



**REPUBLIC OF KENYA**

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

**AT KERICHO**

**CAUSE NO.51 OF 2019**

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

**VERSUS**

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

**JUDGEMENT**

Issue in dispute – victimisation, wrongful, unfair dismissal of Gilbert Ngetich and Nickson Kipkirui (grievants).

The claimant is a registered trade union representing workers within the agricultural section and the respondent is a limited liability company and carries on the business of tea growing and processing in Kericho and which tea is sold in the local and international market.

The parties have a recognition agreement and have negotiated several collective agreements (CBA).

The respondent employed the grievants as general workers on 1<sup>st</sup> October, 2011 and 1<sup>st</sup> November, 2013 respectively.

On 29<sup>th</sup> August, 2017 the grievants reported to work but the supervisor informed them to report to the manager's office, Stanley Cheruiyot. The grievants were introduced to 3 people who were police officers and they were told to accompany them to Konoin police station to record statements and upon asking why they were required to do so, the manager told them that the police would explain.

The manager called for the company vehicle which took the grievants and the police officers to Konoin police station. Upon arrival the grievants were locked up in the cells. They were later informed that they had been arrested on accusation of assaulting their fellow employees during a strike. Their accusers were not mentioned.

The grievants were presented before the Principal Magistrates Court at Sotik on 30<sup>th</sup> August, 2017.

On 1<sup>st</sup> September, 2016 reported on duty. On 2<sup>nd</sup> September, 2016 the respondent issued the grievants with notice to show cause why disciplinary action should not be taken against them for alleged physical assault of three employees on 1<sup>st</sup> and 2<sup>nd</sup> August, 2016.

On 3<sup>rd</sup> November, 2016 the grievants were invited to a disciplinary hearing at Chemosit Club, Kapgwen Estate and where they attended and allowed to go back to work.

The claim is that on 3<sup>rd</sup> December, 2016 the respondent unlawfully, unfairly and illegally dismissed the grievants from their employment on account of gross misconduct. The claimant reported a dispute with the Minister and a meeting with the parties was held on 18<sup>th</sup> January, 2017.

On 28<sup>th</sup> June, 2017 the grievants' appeal was heard and the respondent upheld the decision of summary dismissal.

The claim is also that the judgement in the criminal case against them was delivered on 10<sup>th</sup> November, 2017 where the court acquitted them.

On the reported dispute to the Minister the conciliator recommended the summary dismissal be converted to termination of employment but the respondent refused to accept the same.

At the time employment of the grievants was terminated they were each earning Ksh.491 per day. Employment terminated unfairly and the claimant is seeking the payment of dues;

- a) A declaration that there was unfair dismissal of the grievants;
- b) An order compelling the respondent to reinstate the grievants without loss of benefits;
- c) An order directing the respondent to pay the grievants for the period they have been out of employment;

In the alternative;

- d) Payment of gratuity for the years served as provided in the CBA;
- e) Payment for 12 months;
- f) Payment of 2 months' salary in lieu of notice;
- g) Payment of damages for unfair termination of employment;
- h) Payment of damages for unlawful, illegal and unfair dismissal;
- i) Interests on the dues above;
- j) Costs; and
- k) Certificate of service.

In evidence, Nickson Kipkirui one of the grievants testified that he was employed on 8<sup>th</sup> October, 2012 as a tea picker and was issued with a letter of employment. His employment was stopped following a strike and was arrested together with Elijah and charged before the Principal Magistrates Court at Sotik in August, 2016. The respondent alleged that they had burnt tea bushes but in court they were alleged to have assaulted other employee. The witnesses called in court denied ever being assaulted as alleged and he was discharged.

Mr Kipkirui also testified that the respondent's manager Sammy Kirui had called the police to arrest him on 31<sup>st</sup> August, 2016. On 1<sup>st</sup> September, 2016 when he resumed duty he worked until 5<sup>th</sup> December, 2016 when he was issued with letter of summary dismissal. He had been issued with a notice to show cause and given a hearing notice. The one who had alleged he was assaulted was not at the hearing. At the time he was earning ksh.491 per day and no terminal dues were paid.

The grievant also testified that some employees of the respondent alleged that they had been assaulted during the strike and the only witness called was Samuel Cheruiyot.

The criminal case before Sotik law court was dismissed on 24<sup>th</sup> November, 2017. His employment was terminated on 3<sup>rd</sup> December, 2016.

Gilbert Ngetich the grievant also testified that he was arrested together with Mr Kipkirui and charged for alleged assault of fellow employee but he was acquitted. He was issued with a show cause notice that he had assaulted Samuel Cheruiyot and Evans Ocharo who testified before he disciplinary committee but during the strike there was no employee who had been assaulted or injured. Samuel Cheruiyot lied that he had been beaten. He never filed any statement. The grievants were treated unfairly and the remedies sought should be issued.

Defence

The defence is that the grievants were employees of the respondent until 3<sup>rd</sup> December, 2016 when they were summarily dismissed.

The grievants were invited to a disciplinary hearing on 4<sup>th</sup> November, 2016 after they had been called to show cause why disciplinary action should not be taken against them. The respondent followed the due process both substantively and procedurally in the exercise of disciplinary action. The grievants were found culpable for defiance of the respondent's code of business principles hence termination of employment was lawful.

The defence is also that the grievants were given a fair hearing and allowed to urge their defences which were found unsatisfactory. There was gross misconduct and the code of business principles allow for summary dismissal together with section 44(4) of the Employment Act.

The grievants were allowed to appeal against the decision to terminate employment to the extent that on 28<sup>th</sup> June, 2017 there was a hearing and summary dismissal upheld.

The claimant reported a dispute to the Minister and the respondent participated before the appointed conciliator. Termination of employment was lawful and the claims made are without justification.

The claim for damages is not due as termination of employment was lawful notice pay is not due as this was summary dismissal; the claim for payment of gratuity is not due as the grievants have not established any contractual, statutory basis for the same and the suit should be dismissed with costs.

In evidence the respondent called Johnstone Langat the assistant field manager at Kapwon estate and who testified that on 1<sup>st</sup> and 2<sup>nd</sup> August, 2016 there was a strike at the respondent and the grievants were involved. Some employees wanted to return to work but the grievants caught Samuel Cheruiyot and Lamek Onyango and beat them up. Samuel Cheruiyot made a report to the police on 18<sup>th</sup> August, 2016 and there was a warrant of arrest issued against the grievants and were arrested while at the place of work and charged at Sotik Law court.

The injured employees were treated at the respondent's dispensary. When such a matter arises, the respondent only facilitated the arrest of the grievants. Disciplinary process was undertaken internally. A notice to show cause was issued on 2<sup>nd</sup> November, 2016 and the grievants were heard on 4<sup>th</sup> November, 2016. There were witnesses, Samuel Cheruiyot and for security reasons only a witness statement was presented. The witnesses were called and the grievants questioned them. The disciplinary committee found the grievants culpable a decision of summary dismissal was found appropriate.

Mr Langat also testified that the police arrested the grievants following a report by Samuel Cheruiyot and following investigations they decided to charge them in a criminal case.

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

From the pleadings, the evidence and written submissions the issues which emerge for determination can be summarised as follows;

Whether there was unlawful, unfair and wrongful termination of employment;

Whether the grievants should be reinstated; and Whether the remedies sought should issue.

By letter and notice dated 3<sup>rd</sup> December, 2016 the grievants were terminated from their employment by the respondent by summary dismissal on the grounds that they assaulted other employees on 1<sup>st</sup> and 2<sup>nd</sup> August, 2016 causing them grievous bodily harm. The grievants had been invited to show cause why disciplinary action should not be taken against them vide notice dated 2<sup>nd</sup> November, 2016 and also invited to attend disciplinary hearing on 4<sup>th</sup> November, 2016.

The claimant's case for the grievants is that there was wrongful, unfair and unlawful termination of employment. The grievants were charged before Sotik Magistrates Court and acquitted whereas the respondent found them culpable and of gross misconduct and terminated employment resulting in unfairness.

It is common cause that the grievants' employment was terminated through summary dismissal on 3<sup>rd</sup> December, 2016. The grievants denied in evidence the reasons given for their dismissal and hence discharged their obligation under section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. The burden then shifted to the respondent under section 43(1) and 47(5) to prove the alleged reasons for termination of the grievants' employment, and to justify the grounds for the termination of the employment.

Section 47(5) of the Act requires that;

*(5) For any complaint of unfair termination of employment or wrongful Dismissal the burden of proving that an unfair termination of employment or Wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

Section 43(2) of the Act requires that;

*43(2) 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."*

The grievants were issued with notices to show cause why disciplinary action should not be taken against them for assaulting fellow employees on 1<sup>st</sup> and 2<sup>nd</sup> August, 2016 during an industrial action. On 4<sup>th</sup> November, 2016 the disciplinary hearing was conducted where the grievants were present.

On the allegations made, Gilbert Ngetich the grievant stated that;

*On 1<sup>st</sup> ... I heard some noise-whistle being blown at the playground at around 6am. Employees said lets go demonstrating along the road we went to Koruma and we found employees in Koruma and we came to Chemosit where policemen chased us and we went back and I personally went back to sleep. On 2<sup>nd</sup> the same was the case and I did not assault anyone. ...*

The complainant was **Samuel Cheruiyot**. He testified before the disciplinary hearing as follows;

*On 1<sup>st</sup> I had come from muster I went ... I saw employees coming from Chepchas fields towards our village Koruma. All of a sudden I saw them come towards my direction with sticks I escorted them towards Koruma stage, one of them (gilbert Ngetich) shouted that is a watchman, betrayer. Then people started beating me up- I identified Elijah Morara and Nickson Kipkirui. There are women who shouted to my rescue so that I did not get so injured.*

...

*Nyabke: Who beat you on the head?*

*Samuel: Nickson Kipkirui but the person who initiated beating was Elijah Morara. ...*

From the disciplinary committee proceedings it is clear to the court that the complainant Samuel Cheruiyot saw the person who beat him up and none of them were Gilbert Ngetich the grievant. Save for being part of the demonstrating employees, the allegations addressed in the notice to show cause and leading to disciplinary proceedings that he assaulted a fellow employee is discounted by the very employee he was alleged to have assaulted. The respondent ought to have cleared him and allow him to continue with his duties. The sanction of summary dismissal was not warranted or justified based on the evidence submitted by the disciplinary committee.

The other grievant, Nickson Kipkirui was also alleged to have assaulted fellow employees on 1<sup>st</sup> and 2<sup>nd</sup> August, 2016. His case was that;

*... on 1<sup>st</sup> August 2016 I work up at around 5am ... I heard some whistles being blown at Kimoi playground at around 6am. I went there and employees said we go to demonstrate along the road we went to Koruma and we found employees in koruma at the korum stage we prayed and we went to chemosit gate we stayed there and we were told to go to chemosit club where we stayed till evening when I went back to the village. On 2<sup>nd</sup> the same was the case.*

The complainant called was **Samuel Ngetich**. He tabled similar evidence as Samuel Cheruiyot had against Gilbert Ngetich.

A second complaint was called, **Nelson Langat** and who testified that;

*It was on 2<sup>nd</sup> August 2016 when some employees assaulted me around amani village. I was form Koroma store to collect my payslip. At around filed 48 some employees – 5 of them asked me to follow them on demonstration but I asked to allow me to lock my door first. These employees were – Nickson Kipkirui -4313, Leonard Keter-1502, Paul Cheruiyot-026537, Benson Kiplangat -2093, and Gilbert Rotich-1471. They assaulted me I don't know why. They were calling themselves KDF. Some of them have left work. Some women screamed thus they left assaulting me. Nickson struck e on my back. The team said I was a betrayer and I was giving information to management.*

This complainant was cross-examined and the fullness of his evidence was hazy and did not directly link the grievant to assaulting him. The fact that 5 employees confronted him and demanding him to join in the demonstration and despite mentioning the grievant does not make him culpable.

The other complainant called was Lameck Onyango. From his evidence he singled out the grievant and stated he was not assaulted by him. The grievant intervened and stopped other employees from beating him.

The findings of the disciplinary committee with regard to the complaints made against Nickson Kipkirui are at variance with the evidence given. The committee conclusion on his case was as follows;

*Findings by the committee*

*The defendant (Gilbert Kiprotich) assaulted some employees on 2<sup>nd</sup> August 2016.*

*One of the complainants complained that it was Gilbert who pointed him out to the gang that was chasing employees from the village onto the road.*

*The complainant went to seek treatment at the hospital after assault.*

*The defendant still has a case pending in court over the same assault cases.*

There is nothing further from the truth.

The evidence before the disciplinary hearing was that Gilbert Ngetich did not assault any employee. Equally, Nickson Kipkirui was not found culpable. No such finding or conclusion was made.

As set out above, pursuant to section 43 and 45 of the Act, termination of employment must follow a genuine reason(s) and the employer is required to prove that the reasons for termination were valid and fair reasons. Section 41(2) of the Act obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct.

On the defences made by the grievants, it should have been apparent to the respondent that they were not culpable of the charge of assaulting any employee. There existed no justifiable cause to warrant the sanction of summary dismissal.

The court finds the termination of employment was unfair and lacked validity and the reasons given were not genuine or fair.

The claimant is seeking the reinstatement of the grievants with payment of back wages. Employment terminated on 3<sup>rd</sup> December, 2016. It is over three (3) years since.

The remedy of reinstatement is regulated in law pursuant to section 49 of the Act read together with section 12 of the Employment and Labour Relations Court Act, 2011. Where a matter is not heard and concluded within 3 years, the court shall not issue the remedy of reinstatement particular where the claimant has sought alternative remedies which the court shall consider.

The parties herein have a recognition agreement and CBAs. The CBA are meant to regulate terms and conditions of employment.

On the finding that termination of employment by summary dismissal was unfair, the grievants are entitled to notice pay per the applicable CBA and clause 23(b) and (c) the grievants had each worked within the brackets of over 5 years and 3 years respectively Gilbert Ngetich having worked for over 5 years and Nickson Kipkirui having worked for over 3 years.

Gilbert Ngetich is entitled to 2 months' pay in lieu of notice and on the daily wage of Ksh.491 x 60 days all is Ksh.29, 460 in notice pay.

Nickson Kipkirui is entitled to 45 days' pay in lieu of notice and on the daily wage of ksh.491 x 45 all is Ksh.22, 095 in notice pay.

On the claim for gratuity, clause 30 of the CBA provide for payment of 22 days for each completed year of service and based on the employee's wages at the time employment is terminated.

Gilbert Ngetich worked from 1<sup>st</sup> October, 2011 to 3<sup>rd</sup> December, 2016 a period of 5 years and for 22 days wage all is ksh.54, 010 in gratuity pay.

Nickson Kipkirui worked from 1<sup>st</sup> November, 2013 to 3<sup>rd</sup> December, 2016 a period of 4 years and for 22 days wage all is Ksh.43, 208 in gratuity pay.

On the claim for compensation for unfair termination of employment, on the findings above, under section 49 of the Act compensation is due. The grievant had worked for 4 and 5 years respectively and compensation at 3 months wage at the rate of ksh.491 per days is found reasonable. Each is awarded ksh.44, 190 in compensation.

On the claim for payment of damages for unlawful and illegal termination of employment, the Act has addressed the unfair termination of employment with an award of compensation and the court finds no good basis for award of damages.

On the claim for a certificate of service, such is due pursuant to section 51 of the Act.

The claimant is also seeking the payment of terminal dues with interests. Having succeeded in the claims made and the grievants having been unfairly terminated in their employment, the dues payable to them should be paid within 30 days after which interests shall accrued and based on court rates.

On the claimed costs, the court finds good basis to ward costs to the claimant.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

**a) A declaration that employment was terminated unfairly;**

**b) The grievants are awarded as follow; Gilbert Ngetich is awarded as follows;**

**(i) Compensation at Ksh.44,190;**

**(ii) Notice pay Ksh.29,460;**

**(iii) Gratuity pay ksh.54,010;**

**Nickson Kipkirui is awarded as follows;**

**(i) Compensation ksh.44,190;**

**(ii) Notice pay Ksh.22,095;**

**(iii) Gratuity pays Ksh.43, 208.**

**c) The grievants shall be issued with Certificates of Service pursuant to the provisions of section 51 of the Employment Act, 2007;**

**d) The dues (b) above shall be paid within 30 days from the date hereof after which interests thereof shall accrue at court rates; and**

**e) The claimant is awarded costs of the suit.**

**Delivered in open court at Nairobi this 27<sup>th</sup> day of January, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi