



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 05 OF 2015

KENYA PLANTATION AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

FINLAYS HORTICULTURAL (K) LIMITED.....1STRESPONDENT

FLAMINGO HORTICULTURAL KENYA LTD.....2ND RESPONDENT

JUDGMENT

1. The Claimant, a trade Union, sued the Respondents, for wrongful dismissal of its member one Bernard Onyango Odhiambo.
2. The 1st Respondent is described as a commercial enterprise dully registered under the Companies Act and the 2nd Respondent is a limited liability company registered under the Companies Act of Kenya which has now acquired the 1st Respondent.
3. It is stated that at the time the dispute arose, the grievant was the Chief Shop steward of the 2nd Respondent earning a basic salary of Kshs 7,505/-.
4. It is stated that by a letter dated 22nd July, 2014, the grievant was summoned by his area chief one John Oundo Obiero to attend a meeting scheduled for 28th July, 2014 over a family land dispute. Subsequently that he sought for 7 days compassionate leave commencing on 27th July, 2014 to 2nd August, 2014.
5. The claimant stated that the compassionate leave lasted for 9 days and the Respondent was well informed. however, that upon resumption to duty, the grievant was served with a dismissal letter based on an alleged show cause letter of 30th July, 2014 which the grievant states that he was never served with.
6. The Claimant therefore prayed for judgment against the Respondent for; -

1) A declaration that the dismissal of Benard Onyango Odhiambo is wrongful and unfair.

2) A declaration that Benard Onyango Odhiambo be and is hereby forthwith reinstated into his employment without loss of benefits and privileges from the date of judgment.

IN THE ALTERNATIVE;

3) The summary dismissal of Benard Onyango Odhiambo be and is hereby reduced to normal termination of employment and the Respondent pays the grievant as follows; -

a) Days worked during month of August, 2014 of Kshs. 2,144.30

b) Pay in lieu of Notice of Kshs. 7,505.00

c) Gratuity as provided under the CBA of Kshs. 78.086.00

d) Leave due of Kshs. 11,155.17

e) House allowance of Kshs. 674.33

f) Compensation equivalent of 12 months salary of Kshs 119, 420

g) Cost of this cause

h) Interest in (a) to (h)

4) Cost of this suit be provided for.

7. The Respondent filed a response to the Amended claim on the 24th February, 2016 denying all the contents of the Amended Memorandum of claim and in particular that the 2nd Respondent acquired the 1st Respondent rather than the 1st Respondent changed its name to the 2nd Respondent which remains the same entity.

8. The Respondent denies there being any recognition agreement between it and the Claimant. Further that it is not a member of the Agricultural employer's association and therefore not a party to the recognition agreement produced as Appendix TK1.

9. The Respondent states that it was initially known as *HOME GROWN KENYA LIMITED* before it acquired its present name, and by then the Claimant had sued it under cause 791 of 2010 seeking for the Respondent to recognize it which case was dismissed by the Court on 26th January, 2012 for lacking the simple majority membership.

10. That the Claimant filed yet another claim being Nakuru ELRC cause number 1691 of 2012(Now Nakuru ELLRC cause number 764 of 2014) against the Respondent seeking once more for recognition which suit is pending for hearing before this Court.

11. It is stated that the election of the grievant as the chief shop steward is not because there was a recognition agreement but because the Respondent is determined to promote freedom of association among its employees and to assist the Claimant in pro-agitating its ideas by ensuring that they have representatives within the Respondent's employees.

12. That the Grievant was employed by the Respondent with effect from 8th July, 2004 and on 23rd June, 2014 it was reported to the human resource that the grievant had insulted the welfare chairperson one Anne Naisike while the said lady was addressing workers on issues affecting their general interest with regards to NSSF contributions. Further that he insulted another co-worker Paul Ayuka which incidents were referred to the security department or investigations.

13. That on 17th July, 2014 disciplinary meeting was held which was attended by the grievant together with two representatives of his choice among the workers. However, that on the day of hearing the grievant requested for an adjournment in order to thoroughly prepare his defence which was granted and a further meeting slated for 23rd July, 2014 and the meeting was further adjourned to 30th July, 2014 since the grievant was attending a training.

14. It is stated that on 25th July, 2014, the grievant requested for 7 days' compassionate leave which were not granted as the disciplinary meeting was set to kick off on 30th July, 2014. Nevertheless, that the grievant proceeded for leave without approval.

15. That a show cause letter was served upon the grievant to show cause why disciplinary action should not be taken against him for being absent from work without permission which letter was not responded to by 9th August, 2014 causing the Respondent to summarily dismiss him. that on 13th August, 2014 the grievant lodged an appeal producing for the 1st time the summons by Chief Kanyaluo of 22nd July, 2014 and 5th August, 2014 together with a sick off form from 7th to 8th August, 2014.

16. The appeal hearing was convened on 26th August, 2014 which was objected by the grievant and another appeal meeting was scheduled for 5th September, 2014 which proceeded and the Appeal was rejected and the same communicated to the grievant on the 22nd October, 2014.

17. This claim proceeded for hearing on the 4th May, 2021 where the Claimant, **Benard Onyango Odhiamabo(CW-1)** adopted his witness statement that basically reiterated the claim and prayed for his claim to be allowed.

18. On cross examination, he testified that he requested for permission to be away from work which was denied but since the matter he was attending to was very urgent he opted to go without permission. He testified that he produced the summons letter from the chief to affirm the reason for his absence from work from 27th July, 2014 to 9th August, 2014. he maintained that he was dismissed from work without any disciplinary hearing and upon appeal the termination was upheld and his appeal dismissed.

19. The Respondent on the other hand called as its witness the Human Resource manager, **Tabitha Ndunge(RW-1)** who also adopted her witness statement of 31st March, 2018 that reiterated verbatim the response to the claim.

20. On cross examination, she testified that due process was followed before the claimant was terminated. She stated that the grievant sought for compassionate leave which was denied and he still went for the said leave. She confirmed that the notice to show cause letter was served at the grievant at his last known postal address as he was not at work.

Claimant's submissions.

21. The claimant submitted that it had a valid recognition agreement with the Respondent through the Agricultural employers' association which the Respondent was a member and had a Collective Bargaining Agreement in operation at the time the dispute arose which CBA has not been revoked.

22. They maintained that the 1st Respondent was acquired by the 2nd Respondent, a fact that was communicated to the claimant by the Respondent's memo dated 15th October, 2015 and served on the claimant on the 21st October, 2015.

23. The claimant submitted that the grievant followed all the necessary steps in seeking for leave that he is entitled to as per section 28(1) of the Employment Act which was arbitrarily denied by the Respondent without any reason.

24. It was argued that the grievant ought to have been accorded fair administrative action, by subjecting him to a disciplinary hearing as per section 41 of the Employment Act before dismissing him for gross misconduct under section 44 of the employment Act. They buttressed their arguments by citing the case of **Cherokewa Mrisha –v- Civicon Limited [2014] eKLR**.

25. The Claimant submitted that no reason was given to warrant the summary dismissal of the claimant when the law under section 43 and 45 of the Employment Act mandates the employers to give valid reason for termination. In this they cited the case of **Loice Otieno –v- Kenya Commercial Bank Limited [2013] eKLR**.

26. The claimant argued also that the Respondent alleged to have mailed the show cause letter to the grievant at his last known postal address which address was not recognized by the grievant and further that the Respondent failed to produce evidence of the posted letter. Additionally, that the grievant was a phone call away which the Respondent ought to have used to alert him of the alleged show cause letter, they therefore argued that there was not show cause issued as alleged.

Respondent's Submissions.

27. The respondent on the other hand submitted that the grievant absconded duty and absented himself from duty. It was argued that the grievant sought for permission and was denied, he nevertheless took the leave an act which according to the Respondent is tantamount to insubordination. He argued that chief's summons had also instructed the grievant to seek permission from his employer which means the Summons were dependent of the grievant securing permission. He argued that to be absent from work without permission is tantamount to negation of employment contract which attracts serious labour sanction. They cited the case of **Banking Insurance & Finance Union(Kenya) –v- Barclays Bank of Kenya Limited [2014] eKLR**.

28. The Respondent argued that since the grievant was away from 25th July, 2014 to 13th August, 2014 without any authorization, they issued him with a show cause letter through his postal address but failed to react to it leading to the summary dismissal which he appealed but the appeal was found to be without merit and the dismissal was upheld.

29. Accordingly, it was argued that the Respondent followed due procedure before terminating the service of the grievant and therefore urged this Court to look at the holistic nature of this claim and find in their favour and dismiss the claimants case with costs to them.

30. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

1. Whether the respondent had valid reasons to dismiss the claimant

2. Whether the claimant was accorded due process before dismissal.

3. Whether the claimant is entitled to the remedies sought.

ISSUE NO.1

31. On this issue, the claimant was summarily dismissed vide a letter dated 8/9/2014 produced by claimant as APP TK6. From the said letter the reason for dismissal was being absent from work without leave and lawful cause as from 27th July 2014 to the date of the letter 9/8/2014. The letter is written by Finlay Horticulture Kenya Ltd who are the 1st respondents herein.

ISSUE NO.2

32. The respondents have submitted that the 1st respondent changed its name to the 2nd name which in my view makes it clear that this court is dealing with the right respondent.

33. On the reason for dismissal the claimant gave evidence indicating that indeed he had been absent from work because he had an urgent matter to attend to at his home and he sought for compassionate leave and he was denied the same.

34. Since the issues of the previous misconduct of the claimant if at all relating to insulting another employee and also assault do not form part of the reason for his dismissal, I will not delve into these reasons.

35. As relates to absenteeism, it is evident that the claimant applied for leave on 27/7/14 to 2/8/14 as per APP 4.

36. This was not approved. The claimant nonetheless proceeded for leave the approval notwithstanding.

37. The claimant submitted appendix TK4 a letter summoning him to attend to some issue at home on 28/7/2014. This letter was never brought to the attention of the respondents until 16/8/2014 as per the receipt stamp on the said letter. If indeed the claimant had this letter from his chief which formed the reason for the leave he ought to have submitted it to the respondent at the time he sought for the leave which he did.

38. It is therefore true that he proceeded for leave without permission which is a gross misconduct as per Section 44 of the Employment Act 2007.

39. The respondents in this case had valid reasons to dismiss him from employment as per Section 43 of the Employment Act 2007.

DUE PROCESS

40. As relates to due process, the respondents aver that they sent a show cause letter to the claimant dated 30/7/2014 through registered post to his last known address which is 83 Ombuga which the claimant avers that was not known to him.

41. In fact this address is the chief's address Kanyaluo South. It is not clear why the respondents assumed that it was the claimant's address. There is no evidence that this was the grievant's address.

42. The grievant averred that he never received the show cause letter. The respondents have not tabled any evidence that the show cause letter was indeed served upon the grievant. Any action then taken against the grievant on the assumption that he had received a show cause letter was in the circumstances premised on wrong reasons.

43. The grievant appealed the dismissal which was also disallowed. From the fact that the grievant was dismissed without being heard, the respondent contravened the law which envisages that a man should not be condemned unheard.

44. Section 41 of the Employment Act 2007 states as follows;

"41. Notification and hearing before termination on grounds of misconduct

(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make".

45. Section 45(2) of the Employment Act 2007 states as follows;

"45. (1).....

(2) A termination of employment 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".

46. The grievant having been dismissed without following due process, I find that he was dismissed unfairly and unlawfully.

ISSUE NO. 3 REMEDIES

1. As for the remedies sought, I find that the grievant having been unfairly dismissed, I reduce the dismissal to a normal termination.

2. I also find for the grievant and I award him compensation as follows;

1. Days worked in August 2014 for 9 days = $9/30 \times 9,705 = 2,912/=$

2. 1 month salary in lieu of notice 9,705/=

3. Leave due 11,155.17/=

4. Compensation equivalent to 10 month's salary for unfair dismissal

= 10 x 9,705 = 97,050/=

TOTAL = 120,822/=

Less statutory deduction

5. The respondent will pay costs of this suit plus interest with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Saya for claimant - present

Weru for respondent – present

Court Assistant - Fred