



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1475 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS UNION.....CLAIMANT

VERSUS

FRIGOKEN LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant is a registered trade union. The Respondent is a limited liability company duly registered under the Companies Act, Laws of Kenya.

2. The Respondent and the Claimant have a valid recognition agreement that came into effect on 1st January 2015.

3. The grievant was employed by the Respondent on 1st June 2001 as a packer with a basic salary of Kshs.3,200/- and a house allowance of Kshs.900/-. The grievant duties included making sure that all jars had the correct weight after being filled.

4. On the 8th November 2014, a jar broke and the grievant was issued a suspension letter on the 12th November 2014 and was later dismissed on the 17th November 2014 on the ground that she neglected her duties and failed to follow jar breakage procedure. The grievant alleges she was dismissed unheard contrary to the provisions of Section 41 of the Employment Act, 2007.

5. Through the union, the matter was reported to the Ministry of Labour and a conciliator was appointed and after the hearing the conciliator prepared a report upholding the Respondent's decision to dismiss the grievant. The conciliator recommended, that the grievant be paid wages for 17 days worked in November 2014, accrued leave and a certificate of service. The grievant disagreed with the conciliators report and as a consequence, the conciliator referred the matter back to court.

6. The Claimant approached the court vide a memorandum of claim dated 20th July, 2016 seeking the following orders against the Respondent;

(i) Reinstate the grievant to her former position and treat her in all respects as if she had not been dismissed

(i) Re-engage the grievant in work comparable to that which she performed prior to her dismissal or other reasonably suitable job with the same wages

(ii) Award the grievant compensation of up to twelve (12) months gross wages for unfair dismissal

7. In the alternative and where the reinstatement is not appropriate remedy, the grievant prays that the court orders the Respondent to pay the grievant as follows:

(i)..... One months' notice in lieu..... Kshs.18,460

(ii)..... 17 days worked in November 2014

(18,640 x).....	Kshs.12,070
(iii)..... 5 days pending leave on 2014 not taken	
(18,640 x).....	Kshs.6,390
(iv)..... Leave travelling allowance.....	Kshs.5,200
(v)..... Maximum compensation for unfair dismissal	
(18,640 x 12).....	Kshs.223,680
Total claim.....	Kshs.265,800
(vi)..... Cost of the suit in favour of the Claimant	

8. In response to the memorandum of claim the Respondent filed a statement of response dated 21st August 2017.

9. The Respondent states that the Claimant was employed by the Respondent in 2001 as a casual labourer and by the time she left the company, she had received training on jar breakage procedures which required her to inform all her colleagues to stop operation in the event there was a jar breakage to allow the supervisor examine the area and ensure the safety of products.

10. The Respondent states that on the 8th November 2014 the grievant while working a jar broke. She removed the broken jar and replaced it with two suspect jars and on interrogation lied that she had followed the breakage procedure.

11. The Respondent states that the grievant was suspended on the 13th November 2014 and attended a disciplinary hearing accompanied by a shop steward where she admitted to having not followed the laid down procedure.

12. The Respondent avers that the grievant was issued with a dismissal letter for the reason that she failed to follow the jar breakage procedure. The shop steward appealed against the decision citing harshness and inconsistency of punishment but the Respondent states that the union failed to adduce evidence that would warrant review of the decision.

13. The Respondent prays that the matter be dismissed with costs.

Evidence

14. The grievant, **Mary Munyoki** testified in support of the case. She adopted the witness statement as her evidence in chief. She stated that she was terminated on 17th November 2014 having worked for the Respondent for 13 years 5 months. She stated that she was suspended for 5 days prior to her dismissal and that she was not invited for a disciplinary hearing nor paid her dues. The Claimant prays to be reinstated.

15. On cross examination, the grievant confirmed that she was trained on what to do if there was jar breakage. She testified that when the jar broke, she reported the same to the supervisor who informed her to continue working. Further, the witness confirmed that the union did not agree with the Conciliator's as she had not been issued with a notice to show cause. She also confirmed that her last salary was Kshs.13,960/-.

Respondent's evidence

16. The Respondent, in support of its case called one **Sylvia Kaburu**, the Human Resource Manager. The witness stated that there is a prescribed procedure when a glass jar broke which the grievant did not follow. That the grievant was seen on CCTV returning the suspect jar back to the line before inspection. The witness stated that non-compliance with the procedure could lead to loss of the contract with the client.

17. The witness further testified that the grievant was invited for a disciplinary hearing where she admitted that she had not acted in accordance with the procedure. That the grievant had no previous misconduct warning or reprimand and had served diligently for 13 years.

18. Finally, the witness confirmed that the Human Resource Manager at the time took the minutes at the disciplinary hearing and the minutes were not on record and she had no copy on file.

19. On re-examination, the witness admitted that a glass jar had broken on the material day.

Claimant's Submissions

20. The Claimant submits that the grievant, who is its member was on duty on the 8th November 2014 when a jar broke on the table and not on the line as alleged by the Respondent.

21. The Claimant further submits that after the breakage the grievant informed the supervisor who picked the broken jar but did not stop the line which was his responsibility. It is submitted that the grievant together with a colleague she was working with were suspended on 12th November 2014 but only the grievant was dismissed on 17th November 2014 without being heard in accordance with the provisions of Section 41 of the Employment Act.

22. It is the submission of the Claimant that the grievant was condemned unheard contrary to Article 50 of the Constitution of Kenya, 2010. The Claimant also submits that there is no evidence in form of minutes in support of the disciplinary hearing alleged by the Respondent.

23. It is the Claimant's contention that the colleague who was suspended together with the grievant was recalled to work while the grievant was dismissed which is a form of discrimination by the Respondent.

24. Finally, the Claimant submits that the grievant was unfairly and unlawfully terminated in that the Respondent failed to follow the prescribed procedure before dismissing the grievant and prays that the court enters judgment in favour of the Claimant as prayed.

Respondent's Submissions

25. The Respondent submits that the grievant was employed in 2001 and during her employment she was trained on glass jar breakage procedure which required her to inform all her colleagues to stop operations to allow the supervisor examine the area and ensure safety of the products.

26. The Respondent further submits that on the 8th November 2014 while the grievant was working during the day shift a glass jar broke at around 7:34 am, that the grievant replaced the broken jar with two suspect jars according to the CCTV footage and on interrogation the grievant lied that the breakage procedure had been followed.

27. It is the Respondent's submission that since employment is based on trust, good faith and honesty, once the trust is eroded, the best option for the parties is to separate as observed by Marete J. in **George Morara Nyakioba v Mini Bakeries (Nairobi) Limited [2016] eKLR** where the Judge cited with approval the decision of **National Union of Mine Workers and Another and the Commission for Conciliation, Mediation and Arbitration Case No. JR 2512 of 2007**. The Court observed that it was proper for the employer to take disciplinary action and summarily dismiss the employee because she had broken trust and the good faith that should exist in an employer/employee relationship.

28. Pushing the case, further, the Respondent submits in the instant case the grievant had broken the trust and good faith that existed between her and the Respondent. It submits that the Claimant violated the express terms of the agreement and from the investigations carried out and the CCTV footage, it was established that the grievant was careless in the performance of her duties.

29. Finally, the Respondent submits that the reason for termination was valid as ordained by **Section 44(4)(c) of the Employment Act** which provides that *"an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from the nature it was his duty, under his contract to have performed it carefully."*

30. The Respondents urges the court to find that the reason for dismissal was valid and due process was followed.

Analysis and Determination

31. The issues for determination are whether:

- (i) The grievant's dismissal from employment was unfair;
- (ii) The grievant is entitled to the remedies sought.

32. As to whether the grievant's dismissal from employment was unfair, the home port are the provisions of Section 45 of the Employment Act, 2007. Section 45(2) of the Act provides that:

- (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 employees 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.**

33. This provision is explicit that termination of a contract of employment must comply with both substantive and requirements if it is to meet the threshold of fairness.

34. Other relevant provisions are Sections 41, 43, 44 and 47(5) of the Act.

35. There is no gainsaying that this Court and the Court of Appeal have enforced this and other provisions of the Employment Act steadfastly and there are legions of decisions to that effect. Section 45 of the Act prescribes the fairness test in termination of employment contracts. Under this provision for at termination to pass as fair there must be substantive justification for the termination or dismissal and procedural fairness.

36. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal expressed itself as follows:

“There can be no doubt the Act, which was enacted in 2007, places heavy legal obligations on employer in matter 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.”

37. Having set out the applicable provisions and propositions of law, I now proceed to apply the law to the facts of the instant case.

38. The Respondent summarily dismissed the grievant by letter dated 17th November 2014 on the ground that *“You wilfully neglected to perform and follow the jar breakage procedure you neglected or carelessly and improperly failed to follow the jar breakage procedure to ensure the food safety was maintained.”*

39. According to the Claimant on 8th November 2014, a glass jar under the grievant’s care, broke on the table and she reported the same to the supervisor on duty and was told to continue working. That she was suspended on 12th November 2014 and terminated on 17th November 2014. The grievant admitted that a jar broke.

40. The Respondent’s evidence is that on the material day a glass jar broke at 7.34 am but the grievant did not inform the supervisor and CCTV camera footage showed the grievant returning a suspect jar, back to the line.

41. That the supervisor on duty is seen at 7.36 am and the grievant gives him/her galas and work continues. At 7.38 am the quality controller is seen coming to the desk and finds a broken glass. That at 7.42 am the grievant is seen releasing a second suspect jar back to the process.

42. It is not in dispute that the grievant had been trained on how to act in case a jar broke on the table or production line. There is evidence of a training conducted on 12th February 2014. The employee involved initiates the process by notifying the supervisor immediately so that the area is cleared of pieces of glass to ensure product safety.

43. It is important to note that the Respondent was dealing with packaging of French beans for export and product quality and safety was elemental.

44. Section 43(2) of the Employment Act, 2007 provides that:

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

45. From the evidence on record, it is clear that the jar breakage procedure was not followed owing to the grievant’s omission. It was the grievant’s duty to raise the alarm.

46. The Court is persuaded and finds that the Respondent had a valid reason to terminate the grievant’s employment on 17th November 2014 as provided by Section 44(4)(c) of the Employment Act.

Procedure

47. While Section 45(2)(c) of the Employment Act decrees that termination of employment should be in accordance with fair procedure, Section 41 details the procedural precepts to be complied with.

48. In **Kenya Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, the Court of Appeal expressed itself as follows on the requirements of Section 41 of the Employment Act.

“Four elements must thus be discernible for the procedure to pass muster: -

(i) An explanation of the grounds of termination in a language understood by the employee.

(ii) The reason for which the employer is considering termination.

(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.

(iv) *Hearing and considering any representation made by the employee and the person chosen by the employee.*”

49. In the instant case, the grievant testified that she was not invited for a disciplinary hearing. RW1, Sylvia Kaburu testified that the Respondent conducted a disciplinary hearing during which the grievant admitted that she did not act in accordance with the procedure and an unnamed shop steward attended the proceedings.

50. In addition, although the witness confirmed on cross examination that minutes of the disciplinary hearing were recorded by the human resource manager at the time, she admitted that the minutes were not on record and she had no copy of the proceedings.

51. Instructively, the grievant was suspended on 12th November 2014, the date on which the disciplinary proceedings allegedly took place.

52. In the absence of minutes of the disciplinary hearing or a record of what transpired thereat, the Court has to weigh the Claimant's evidence against that of the Respondent.

53. Applying the evidential rule that he who alleges must prove as ordained by the Evidence Act, it was the duty of the Respondent to lead evidence to establish that it invited the grievant to the disciplinary hearing and avail the minutes or record of the proceedings, including the names of those who were in attendance. The Respondent did not furnish the Court with such evidence.

54. It is unclear how the grievant was invited or had been notified of the right to be accompanied by a colleague.

55. From the evidence on record, it is the finding of the Court that the grievant was not taken through any disciplinary hearing as provided by Section 41 of the Employment Act which renders the grievant's summary dismissal procedurally flawed and thus unfair within the meaning of Section 45 of the Employment Act.

56. Having found that the grievant's summary dismissal was unfair for want of procedural fairness. I now proceed to assess the reliefs available to the grievant:

(a) Reinstatement or re-engagement under Section 12(3)(vii) of the Employment and Labour Relations Court, Act 2011. The remedy of reinstatement is only available within three years of dismissal and both reinstatement and re-engagement are discretionary remedies under Section 49(3)(a) and (b) of the Employment Act, 2007.

57. Since the grievant was dismissed on 17th November 2014 which is more than seven years ago and has been out of employment for a long time, the remedies of reinstatement or re-engagement are not available.

(b) One month's salary in lieu Kshs.18,460.00

58. Having found that the grievant's summary dismissal was unfair for want of procedural propriety, the grievant is awarded on month's salary in lieu of notice.

(c) 17 days wage worked in the month of November 2014, Kshs.12,070/-

59. The Respondent neither contested the prayer nor availed evidence that the grievant had been paid for the 17 days as promised in the termination letter. The sum of **Kshs.12,070/-** is awarded.

(d) 5 days pending leave in 2014 Kshs.6,390/-

60. The Respondent did not contest this prayer or adduce evidence of payment as promised in the dismissal letter dated 17th November 2014. The grievant is awarded **Kshs.6,390/-**.

(e) Leave travelling allowance Kshs.5,200/-

61. The Claimant led no evidence to establish this claim or how the amount was arrived at. The amount appears in paragraph 6 of the memorandum of agreement between the Respondent and the Union dated 3rd February 2016 whose effective date was 1st January 2015. Even assuming that the sum was provided for in a previous memorandum between the parties, a copy was not availed to the Court. The prayer is **declined**.

(f) Maximum compensation for unfair dismissal Kshs.223,680/-

62. It is unclear how the Claimant arrived at the grievant's salary of Kshs.18,460.00 as it provided no pay slip or bank statement to buttress the claim. The grievant confirmed on cross examination that her last salary was Kshs.13,960/-.

63. Having found that the grievant's summary dismissal was unfair for want of procedural fairness, the grievant is eligible for the discretionary relief provided by Section 49(1)(c) of the Employment Act. In determining the quantum of compensation, the Court has taken into consideration the following factors: –

i) The grievant was an employee of the Respondent for a total of 13 years, 5 months which is undoubtedly a long time and wished to continue as exemplified by the prayer for the remedies of reinstatement and re-engagement.

ii) The grievant had no previous warning or misconduct or reprimand and served diligently as confirmed by RW1 on cross examination.

iii) The Claimant did not lodge an appeal against the dismissal but the shop steward one Mr. Godfrey Ogola did on 17th November 2014.

iv) The grievant substantially contributed to the summary dismissal.

64. In light of the foregoing, the equivalent of five (5) months' salary is fair.

65. In the upshot judgment is entered for the grievant against the Respondent as follows:

- (a) **One month's salary in lieu of notice.**
- (b) **17 days worked in the month of November 2014.**
- (c) **5 days pending leave days.**
- (d) **Equivalent of five (5) months' salary compensation.**
- (e) **The Claimant is awarded costs of this suit.**
- (f) **Interest at court rates from the date of judgment till payment in full.**

66. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF APRIL 2022

DR. JACOB GAKERI

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 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 has 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.

DR. JACOB GAKERI

JUDGE