



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 203 OF 2017

DAVID KIPKEMBOI LAGAT.....CLAIMANT

VERSUS

KIPCHABO TEA FACTORY LTD.....RESPONDENT

JUDGMENT

1. David Kipkemboi Lagat (the Claimant) sued Kipchabo Tea Factory Ltd (the Respondent) on 17 May 2017 and the Issues in Dispute were stated as:

- (i) Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent.
- (ii) Whether the reason by the Respondent for termination of the Claimant amounts to a fair reason.
- (iii) Whether the Claimant is entitled to compensation for unlawful, unrocedural and unfair termination from employment as prayed for in the Memorandum of Claim.
- (iv) Whether the Claimant is entitled to an award of a certificate of service.
- (v) Who should pay costs and interest of the suit?

2. Pursuant to leave, the Claimant filed an Amended Statement of Claim on 2 July 2016 and the Respondent filed a Response on 12 February 2019.

3. The Claimant filed a Reply to Response on 21 February 2019 and the Cause was heard on 1 December 2020 and 16 February 2021. The Claimant and the Respondents Production Manager testified.

4. The Claimant filed his submissions on 15 March 2021 and the Respondent on 15 April 2021.

5. The Court has considered the pleadings, evidence and submissions.

Did the Claimant abscond work?

6. The Respondent's witness testified that upon being served with the show-cause, the Claimant absconded duty.

7. The Claimant on his part testified that he was verbally informed that his services were no longer required on 1 April 2016 by a Manager he named (it was explained he left employment). He also stated that attendance records were kept

8. The Respondent did not deny keeping attendance records and in the view of the Court, the production of the attendance records would have corroborated the oral testimony that the Claimant deserted work upon receipt of the show-cause.

9. Failure to report to work without permission or lawful cause is also a misconduct warranting summary dismissal.

10. The Respondent did not show that it attempted to find or that asked the Claimant to explain his whereabouts.

11. In light of the evidence on record, the Court finds that it is more probable that the Claimant was dismissed on 1 April 2016.

Unfair termination of employment

Procedural fairness

12. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination of employment (unless it is a case of summary dismissal) while section 41 of the Act requires the employer to afford the employee an opportunity to make representations before the decision to terminate is taken.

13. On or about 20 February 2016, the Respondent alleged that the Claimant and a driver had collected 753kgs of Greenleaf tea but had not documented the same as was required by standard practice.

14. The Respondent conducted investigations and on 4 March 2016, the Claimant and his colleague recorded a statement in the following terms:

We the undersigned do hereby confirm the following regarding the 753kgs collected from Kapkorio block on 20th February 2016 using Kipchabo tea carrier KBJ 131U.

1. That we actually collected 753kgs from the block on that day.
2. That Esther Komen, Supervisor Kamimei Block was present during our collection.
3. That the collected Greenleaf were erroneously not recorded in the delivery note, which was an omission on our part.
4. That the Greenleaf was delivered to Kipchabo Factory and received.
5. That all the above 1 - 4 are true to the best of our knowledge.

15. Based on the above statement, the Respondent gave the Claimant an ultimatum through a letter dated 8 March 2016 to produce the Greenleaf tea and also show-cause why disciplinary action should not be taken.

16. The Claimant responded on 30 March 2016 and his employment was terminated on 1 April 2016.

17. The Claimant contended that the decision was not preceded by a fair procedure.

18. The Claimant was notified of the allegation to confront and he was requested to make a response which he did in writing.

19. The Court is satisfied that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

20. Pursuant to sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to not only prove but prove as valid and fair, the reasons for the termination of the Claimants employment.

21. The Claimant testified that he was verbally informed that his services were no longer required by a named Manager (it was stated that the Manager had left employment).

22. The Respondent's witness testified that the Claimant, a loader and a driver collected 753kgs of Greenleaf but did not deliberately record the same in the delivery note and that when the omission was found, the Claimant and the driver admitted the same.

23. The Claimant admitted during investigations that the 753kgs of Greenleaf was not recorded in the delivery note but in Court he testified that it was the duty of the driver to make the entries in the record sheets.

24. The Respondent's witness admitted during cross-examination that the Claimant's delivery notes did not require the Claimant's signature but he went on to state that the allegation against the Claimant was not the loss of the Greenleaf but failure to deliver the 753kgs of Greenleaf.

25. From the evidence on record, it is clear that the Claimant's job was to load. He had no responsibility to keep or make records or entries. There was a designated driver whose function included making entries, driving the truck to the delivery point before the Claimant would unload.

26. Nevertheless, none of the parties explained where the truck went to with the 753kgs of Greenleaf. The Claimant was the loader on the day in contention, he did not disclose whether he was with the driver and the truck after the loading or what could have happened before delivery.

27. The Claimant was not candid. He was in pole position to explain factors which were peculiarly within his knowledge on where the truck went after it had been loaded. He made a half-confession in his statement of 4 March 2016

28. The inference the Court can draw from the lack of candour is that the Claimant was complicit in the loss of the Greenleaf.

29. The Court finds the Claimant is not entitled to any remedy on account of unfair termination of employment.

Breach of contract

Overtime

30. The Claimant sought Kshs 2,261,021/- on account of time from January 2002 to April 2016.

31. However, the Claimant did not prove the contractually agreed working hours or the prescribed minimum working hours in the sector the Respondent operated in beyond which he would be entitled or eligible for overtime pay.

32. The Claimant did not give any explanation why he served for that long without overtime pay. Relief is declined.

Leave

33. On account of leave, the Claimant prayed for Kshs 1,890/- being outstanding leave for the months served in 2016.

34. The Respondent did not interrogate the head of the claim or produce leave records and by dint of section 10(3) & (7) of the Employment Act, 2007, the Court will allow the head of the claim.

Service gratuity

35. The Claimant was a contributor to the National Social Security Fund and is therefore not eligible for service pay by dint of section 35(5) & (6) of the Employment Act, 2007.

Certificate of Service

36. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

37. Save for leave and certificate of service, the Court finds no merit in the Cause and it is dismissed. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 26th day of May 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mwakio Kirwa & Co. Advocates

For Respondent G & A Advocates LLP

Court Assistant Chrispo Aura