act 2007 and its Disciplinary Policy before arriving at the decision to terminate the Claimant's contract.

41. The Respondent submitted that it had valid reasons to warrant the Claimant's summary dismissal, because on the 29th January, 2019 he was caught by three managers talking to strangers who, on seeing the managers escaped by a motor cycle carrying a container and a hosepipe. Upon enquiry by the managers, the claimant verbally confessed that he had negotiated to sell to the strangers, 20 litres of fuel for kshs.1200.

42. It contended that it undertook a fact-finding process which included interviewing the witnesses who were at the scene on the material date. Further the Claimant recorded a statement dated 29th January, 2019, whereby he admitted to the offence of talking with unknown persons with the intention of siphoning fuel and acknowledged that he was caught in the act by the Respondent's manager and even sought forgiveness as he was a first time offender.

43. The Respondent submitted that the Claimant attended the disciplinary hearing as scheduled and was given an opportunity to defend himself against the allegations levelled against him. The Claimant was accompanied and represented at the hearing by two shop stewards, Thomas Obuya and Ronald Ouma and again he admitted to having taken an unauthorized route and talking to unknown persons.

44. The Respondent submitted that upon considering the Claimants representations, the hearing committee found that the reasons provided were unsatisfactory and that the Claimants actions demonstrated disregard for the Respondent's policies and procedures and were tantamount to gross misconduct which warranted summary dismissal and he was issued with a summary dismissal letter dated 23rd February and informed of his right to appeal the said decision.

45. The Respondent submitted that it lost trust in the Claimant's ability to discharge his duties and to act in a manner that protected the Respondent's physical and financial assets as well as obey the law and proper instructions and was left with no choice but to terminate his services.

46. The Respondent cited the case of *Agnes Kavita Mbiti vs. Housing Finance Company Limited [2017] eKLR* to urge that the lack of trust and lack of respect for the Respondents regulations went to substratum of the employment relationship. It also cited the cases of the *Nazareno Kariuki vs. Feed the Children Kenya [2013] eKLR* on the role and scope of the Employment and Labour Relation Court in internal disciplinary procedures.

47. The Respondent submitted that the Claimants termination was procedurally fair within the confines of section 41 of the Employment Act, because due process was followed before a decision was made to terminate the Claimant's employment. For emphasis, it cited the case of *Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Ltd. [2013] eKLR* which outlined the elements of procedural fairness. The Respondent further contended that it followed the process as espoused in its Disciplinary Procedure.

48. The Respondent maintained that there was no need for a sign language interpreter during the disciplinary proceedings because the Claimant had a hearing aid, and at no time did he or his two representatives object to the proceedings on the basis that he could not participate due to impaired hearing. It contended the Claimant actively participated in the hearing accompanied by two shop stewards and at no time did the Claimant or his representatives make any request for a sign language interpreter during the hearing. Relying on the minutes recorded, the respondent submitted that the Claimant understood the allegations made against him and sufficiently addressed the hearing committee in his defense. He and his representatives were able to give clear and detailed responses to the allegations levelled against him.

49. The Respondent submitted that the conduct of the Claimant amounted to gross misconduct and sanction recommended was dismissal. Following the findings of the hearing committee and its policies, the Respondent resolved to terminate the Claimants contract and informed him of the decision vide letter dated 23rd February, 2019. It also computed and paid the Claimants terminal dues which included his salary for the days worked up to the last day, pro rata leave earned but not utilized, overtime worked but not paid and one way bus fare. Further the Claimant was informed of his right to appeal against the decision.

50. The Respondent submitted that on 25th February, 2019 the Claimant wrote to the Respondent appealing against its decision to terminate his employment contract, the Respondent Managing Director considered grounds raised in the appeal and found no justifiable reason to interfere with the decision rendered on 23rd February, 2019 and upheld the summary dismissal and subsequently informed the Claimant of its determination vide a letter dated 7th May, 2019.

51. Finally, the Respondent submitted that, following the summary dismissal for gross misconduct, the Claimant was no longer eligible for the voluntary separation package.

Issues for determination

52. I have carefully considered the pleadings, evidence and submissions and I find that the issues for determination in this suit are as follows:-

(i) Whether the Claimant's summary dismissal was for a valid and fair reason.

(ii) Whether the procedure followed was fair.

(iii) Whether the reliefs sought are merited.

Reason for the termination

53. Section 45 (1) and (2) of the Employment Act states as follows:

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer 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 employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”

54. In the case of *Pamela Nelima Lutta vs. Mumias Sugar Co. Ltd [2017] eKLR* Onyango J. held that:

“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.” (emphasis added)

55. Similarly in the case of *Walter Ogal Anuri vs. Teachers Service Commission [2013] eKLR* the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

56. In the Court of Appeal case of *Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR* the Court of Appeal stated as follows:

“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 reasons are valid and fair (Section 45)...among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

57. In this case, the claimant was found by the managers of respondent in circumstances that allegedly suggested that he was he was trying to siphon fuel from the company tractor he was assigned to drive on 29th January, 2019. He had parked the tractor on the road talking to strangers who had a can, hosepipe and a motor cycle. The strangers ran away when the managers stopped to see what was happening. Upon enquiry, he admitted that he had been stopped by the strangers who wanted to siphon fuel from the tractor. No evidence was adduced to confirm that any fuel was indeed siphoned from the tractor. The claimant denied the offence and maintained that he had refused to siphon fuel from the tractor even before the managers arrived at the scene.

58. Having considered the evidence presented by both sides, I find that the respondent has failed to prove that the claimant siphoned fuel from the tractor. The evidence on record shows that he was stopped by strangers with intention to siphon fuel from the tractor but he refused. The managers who found the claimant at the scene did not testify during the disciplinary hearing or in this case to shed light on whether actual siphoning of fuel or attempt to do so occurred. The claimant raised questions during the disciplinary hearing but they were not answered because the witnesses never attended the hearing. It means that the allegation that fuel was siphoned is hearsay. Consequently, I find and holds that the employer has failed to prove that the summary dismissal was not grounded on valid and fair reason.

The procedure

59. 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.”

60. In this case the claimant was interrogated on 29th January 2019 by the managers on the ground and he admitted that he had been stopped by strangers who wanted to buy fuel from the tractor but he declined. He also recorded a statement on the same date in which he reiterated

the same story. Thereafter he was served with a show cause letter and he responded in writing. On 14th February 2019, he was accorded an oral hearing before a committee where he attended with two union officials and defended himself.

61. However according to the claimant, the hearing was not fair because he was not availed Sign language interpreter. On the other hand, the respondent contended that the claimant did not require the said interpreter because he had been provided with hearing aid. It further contended that the neither the claimant nor his union representatives protested the lack of sign language interpreter during the hearing.

62. I have carefully considered the evidence on record and confirmed that the claimant was notified of the charges of misconduct against him in writing and he was availed a fair opportunity to defend himself. The minutes of the disciplinary hearing produced shows that during the hearing, he was represented by two union officials and they agreed to proceed with the hearing. He gave a detailed statement and answered many questions that were put to him by the panel. Thereafter his representatives made their submissions.

63. To that extent, I find that the claimant was accorded a fair opportunity to defend himself and he did so. His representations were considered but were found unsatisfactory and he was dismissed. The proceedings were not rendered unfair by the failure to provide a sign language interpreter as the claimant had understood the charges and defended himself without any protest. Thereafter he appealed against the dismissal and he was heard on the appeal. Consequently, I proceed to hold that the respondent has proved that the dismissal of the claimant was done in accordance with a fair procedure.

Reliefs

64. In view of the finding that the respondent has not proved that the dismissal of the claimant was grounded on a valid and fair reasons, I make declaration that the dismissal was unfair within the meaning of section 45 of the Employment Act.

65. The claimant had already applied for a Voluntary Early Retirement and the employer had agreed. His last working day was agreed to be 28.2.2019 but the employer unfairly dismissed him on 23.2.2019 and forfeited all the benefits under the early retirement agreement. The claimant is therefore entitled to his retirement benefits under the CBA.

66. The claimant did not quantify the claim and therefore, I leave it to the parties to assess the amount of the benefits payable. The claimant will also have certificate of service, costs of the suit plus interests at court rates from the date of filing the suit. The benefits shall be paid less statutory deductions.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 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