Hare v Base Titanium Limited (Cause 284 of 2018)
[2022] KEELRC 1147 (KLR) (15 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1147 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 284 OF 2018

B ONGAYA, J

JULY 15, 2022

BETWEEN

ALBERT MGAZA HARE ..... CLAIMANT

AND

BASE TITANIUM LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 30.04.2018 through Munee Katu & Associates Advocates. The claimant prayed for judgment against the respondent for:

    a. A declaration that the claimant's termination by the respondent was procedurally unfair.

    b. Order for reinstatement of the claimant un-conditionally without any loss of benefits including allowances and seniority and the claimant be treated as if he had not been terminated until the date of reinstatement.

    c. If the respondent not willing to continue engaging the claimant, then the respondent be ordered to pay the claimant gratuity for 3 years Kshs. 123, 393.00; and, maximum compensation for unfair termination Kshs.987, 144.00 thus a sum of Kshs.1, 110, 537.00.

    d. Costs and interest of the suit.

2. The respondent employed the claimant as a welder on a monthly wage of Kshs.82, 262.00 and effective 01.04.2014 per the letter of appointment. The respondent's Employee Handbook provided for further terms and conditions of service.

3. The claimant received a letter dated 22.03.2017 being to show cause and invitation to a disciplinary hearing. The letter alleged that the claimant's behaviour after the pre-start meeting on 09.03.2017 could be considered as gross misconduct because he had allegedly used demeaning and insulting language towards his supervisor Samuel Olwa (also referred to as SO in the records of the ensuing

disciplinary hearings) after he said a verbal warning would be issued to the claimant and other two late-comers. The further allegation was that the claimant had claimed harassment by the same supervisor on grounds of tribalism for which no specific proof was provided by the claimant or other witnesses – a claim believed to have been intentionally false and calculated to incite others in the claimant's team to disrespect the supervisor. The letter stated that if any of the allegations were found to be true then it would amount to gross misconduct per section 44(4) (d) and (e) of the *Employment Act*, 2007. Further it would amount to breach of respondent's standards being gross misconduct on account of unacceptable performance and misconduct; and, fair treatment standards – and whose particulars were set out in the letter. The letter summarised the levelled allegations as follows:

a. Failure or refusal to obey a proper command being that he had agreed in writing at the boilermakers' workshop meeting of 26.10.2016 (amounting to a lawful supervisor's instruction) that he would be reporting to work at 6.50am for the safety pre-start meeting. Nevertheless, on the material date and on 06.02.2017 he had been late for the meeting.

b. Insubordination through use of demeaning, abusive or insulting language. The particulars were that on 09.03.2017 his supervisor SO questioned why he had reported to work late and missed the pre-start meeting and the claimant was uncooperative in providing a justification and argumentatively called SO a "tribalist" initially alleging to have been on a late bus but a supervisor who was on the same bus confirming the claimant had been at work on time to attend the meeting. Further, the claimant failed to give an explanation and was heard shouting from the workshop floor.

c. Racialism and tribalism incitement in stating against SO "you are a tribalist" and which was a deliberate false claim amounting to harassment on the basis of racial grounds. The letter stated the claimant had provided no evidence to support his claim and which was a gross misconduct per the respondent's Fair Treatment Standard.

4. The letter further stated that by the incident of 09.03.2017 the claimant called his supervisor a tribalist and implied that he was harassing him and others from the coast because they did not come from upcountry and all that, without due evidence against the supervisor. Further, investigations had established that the supervisor had not harassed the claimant on racial grounds – so that the claimant had used tribalism to create divisiveness amongst the team. The letter stated that the claimant had been given many chances or opportunities and time to correct his behaviour but he appeared unable or unwilling to respect the rules and authority. He was required to show cause in writing by Wednesday 09.03.2017 why disciplinary action including termination should not be taken against him. The letter further invited the claimant to attend a disciplinary hearing on Friday 31.03.2017 at 10.30am and he was entitled to bring a respondent's employee of his choice as a support person at the meeting. The letter concluded thus, "After this meeting we will review all information and provide a final decision as to what, if any, disciplinary action will be taken."

5. The claimant responded to the letter to show cause by his letter dated 28.03.2017 thus, "I hereby wish to inform the disciplinary committee that I have valid reasons for the comments I made to my supervisor Mr. Sam Olwa and also I have witnesses to prove that, therefore no disciplinary action should be taken against me. I will appear as per scheduled on 31.03.2017 at 10.30am with my witness ready to defend my commends."

6. The claimant attended the disciplinary hearing on 31.03.2017 and the minutes are exhibited. Both parties have exhibited a verbatim record of the disciplinary hearing and another exhibited by the respondent being an analysis by the chairperson of the disciplinary hearing one Sami Chalwa and also being the respondent's Finance & Administration Manager. The Chairperson found that the claimant

was culpable of using insulting and abusive language. The chairperson found that witnesses had not been called to prove the charge because the claimant had admitted in his own statement that he had called SO a tribalist. The chairperson then recommended that the claimant be terminated on account of using insulting and abusive language.

7. The claimant received the letter of termination from employment dated 05.04.2017. The stated reason for termination was insubordination through use of demeaning, abusive and insulting language thus, "There is sufficient evidence to prove that your behaviour towards your supervisor on the 9th March 2017 was indeed insubordination. Insubordination includes being uncooperative, argumentative, shouting at your supervisor and using insulting language, in this instance, calling Samuel a "tribalist".

8. This is deemed gross misconduct as per Clause 44 (d) of the *Employment Act* which states that an employee may be lawfully dismissed (summarily) if "44(d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer". It is also considered a serious breach of Company Standards and considered as gross misconduct.

9. It should also be noted that aside from the incident of the 9th March 2017, the Chair also found that there was evidence indicating that you have had strained relationship with other supervisors and seniors and that you generally have a problem with authority."

10. The claimant appealed by the letter dated 05.04.2017. He stated that after the disciplinary hearing on 31.04.2017, a review of the document was done on the 05.04.2017 and he stated clearly before the committee that his witnesses were not interviewed to the fullest and a lot of information was not recovered from the list of witnesses he provided to the committee. He requested the matter be reviewed by the General Manager by granting fair treatment to both the accused and the accuser. Further, summary termination was unfair act after all the services he had offered to the organisation including a lot of modification to the plant and the site as a whole.

11. The appeal hearing was on 13.04.2017. At that hearing the claimant opted that the appeal be upon only the charge for which he had been terminated. He had listed 12 witnesses and when asked whether he was going to call all of them, he opted not to call any of them because he was going to appeal on the basis of the charge he had been found guilty. The record of proceedings (minutes) show that the claimant admitted the charge and apologised as he did not as well wish to call witnesses as had been expressed in his letter of appeal.

12. The claimant's case is that he had a clean record of service and he had no warning letters on his employment record. His further case is that the respondent did not act with justice and equity in terminating the claimant. Further, the procedure at the disciplinary and appeal hearings was unfair, lacking in equity and justice.

13. The respondent filed the memorandum of defence on 28.05.2018 through Otieno Asewe & Company Advocates. The respondent admitted that the claimant was employed by the respondent and the disciplinary hearing as well as the appeal hearings took place, except that, the claimant had exhibited minutes of the disciplinary hearing leaving out the last signed page; and the respondent exhibited the complete set of the minutes. The respondent pleaded that it adopted a fair procedure in terminating the claimant and it was as per the *Employment Act*, 2007. The claimant was not entitled to gratuity because he was a member of NSSF. Further, whereas the claimant had the requisite technical skills to perform the job as a welder and the quality of his work was good, he was not hard working, he could not work without strict supervision, and, he was not a team player. The respondent prayed that the claimant's prayers be dismissed with costs.

14. The claimant testified to support his case. The respondent's witness (RW) was Edith Kiragu, the Human Resource Manager. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

    i. To answer the 1st issue for determination, the Court returns that there is no dispute that the respondent employed the claimant as a welder.

    ii. To answer the 2nd issue, there is no dispute that the respondent terminated the contract of employment. The claimant appealed against the termination but the respondent declined the appeal.

    iii. To answer the 3rd issue the Court returns that the procedure leading to the termination was not unfair. The claimant received the show cause letter, he replied, he attended the disciplinary and appeal hearings accompanied with a fellow employee as a representative, he was heard, and the respondent made the decision to terminate the contract of service. The Court finds that as submitted for the respondent, the procedure on notice and hearing as per section 41 of the *Employment Act*, 2007 was complied with. Further, it is submitted for the respondent that persons who had been at the disciplinary hearing also attended the appeal hearing. However, the evidence was that the two persons attended only in their official capacities to facilitate the hearings, Pennie Warren as the Human Resource Manager, and, Esther Chalwa, as the Senior Administrative Officer who took minutes at both hearings. The record of proceedings shows that the chairpersons at both hearings took charge of the proceedings and solely made the analysis of the findings and recommendations.

15. It was also submitted for the claimant that on 31.03.2017 after the disciplinary hearing the meeting adjourned and the termination letter was issued prior to the claimant concluding his defence. However, the minutes show that at the end of the meeting under adjournment, it is stated thus, "The meeting was adjourned by SC at 1340hrs to enable him study evidence and to prepare recommendations. SC stated that the minutes would be circulated for signing Monday, 3rd April 2017." The Court finds that the terms of the adjournment were clear and it was not that the claimant would be heard in further exculpation. It was that the minutes were to be prepared and which was done and were signed on 05.04.2017 by all those present at the hearing, including the claimant. Further SC, the chairperson, studied the evidence and prepared the recommendations being dated 31.03.2017. The Court finds that the hearing on 31.03.2017 was conclusive and only subject to the two terms of the adjournment clause and both of which were duly satisfied.

16. In any event, as will be shown shortly in this judgment, the claimant was found culpable upon his own admission. It cannot be said that he was prejudiced for want of an independent disciplinary panel or failure to call witnesses whereas he admitted the charge at both hearings and at the appeal, he opted not to call witnesses and instead admitted as was levelled, apologised, and, offered mitigation that he really needed the job for his livelihood and his family's welfare.

17. Further, it was urged that the claimant had not been given a warning or ought to have been warned instead of the termination. The Court returns that the claimant has not established a contractual or statutory provision that such warning was a precondition to termination in event of gross misconduct as had been levelled against him.

18. To answer the 4th issue for determination, the respondent has established that as at termination the reason for termination existed per section 43 of the Act. Further, the respondent has established that the reason was fair as envisaged in section 45 of the Act because it related to the claimant's conduct, capacity and compatibility as well as the respondent's operational requirements.

19. For avoidance of doubt and as submitted for the respondent, the claimant admitted the charge.

20. First, in his letter responding to the show cause letter, he stated that he had evidence and he would call witnesses to show that SO was a tribalist. The effect of that response is found to be that he was not denying uttering the words but that he had a justification as he could substantiate the utterance.

21. Second, at the disciplinary hearing he failed to provide such witnesses and towards the end of the hearing the claimant (being AH) is recorded admitting the charge thus, "SC asked AH whether he has anything to say after listening to all the evidence. AH responded that he believes there is pressure from managers but he was wrong for calling SO a tribalist which after hearing he understood he used the wrong word. He added that he did not mean to insult him but felt pressured by SO and so he concluded that he was doing that because he was not from his tribe. SO asked whether AH thought he was a tribalist. AH responded that he did not think that way now after SO had defended himself. He also added that SO has changed a lot of late and was allowed to talk in a pre-start and greets him."

22. Third, at the appeal hearing the claimant is recorded as accepting the charge thus, "AH responded that he accepted the charge in the first hearing that he did in fact call his supervisor a tribalist and apologized during the same hearing. He has since realised that the choice of words he used were wrong and have severally apologized to Sam Olwa. AH said he was ready to change and adjust his behaviour and use other channels to air his grievances e.g. whistle blowing system, report to HR or the OHST team. AH promised to avoid allowing work pressure and stress from home to interfere with his attitude and that he was ready to change and adjust himself. AH asked the chair to consider that he has a family and a daughter who was in Form One."

23. The Court therefore returns that the claimant admitted the reasons and by his own admission, the reason is found to have been genuine and fair.

24. It may be that the claimant had a genuine complaint against the supervisor SO on account of alleged mistreatment by SO. However, the Court finds that instead of invoking the respondent's grievance procedure, the claimant engaged the supervisor explosively in an argument and using the abusive and insulting words that SO was a tribalist. Clause 8 of the respondent's Employee Handbook provided for grievance procedure to be governed by the Fair Treatment System BSD010. The Clause 8 was express as covering grievances such as victimization, unacceptable working environment, unfair or inconsistent behaviour by a manager towards a subordinate, discrimination and, sexual harassment. The Clause provided that the system (which invariably was known to the claimant) provided for information on how to notify the company of a grievance and the process that would be followed to resolve it; and further information was available from the Human Resource Department. The Court finds no reason to deviate from the findings of the chairperson of the disciplinary hearing in his analysis thus, "I must state from the onset that if there was evidence of discrimination by SO and that AH acted this way because of the alleged discrimination, I would still find him guilty as he was argumentative and uncooperative with his supervisor, which is also deemed insubordination. I have found that the 2nd charge was proved. My reasons are as follows-

    a. AH called SO a tribalist upon being asked a question any supervisor would ordinarily ask.

    b. If at all the claim for discrimination was to be believed, used the existing system to address the issue."

25. The Court therefore returns that the termination was not unfair both in substance and procedure. It is unfortunate that the claimant had all the necessary technical skills as a general welder but had his contract of service terminate as it transpired and, despite his otherwise potential for performing good work. It could be that a lesser punishment would be imposed as proportionate by a different employer

in similar circumstances. However, that is beside the point in issue in the present dispute as that was not the claimant's pleaded case and in any event, the Court will not substitute its own discretion in place of the respondent's employer's prerogative to exercise disciplinary control over its employee, the claimant.

26. The remedies as prayed for will collapse as unjustified. The evidence was that the claimant was a member of NSSF and as submitted for the respondent, gratuity or service pay would not be available especially per section 35(6) of the *Employment Act*, 2007.

27. The Court has considered the claimant's remorsefulness at the disciplinary and appeal hearings. It would also appear that he had valid grievances against his supervisor SO only that he did not invoke the grievance procedure but instead acted as was levelled and found against him. The Court therefore returns that each party will bear own costs of the suit.

28. In conclusion, judgment is hereby entered for the respondent against the claimant for the dismissed of the suit with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 15TH JULY, 2022.

BYRAM ONGAYA

JUDGE