



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO**

**CAUSE NO.43 OF 2019**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION..... CLAIMANT**

**VERSUS**

**UNILEVER TEA (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

Issue in dispute – wrongful dismissal of Naftali Sagero Ombei, the grievant.

The claimant is a registered trade union representing employees within the agricultural sector. The respondent is a limited liability company. The parties herein have a recognition agreement and have negotiated several collective agreements (CBA).

The claim is that the grievant was employed by the respondent on 3<sup>rd</sup> March, 1990 then Brook Bond Tea (K) Limited as a general worker, Ngoina Estate. In the year 1993 he became a trainee acting clerk and on 1<sup>st</sup> March, 1997 he was confirmed as grade II clerk and further promoted to check clerk grade II and last serving as Clerk Grade I.

The grievant was transferred to Kapkorech Estate in the same capacity on 10<sup>th</sup> January, 2011 and after 3 years he was transferred to Kericho Estate, Chebwon division vide letter dated 20<sup>th</sup> March, 2014.

On 3<sup>rd</sup> March, 2017 the grievant was issued with letter and notice to show cause and required to reply over alleged violation of the standard code of conduct and company policy for receipt of Ksh.103,700 from 2014 to 2015 from a tenant of the respondent and where he failed to transmit the same to the respondent.

The grievant replied to the notice issued on 6<sup>th</sup> March, 2017 and stated that the information therein was false as his role was only to document payments and had no authority to receive monies on behalf of the respondent and he did not receive any money.

Vide letter dated 6<sup>th</sup> March, 2017 the grievant was summoned to a disciplinary hearing at the respondent's International training Centre at Kericho and soon thereafter he proceeded on leave and upon return on 18<sup>th</sup> April, 2017 on the 24<sup>th</sup> April, 2017 he was issued with letter of summary dismissal.

The grievant made a report to the claimant and who lodged an appeal on 17<sup>th</sup> May, 2017 and there was a hearing on 31<sup>st</sup> May, 2017 but there was no amicable resolution and a dispute was reported to the Minister who appointed a conciliator but there no agreement and a Certificate of Disagreement was issued.

The claim is that the grievant had worked for the respondent for 27 years without any record of indiscipline and the action taken to dismiss him was malicious and unfair. At the time the grievant was earning ksh.28,560 per month and the claimant is seeking for a reinstatement of the grievant without loss of benefits; payment for the period of dismissal; payment for untaken leave days and in the alternative; the claimant is seeking that the respondent be ordered to pay the grievant terminal dues;

- a) Gratuity for years served in accordance with the CBA;
- b) Salary arrears as per the CBA;
- c) Salary for 12 months;
- d) Untaken leave days;

- e) Travelling allowance;
- f) Damages for unlawful, unfair dismissal; and
- g) Costs of the suit.

The grievant testified in support of the claim that upon employment by the respondent he worked diligently until 3<sup>rd</sup> March, 2017 when the estate manager called him and was issued with a notice to show cause over allegations that he had violated the standard code of the company by receiving Ksh.103, 700 in the year 2014 to 2015 from a tenant of the respondent but failed to transmit the same to the respondent.

The grievant also testified that the stated allegation had variations between the amount stated in the notice to show cause and the letter of dismissal being Ksh.103, 700 and 42,700. He was in Kapkorrech state for 3 months in the year 2014 and the rent payable of Ksh.6, 100 does not add up to the stated Ksh.42, 700 and he had handed over to the incoming chief clerk before leaving and if there was any issue it should have been detected by the incoming chief clerk and audits at the end of the year.

The grievant also testified that he replied to the notice to show cause issued to him stating that the information presented was false as his role was solely to document payments and did not have the authority to receive cash from tenants. He was then invited to the disciplinary hearing and then went on leave and upon return on 18<sup>th</sup> April, 2017 he worked for a few days and on 24<sup>th</sup> April, 2017 he was issued with letter terminating employment by dismissal.

His role had been to collect rent from tenants and pass on to the respondent after issuing a receipt. When on leave the respondent would appoint somebody else to take up his duties. The respondent introduced payments through M-PESA pay bill and the head office would take account and the account department would issue receipt. When the notice to show cause was issued it was noted Ksh.103, 700 was not accounted for which was not true. The allegations that he had allowed 3 tenants not to pay rent was not true since the respondent had no standard way of issuing receipts. Before the M-PESA pay bill number, all tenants would be issued with receipts. The 3 noted tenants had not been issued with receipts by the respondent save there had been a complaint by one tenants who never collected his receipts and upon transfer in March, 2014 he handed over his books and the cashier or the audit had never noted any deficit. The variance from Ksh.103, 700 to Ksh.42, 700 was not explained.

The grievant also testified that he sent ksh.39, 000 to the respondent witness being cash he had borrowed and this was a refund. He was paying with interest. He had picked several goods from his shop then he got sick and forced to borrow cash and was paying back.

The grievant also testified that his case with the respondent arose following a complaint made by a tenant who was accused by the respondent of having rent arrears but the claimant had borrowed cash from him and also obtained goods from his shop and was paying him back. The defence that the refund related to the rent not submitted to the respondent is not true.

#### Defence

The respondent's case is that the claimant has elaborated that the grievant was taken through procedural fairness and lawfulness and leading to his dismissal from employment. There was substantive justification for the termination of employment for breach of the respondent's code of business principles and there were reasonable grounds to believe the grievant had engaged in actions that amount to gross misconduct and the suit should be dismissed.

There is a valid CBA between the parties and the grievant was an employee of the respondent.

On 3<sup>rd</sup> March, 2017 the grievant was issued with a notice to show cause following violation of the code of business principles that warranted disciplinary action to be taken against him. The claimant replied to the issued notice but the same was found unsatisfactory and was hence invited to a disciplinary hearing on 9<sup>th</sup> March, 2017 where he was given a fair hearing.

The defence is also that upon a review of the evidence before it and the testimonies provided to the disciplinary committee the respondent found a justifiable cause to determine the actions of the grievant of collecting money on its behalf amounted to gross misconduct and by letter dated 24<sup>th</sup> April, 2017 dismissed the grievant from his employment.

There was an appeal lodged by the grievant which was heard but the respondent established there had been gross misconduct to justify dismissal. The claimant reported a dispute to the Minister and the appointed conciliator established that the grievant had abused the trust bestowed upon him when he failed to account for the rent money that he received from a tenant and the termination of employment was both fair and procedural. The claim should be dismissed with costs.

Chumba Yegon an employee of the respondent and the one who chaired the disciplinary committee hearing the grievant testified that the respondent issued the grievant with a notice to show cause on 3<sup>rd</sup> March, 2017 for breach of conduct and code policy and for collecting rent from a tenant and failed to remit to the accounts. He replied but this was found unsatisfactory and hence invited to a disciplinary hearing on 9<sup>th</sup> March, 2017. Upon the review of the evidence it was established that the grievant had indeed received rent and failed to submit.

A complaint had been lodged through the accounts clerk against the grievant that he had been paid Ksh.103, 700 by a tenant and failed to

submit. The grievant was required to remit the rent to the respondent but failed to do so. A supplier who had rented the house complained against the grievant.

The respondent followed the due process of the law and in accordance with the work place policy and established the grievant had grossly misconducted himself to justify summary dismissal.

Mr Yegon also testified that the claimant had been transferred and did handing over to the new clerk who found a difference and upon calling Mr Mark the tenant it was established there was Ksh.103, 700 not submitted. Before the disciplinary hearing Mark testified that the new chief clerk found that he had not paid rent for 17 month.

The disciplinary committee could not tell who had given the figure of ksh.103, 700. There is no audit report on this amounts. The tenant had been found to have rent arrears. And following allegations by Mark the respondent went back to the books and the missing amount was established to be ksh.42, 700. The grievant had been given notice to show cause to allow for investigations and the correct figure was Ksh.42, 700.

By the time the case was reported the grievant owed Mark Ksh.2, 500. There was ksh.40, 000 sent by Mark as rent. The grievant as a senior officer of the respondent had collected cash and failed to remit which was in breach of the company policy. He was not supposed to keep collected cash to himself. When the grievant was dismissed he had repaid to Mark Ksh.40, 000 and had a balance of Ksh.2, 500.

The respondent also filed various witness statements, work records and detailed disciplinary committee hearing proceedings.

At the close of the hearing, both parties filed written submissions.

The court has considered the pleadings, the evidence and the written submissions and the issues identified for determination can be summarised as follows;

Whether there was unfair termination of employment;

Whether the reasons given are valid; and

Whether the remedies sought should be issued.

The respondent terminated the grievants employment by summary dismissal vide letter dated 24<sup>th</sup> April, 2017 and on the grounds that;

*Summary dismissal*

*... between the years 2014 and 2015, you received a total amount of Kshs.42,700 (...) from a tenant of Unilever Tea Kenya Limited for onward transmission to the company, however, you failed to transmit the same to the company.*

*You were asked to submit a written explanation detailing why disciplinary action should not be taken against you for the aforementioned misconduct. You were further asked to attend a disciplinary hearing that was set for 9<sup>th</sup> March 2017 ... at which your written explanation and allegations levelled against you would be discussed. ...*

On the first issue as to whether there was unfair termination of employment; the due process of the law requires outlined under section 41 and 44 of the Employment Act, 2007 (the Act), the employer is required to issue an employee who is alleged to have misconducted himself or has grossly misconducted himself notice and be allowed to given his defence. This is to allow the employee know the matters he is faced with and be able to attend and given a defence.

The grievant testified that he was issued with a notice to show cause dated 3<sup>rd</sup> March, 2017 to which he replied on 6<sup>th</sup> March, 2017 and was also invited to a disciplinary hearing on 9<sup>th</sup> March, 2017. He attended and from the minutes filed by the respondent he was present together with a shop steward.

There was procedural fairness accorded to the claimant.

Save for procedural justice, the law under section 43 and 45 of the Act requires that the employee subject to disciplinary action be accorded substantive justice. Section 43 of the Act requires the employer to prove the reasons for termination of employment. These should be matters that the employer genuinely believes to exist and which led to termination of employment.

In this case, in the notice to show cause dated 3<sup>rd</sup> March, 2017 the claimant was alleged to have;

*It is alleged that you have violated the following Code of Business Principles*

*...*

*It is alleged that between the years 2014 and 2015, you received a total of KShs.103, 700 (...) from a tenant of Unilever Tea Kenya Limited for onward transmission to the company; however, you failed to transmit the same to the company. ...*

In reply, the grievant denied these allegation and asserted that in the year 2014 and 2015 he never received the sum of Ksh.103, 700 from a tenant and such allegations are false. That he was not authorised to receive money on behalf of the respondent except that his role was to document whenever a tenant paid money to the management.

The claimant was then invited to a disciplinary hearing.

In the letter and notice terminating employment dated 24<sup>th</sup> April, 2017 the claimant was dismissing on the grounds that he had received ksh.42, 700 in rent money and failed to submit the same to the respondent.

In the disciplinary committee hearing, It emerged the claimant was alleged to have received money from Mr Mark, a tenant and who was called as a witness.

From the disciplinary committee proceedings; the grievants evidence was captured as follows;

*Investigator: what was your role as a chief clerk at Kapkorech Segero (Grievant) : Administrative, custodian of documents, responsible for office running, returns, financial documents and record keeping.*

*Investigator: were you responsible for any cash money*

*Segero: mine was to document it only. I never received any money.*

*Investigator: Charles, maybe you can confirm how the procedure was then since you were on that side*

*Charles: I was three and chief clerk was in some instances given money*

*Segero: in was the responsibility of the welfare to relay the message to tenants to pay rent and not me.*

*Investigator: what was the message between you and the tenant all about:*

*Segero: it was communication about the money that he owed me for the commodities.*

...

When the subject tenant and Mark Mairura was called to give his evidence he testified that;

*Chumba: kindly explain to us the history about this money/arrears*

*Mark: I got surprised when Sally informed him [me] about the arrears when he had gone to pay the money rent.*

*Investigator: how did the arrears amount to 17 months arrears*

*Mark: I realised it when Sally informed us since no receipts were issued to us by Segero since he always gave excuses, so we went and we counted how many receipts were missing.*

*Maybe there were miscalculations.*

*What I can recall at times we could send the office messenger to take the money and to ask for receipts*

*I can't tell somehow*

*We just worked it out after being informed that we were in a lot of arrears*

*I recall one receipt for Ksh.30500 for April 2016*

*We had no arrears*

*We had no arrears*

*Yes we paid monthly*

*Yes, a time the officer could take items on credit like milk and balance off with the arrears till when the office shifted to Chagik.*

The court examination of Mark Mairura's evidence is that he would pay his rent money in cash to the grievant, he later noted such rent monies had not been submitted and the grievant offered to repay.

It is also apparent from the evidence that Mark Mairura was running a business and the grievant would make purchases therefrom but such never went beyond ksh.400 at a time.

It is also clear to the court that there were money transactions between the grievant and Mar Mairura where the grievant paid ksh.39,000 and there is an apparent balance owing.

The grievant admitted before the disciplinary committee that he owed Mark mairura and he repaid part of the money;

*Chumba: when did you repay MARK?*

*Segero: I might not recall the exact time*

*Investigator: have the complainants ever lent large amount of money or items to anyone?*

*Mark: no. our canteen is too small. Maybe the largest amount could be Ksh.400*

*Shop steward: has Segero ever borrowed money from you*

*Mark: yes, there is only one time when Segero called me when he was in town requesting for 10000 shs but I had 500shs in my mpesa and so I sent it to him and he has never refunded, even though I asked him for it*

*Shop steward: why the change of duration i.e. 17 months and now to 7 months*

*Mark: the truth is we calculated and because we were not sure since we didn't have all the records.*

The amounts alleged to have been received from tenant(s) and not submitted to the respondent kept on varying and changing as events unfolded from Ksh.103,700 to the last figure of Ksh.42,700. Even where the grievant may have held rent moneys from tenants and failed to remit to the respondent, the duty was upon the respondent as the employer to carry out investigations and secure evidence through an audit and use it accordingly.

The court reading of the evidence and particularly that of the investigator that;

*I do agree the initial statement of Mark and Imelda indicated 17 months of arrears was outstanding whilst the record shows only 7.*

*This confusion is understandable and would in the first place never have arisen if the defendant [the grievant] was diligent in his duties and issued all tenants with their receipts in time.*

The duty was upon the respondent as the employer to secure the evidence. The grievant as the one required defending himself ought to have given a fair chance to urge his case based on the allegation made against him. The investigator further submitted that;

*We have heard further evidence from 3 more tenants confirming the same pattern that defendant followed.*

*Its very clear that in addition to taking money for own gain the whole "plan" of defendant was all along to roll money received by tenants – he put it into his pocket and clearly paid back larger amounts of money in order to take up the money he had taken. He was however caught unawares when he was transferred and could not raise the entire amount of money he actually owed toward Mark and Imelda's rent.*

The above analysis put into account, all what the court is required to address is whether the employer had a genuine and valid reason leading to termination of employment. A reason(s) which existed at the time a decision to terminate employment was taken.

Despite the conflicting figures as to how much money the grievant had failed to submit, the respondent as the employer established that the grievant had received money from tenant(s) and which he had failed to submit and had engaged in such transactions while serving as chief clerk in the years 2014 and 2015.

In the case of **Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] eKLR**, the court held that;

*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.*

...

*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. ...*

In this case, the employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the grievant had committed gross misconduct in their employment and had done acts which were substantially detrimental to the company.

The court finds the termination of employment by summary dismissal was justified and for reasonable cause pursuant to section 44 of the Act read together with section 41 of the Act.

The remedy of reinstatement is not available to an employee whose employment is terminated for a good cause.

On the alternative claims for payment of terminal dues of gratuity, salary arrears as per the CBA and compensation, under the CBA gratuity is not payable in a case of termination of employment by summary dismissal. Compensation and notice pay is equally not available for similar reasons.

The claim for salary arrears is not quantified and there are no submissions as to how this claim is arrived at. Similarly, the claim for payment of pending leave days is not gone into or quantified.

**Accordingly, for the reasons set out above, the claim is hereby found without and is dismissed. Each party shall bear own costs.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....