



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

CAUSE NO.104 OF 2018

KENYA PLANTATION & AGRICULTURAL WORKERS UNION..CLAIMANT

VERSUS

UNILEVER TEA (K) LIMITED.....RESSPONDENT

JUDGEMENT

Issue in dispute – victimisation, wrongful and unfair dismissal of Florence Oichoe (the Grievant).

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

The grievant was employed by the respondent on 15th December, 2004 as a general worker in tea hand plucking.

On 8th October, 2016 the grievant travelled to her rural home and left her son at the company house. A neighbour's boy locked him from outside but he managed to get another boy to open for him when they went out to look for the boy who had locked the door and beat him up. The boy reported the beatings to his aunt (Sheila Cherono) who was an employee of the respondent in the security department and who came and beat up the grievant's son.

The grievant was called back from home and on 9th October, 2016 evening, Cherono came to her house and picked a quarrel with her. The security in the area raised an alarm and the two were picked to the security office where they recorded statements.

On 19th October, 2016 the grievant was issued with a notice to show cause demanding her to give written explanations as to why disciplinary action should not be taken against her for allegedly threatening Cherono with death. The grievant replied and by letter dated 1st November, 2016 she was invited to a disciplinary hearing on 2nd November, 2016.

On 12th November, 2016 the respondent issued the grievant with letter dismissing her from her employment on account of breach of business principles. She reported the matter to the claimant and who lodged an appeal against such decision and also reported a dispute to the Minister and the respondent refused to attend.

The termination of employment was wrongful, unfair and the summary dismissal was not justified. She was earning Ksh.515 per day. The grievant had worked for 12 years and unless the court intervenes the grievant will lose her work benefits. The claimant is seeking the following;

- a) Gratuity for years worked in accordance with the CBA;
- b) Prorate leave for months worked;
- c) Compensation for 12 months;
- d) Bus fare one way;
- e) Unpaid wages;
- f) Unpaid overtime;
- g) Notice pay;

h) Damages for unfair dismissal; and

i) Costs of the suit.

The grievant testified in support of the claim. That on 8th October, 2016 she had left for her home in Kisii and left her son in the company house when her neighbour Cherono's son came and beat him up. Another neighbour called the grievant and when she came back, Cherono came and there was a quarrel but the respondent decided to issue her with a notice to show cause as Cherono had alleged she had been threatened with death which was not the case.

The grievant also testified that she attended disciplinary hearing and dismissed from her employment without payment of any terminal dues.

The defence is that the grievant was an employee of the respondent when she was served with a notice to show cause to explain why she had breached the code of business principles. She was accorded a hearing before the disciplinary committee but failed to give satisfactory responses of the offences she was charged with. She appealed but there were no good grounds and it was dismissed.

The defence is also that the summary dismissal was justified and the claim should be dismissed.

Jeremiah Koskei a member of the disciplinary committee with regard to the grieving's disciplinary hearing testified that before summary dismissal, the grievant was issued with notice to show cause for breach and violation of the code of standard of conduct, code policy and her response was found unsatisfactory.

The evidence was that the grievant had threatened to kill her workmate as a result of an argument between them amounting to gross misconduct. Following a quarrel between the grievant and Cherono in the camp village following an assault to her son, she made threats to the effect that she would kill Cherono.

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

Determination

By letter dated 12th November, 2016 the respondent terminated the grievant's employment by summary dismissal on the grounds that;

On 25th October, 2016 you were issued with a letter that requested you show cause why disciplinary action should not be taken against you for breach of the Code of Business Principles and being absent from duty without permission.

You were asked to submit a written explanation ...

Based on the evidence by all parties to the hearing committee in this disciplinary hearing held on 2nd November, 2016 the committee concluded that the Code of Business Principles provisions have been breached ... this constitutes gross misconduct ..

The summary dismissal was for the grounds that the grievant was absent from duty without permission.

Prior to such decision, the respondent had issued the grievant with notice dated 19th October, 2016;

RE: NOTICE TO SHOW CAUSE

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

... It is alleged that on 12th September 2016 you argued with Sheila Cherono and threatened to kill her in Masobet B village.

The letter therefore demands that you show cause why disciplinary action should not be taken against you for breach of the Code of Business Principles as outlined above. ...

The show cause related to alleged threats to kill Sheila Cherono.

The respondent filed the disciplinary committee minutes held on 2nd November, 2016. The allegations made against the grievant were with regard to her making threats to kill Cherono. There is no charge, allegation of matter with regard to being absent from duty without permission.

There is a huge disparity between the reasons given for termination of employment and the allegations made against the claimant and for which she was issued with notice to show cause and was called to a disciplinary hearing to defend herself.

Section 43 of the Employment Act, 2007 requires that;

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(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.

Termination of employment must be for reasons that exists and which cause termination of employment. such reasons must be valid, fair and justified pursuant to section 45(2) of the Employment Act, 2007;

(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 employee's 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.

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

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters 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. ...

On the evidence before court, the court find no valid or fair reason leading to termination of employment. the reason(s) given for termination of employment is/are unlawful and unrelated to matters the grievant was required to respond to and therefore wrongful. Such cannot be justified under the law, the employment contract and hence contrary to sections 43 and 45 of the Employment Act, 2007.

The summary dismissal of the grievant is hereby found unfair.

The grievant was earning ksh.515 per day at the time employment terminated.

In the notice terminating employment, the respondent offered to pay the following;

a) wages for days worked;

b) pro-rata leave days not taken;

c) overtime pay earned; and

d) one way bus fare.

These dues are settled.

For the other remedies sought by the claimant, compensation is due. the grievant was earning ksh.515 per day amounting to Ksh.15,450 per month. The grievant had

worked for 12 years before the unfair termination of employment and an award of 10 months gross wage is hereby found appropriate compensation all at ksh.154,500.

Notice pay under clause 23 (c) of the CBA an employee who had worked for over 5 years is entitled to two months' notice pay. The grievant had worked for 12 years. notice pay is ksh.31,000.

On the claim for damages for wrongful termination, with the award of compensation, the grievant is well compensated.

Gratuity pay is due under clause 30(a) of the CBA and on the findings that termination of employment was not justified, such pay is due and for 12 years the grievant is entitled to ksh.135,960.

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

a) A declaration that the grieving's employment was unfairly terminated;

b) Compensation awarded at ksh.154,500;

c) Gratuity pay Ksh.135,960;

d) Notice pay ksh.31,000;

e) Costs of the suit; and

f) Dues under (c) above shall be paid with interests at court rates from the date employment terminated until payment in full.

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

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and