Kichoi v Teita Estate Limited (Cause 490 of 2017) [2022] KEELRC 101 (KLR) (17 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 101 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 490 OF 2017

B ONGAYA, J

JUNE 17, 2022

BETWEEN

STEPHEN NGURE KICHOI .... CLAIMANT

AND

TEITA ESTATE LIMITED .... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 21.06.2017 through Nyakoni Ratemo & Company Advocates The claimant was employed by the respondent from 01.09.1994 until 09.12.2014 at a time he earned 18, 975.00 per month. There is no dispute that the respondent had concluded recognition and collective agreements with the Kenya Plantation and Agricultural Workers' Union (KPAWU) and the claimant was a member so that the collective agreement (CBA) in place bound the parties. The claimant's case is that his termination was harsh, drastic, and inconsiderate of the many years he had diligently worked for the respondent and in all fairness he was at least entitled to an opportunity to be heard before termination of his employment. Further the respondent failed to notify and hear him prior to the termination in violation of principles of natural justice and sections 41, 43, 44, and 45 of the Employment Act, 2007, ILO Convention on termination of employment, 1982 and Article 41 of the Constitutionof Kenya, 2010. He claims contractual and terminal dues as well as compensation for unfair termination and, gratuity.

2. The claimant particularised his claims as follows:

    a) Three-months' payment in lieu of notice Kshs. 56, 925.00.

    b) Leave payment for 20 years (28-days x 20-years x Kshs.730) Kshs.408, 800.00.

    c) Compensation for unfair termination Kshs.18, 975 x 12-months Kshs.227, 700.00.

    d) Unpaid public holidays (10-days x 20years x Kshs.730) x2 = Kshs.292, 000.00.

e) Gratuity per CBA 18-days x 20-years x Kshs.730 = Kshs. 262, 800.00.

f) House allowance not paid 15/100 x 18, 975 x 12 x 20-years = Kshs. 683, 100.00.

g) Total claim Kshs. 1, 931, 325.00.

The claimant prayed for judgment against the respondent for:

a) Payment of terminal dues of Kshs. 1, 931, 325.00.

b) Costs and interest at Court rates.

c) A declaration the dismissal from service was unfair and unjust.

d) Certificate of service.

e) Any other relief that the Court may deem just and fit to grant.

3. The respondent filed the memorandum of reply on 20.03.2018 through Kishore Nanji Advocate The respondent admitted that it employed the claimant as pleaded in the memorandum of claim. The respondent denied that the dismissal was drastic, harsh, inconsiderate, unfair or unjust as alleged for the claimant. The respondent denied that it had failed to notify the claimant prior to the dismissal.

4. The respondent pleaded that during the period 15.08.2014 to 30.11.2014 the Head Person in the claimant's Cutting Section lodged a complaint that the claimant was misusing his position as a supervisor in that section in that he was borrowing money from his juniors and not refunding the same as agreed with the same juniors. Further, on 01.12.2014 the respondent suspended the claimant from his duties with full pay pending investigations on the said complaint and after the investigations the respondent discharged the claimant from employment effective 10.12.2014.

5. The respondent's further case is that on 22.12.2014 it paid the claimant a sum of Kshs. 268, 372.00 to Kamba Cooperative Savings & Credit Society Limited and to Teita Welfare Association in full and final settlement of the claimant's dues in respect of his employment with the respondent and as was computed as follows:

a) Pay in lieu of three months' notice Kshs.56, 925.00.

b) Leave pay due for 6 days Kshs.4, 379.00.

c) Travelling allowance Kshs.1, 000.00.

d) Wages for 8 days worked in December 2014 Kshs. 5, 838.00.

e) Gratuity for 20-years at 18 days per year Kshs. 262, 728.00.

f) Total dues Kshs. 330, 780.00.

g) Less statutory deductions Kshs.557.00 and PAYE Kshs. 61, 941.00.

h) Net due Kshs. 268, 372.00 (all applied to settle claimant's Sacco and Welfare liabilities).

6. The respondent therefore denied the claims made for the claimant. The respondent prayed that the claimant's suit be dismissed with costs.

7. The statutory conciliation under the Labor Relations Act failed to yield a compromise of the dispute and the suit was filed.

8. The claimant testified to support his case. The respondent's witness (RW) was one Edward Keah, the Human Resource Manager at the material time but having retired from the respondent's service

effective 31.12.2017. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

9. To answer the 1st issue, parties are in agreement that they were in a contract of service. The claimant was employed by the respondent from 01.09.1994 to 09.12.2014. As at termination the claimant was the respondent's Supervisor – Leaf Sisal Cutting Section earning Kshs. 18, 975.00.

10. To answer the 2nd issue, there is no dispute that the respondent terminated the claimant's employment with immediate effect by the letter dated 09.12.2014. The reason for termination was stated as follows:

> " Dear Ngure,
>
> REF: TERMINATION
>
> This has referenced to the previous incidents where you have been associated in the alleged mismanagement of employee wages when paying, and the habit of borrowing money from staff under you. In this respect you were advised that whatever you have been doing is illegal and contrary to the company policies and procedures.
>
> In accordance with the *Employment Act*, 2007 clause 44 section 4(e) an employee commits, or on reasonable grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. This offence may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.
>
> In view of the above the Management is deeply concerned with your attitude, and has lost confidence in you. Therefore, your services with the company are hereby terminated with immediate effect.
>
> You will be paid whatever is legally due to you in accordance with the Employment Act, 2007 upon handing over all company properties that may be in your possession to the satisfaction of your departmental head.
>
> By a copy of this letter we are asking accounts department to calculate your final dues for collection on or before 15th December, 2014.
>
> Kindly make arrangements to vacate the estate immediately you receive your final dues.
>
> For: Teita Estate Limited
>
> Signed,
>
> M. Waihenya
>
> Personnel Manager"

11. The termination letter came after the suspension letter dated 01.12.2014 and placing the claimant on suspension from 01.12.2014 to 06.12.2014 to pave way into the allegations that the claimant abused his supervisor position by borrowing money from his juniors without refunding.

12. To answer the 3rd issue for determination the Court returns that the procedure leading to the termination was unfair.

13. The evidence was that the claimant received the suspension letter and when he resumed after the suspension period, he was handed the termination letter. The suspension letter had promised that upon lapsing of the suspension period, the case against the respondent would be listened to. RW testified thus, "I agree is unfair to be condemned without a hearing. Disciplinary hearing minutes for

the case against the claimant are not filed. No such minutes are filed in Court.... We gave no termination notice to the claimant. He was paid 3-months in lieu of notice. See letter of termination." In re-examination RW further testified thus, "A meeting with the claimant was held with respect to the complaints. See suspension letter. He was suspended to report back for hearing of case on 06.12.2014. No minutes filed but meeting took place. He was later terminated from employment."

14. On his part the claimant testified in cross-examination thus, "I received suspension letter prior to receiving termination letter. It is letter of suspension dated 01.12.2014. Is respondent document 9. I was not given disciplinary hearing. In December I did not go back to work. Termination letter I received 09.12.2014. On 06.12.2014 I did not resume duty at end of suspension."

15. In re-examination, the claimant testified, "I see suspension dated 01.12.2014. I received the letter. Is respondent document 9 on initial bundle. I see 3rd last paragraph. (Read) Suspension was from 01.12.2014. After 01.12.2014 I did not resume duty because Farm Administrator was absent. I reported at office but he was absent. I was told come when Farm Administrator is present. I never received invitation letter for disciplinary hearing."

16. The Court has considered the evidence. While the respondent promised a disciplinary hearing after lapsing of the suspension period, the Court finds that on a balance of probability such hearing did not take place. The respondent while embracing the practice of documenting all the employment records and processes has failed to show that the alleged disciplinary hearing actually took place and the relevant minutes of the alleged disciplinary meeting were not exhibited at all. The Court has considered the nature of the allegations and returns that it was crucial for the claimant to be heard towards self-exculpation prior to arriving at his culpability or otherwise. The Court finds that to that extent there was no hearing as envisaged in section 41 of the Employment Act, 2007, the rules of natural justice had thereby been violated, and the procedure to terminate the employment contract as adopted by the respondent cannot be said to have been fair as envisaged in section 45 of the Act. The submissions made for the claimant in that regard are upheld.

17. To answer the 4th issue, the Court returns that the respondent has failed to show that as at the time of termination, it had a valid or genuine reason as envisaged in section 43 of the Act. The reason for termination as alleged was that the claimant abused his supervisor position by borrowing money from his juniors without refunding. The claimant testified that he denied the allegations and that the alleged complainant one Rose was never called to testify before the employer and she was not known to the claimant. RW testified as follows, "An employee complained mid-month advance had not been paid. It was Rose Chao Nyangala. Rose is not a witness in the Court today. Rose complained that mid-month advance had not been paid to her. When she asked for it she was told to wait until end-month. The claimant had a duty or role to pay to Rose the mid-month allowance. It was part of his duty to pay staff under him. His role as supervisor included paying employees under him but I have no documentation of such role – it was a practice or arrangement. I told Rose to write down her grievance. I decided the claimant be dismissed after investigating and meeting the claimant."

18. The Court has considered the respondent's investigation reports dated 14.11.2014 and 17.11.2014. The reports enumerated accounts by staff working under the claimant who alleged that the claimant had borrowed cash from them but he had failed to refund the same. The reports include such accounts allegedly by Headman Jacob Okundi; Headman Pascal Mwanjila; Charles Amwayo; Madam Rose Ongachi; Josephine Akisa; one Masese; Nyambura Zena; and Mwalengo Benard. The report was signed by Christopher N. Ndunda the Cutting Manager and the claimant's immediate supervisor. The complainants and the Cutting Manager were not witnesses in Court proceedings and in absence of a disciplinary hearing, the Court finds that the allegations remained empty without being supported by relevant evidence. The claimant has never had a chance to test the veracity of the allegations by

examining and cross-examining the alleged complainants and the Cutting Manager who allegedly received the complaints as of first instance. The Court finds that the respondent has failed to show that the reason for termination existed as at the time of termination as envisaged in section 43 of the Act. The termination was unfair in substance as well as in procedure. The respondent has failed to discharge the burden of justifying the grounds for termination of employment of the claimant as was required in section 47(5) of the Act.

19. While making that finding the Court has considered the Court of Appeal opinion (cited for the respondent) in [*Kenya Revenue Authority Reuwel Waithaka Gitahi & 2 Others*] [2019]eKLR (Waki, Warsame, and Sichale JJ. A) thus, "We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.

    The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test. In the case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows:

> "The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing........... The test to be applied is now settled. In the case of the *Judicial Service Commission vs. Gladys Boss Shollei*, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley vs. B.C.Tel.* (2001) 2 S.C.R. 161
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> "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."
>
> Similar guidelines are to be found in Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642, thus: -
>
> > "...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of

each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

20. In the instant case, it remains mere allegations by the respondent that complaints were made by staff working under the claimant. Even if the respondent was to be trusted in saying that complaints were made, the veracity of the content of the complaints remained very suspicious – that the employees signed for the mid-month or end-month payment and the claimant failed to hand the cash in the payment to the complainants who then made the complaints after an inordinate delay. The complaints related to such alleged misconduct by the claimant variously happening in January 2014; unspecified months; unspecified date in 2012; mid-month 2011 and on a date complainant could not exactly remember; and in 2013 on a month that could not be told – and the Court finds that the allegations stood on loose sand and could not be trusted at all as per the accounts in the reports dated 17.11.2014 and 14.11.2014. Indeed, the Cutting Manager as the maker of the report dated 14.11.2014 stated that he made a mistake in not bringing one of the complainants and the claimant so as to see (establish by a hearing) who was saying the truth. He further concluded the report, "I apologise for not reacting during the right time. Thanks." The Court returns that the reports constituting the basis of the reasons of termination of the claimant's service had adequate holes and gaps that in absence of a disciplinary hearing (towards attempting to fill them),the holes and gaps were so glaring. The complaints are reported as not sure on the dates the grievances took place and no explanation is given for the belated reports. The impression left is one that suggests that the claimant was a victim of a design and scheme to be unfairly hounded out of his otherwise long and clean service with the respondent. In the circumstances, upon a subjective test of whether the reasons for termination were valid, genuine or truthful, the Court finds that the respondent failed to pass that test.

21. The Court returns that the termination of the claimant's contract of employment with the respondent was therefore unfair both in procedure and substance.

22. The 5th issue is the determination of the amount to be awarded for the unfair and unjust termination.

23. The Court has considered the factors in section 49 of the Act. The claimant desired to continue in employment. He otherwise had a long and clean record of service of over 20 years. He was dismissed upon very serious allegations but without the same being established. The established procedural and substantive unfairness are such aggravating factors against the respondent. Further, the respondent has since computed the claimant's terminal dues and applied them to settle Sacco and Welfare claimant's liabilities – while such computation suggests payment of final dues, the Court finds the respondent's conduct to amount to an aggravating factor in that the unfair termination was accompanied with the claimant leaving his long service empty-handed without due social protection – he was unprepared in view of the liabilities and his gratuity and other final dues were applied to pay the said liabilities. The Court therefore finds this to be a proper case for the award of maximum compensation of 12 months' salaries under section 49 of the Act making Kshs.227, 700.00.

24. The 6th issue is whether the claimant is entitled to the other remedies as prayed for. The evidence is that the respondent computed the gratuity or service pay for 20 years, notice pay and due leave days all of which were paid to meet Sacco and Welfare liabilities – the payment being established to have been with the claimant's concurrence or authority. The claims in that regard were satisfied. There is no reason to doubt the respondent's evidence that the claimant was housed and the claim for house allowance is found unjustified. In any event the claims for leave pay, house allowance and holidays payment over the 20 years served were all continuing injuries whose cessation had been on the termination date of 09.12.2014 and the suit having been filed on 21.06.2017, the same are found to have been time barred

under section 90 of the Act prescribing the time of limitation of 12 months from the date of cessation of such continuing injuries. The claims and prayers in that regard will be declined. At the hearing parties recorded a consent that there was no dispute that the respondent ought to deliver the certificate of service. The claimant has substantially succeeded and in absence of any other material and in view of the payments already computed and paid by the respondent, the respondent to pay 75% of the claimant's costs of the suit.

25. In conclusion judgment is hereby entered for the claimant against the respondent for:

    1) The declaration that the termination of the claimant's contract of service by the respondent was unfair and unjust.

    2) The respondent to pay the claimant Kshs.227, 700.00 in compensation for the unfair and unjust termination by 01.09.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

    3) The respondent to deliver the claimant's certificate of service in 30 days from the date of this judgment.

    4) The respondent to pay the claimant 75% costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH JUNE, 2022.

BYRAM ONGAYA

JUDGE