



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC CAUSE NO. 11 OF 2019

KENYA PLANTATION AND AGRICULTURE WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA (K).....RESPONDENT

JUDGMENT

1. The claimant is a trade union registered to represent workers in the agricultural sector. It brought this suit on 7/2/2019 on behalf of Ms. Isabella Nyamboke (hereinafter called 'the grievant') alleging that the summary dismissal of the grievant from employment was wrongful, unfair and unlawful. It therefore prayed for the following reliefs against the respondent:-

- a) To unconditionally reinstate the grievant therein;
- b) To pay to the grievant for the entire period within which she was dismissed;
- c) To pay the grievant in respect of all the leave days due to him as at the time of reinstatement;
- d) To pay the grievant leave travelling allowance;

In the alternative to prayer 1 above, an order directing the Respondent to do the following:-

- a. Pay the grievant gratuity for the years she has served with the Respondent at the rates provided or in the CBA;
- b. Pay the grievant salary arrears as per the CBA;
- c. Pay the grievant salary for a period of twelve(12)Months;
- d. Pay the grievant in lieu of leave for the period dismissed;
- e. Pay the grievant damages for unlawful, illegal and unfair dismissal;
- f. Pay the grievant the costs of the case;
- g. Pay the grievant the costs of the cause;
- h. Pay the grievant interest on a, b, c, d, and e above;
- i. pay any other relief tis Honourable court deems fit to grant

2. The respondent filed a defence on 2/4/2019 admitting that the grievant was his employee until 8/12/2016 when it dismissed her for misconduct. It averred that the dismissal was fair because the grievant was informed of the offence and accorded a chance to defend herself in writing and orally as required by the employment Act. Therefore, it prayed for the suits to be dismissed with costs.

3. The suit went to full hearing and both parties gave evidence and thereafter filed written submissions

Claimants' case

4. The grievant testified as CW 1. She adopted her written statement and produced documents as exhibits. In brief, she stated that she joined the respondent in May 2006 as a general worker referred to as Tea hand and plucking at respondents Kimugu Estate Kapkatungor Division. She later became union member and a shops award.
5. On unspecified date, she reported to work from leave and workers reported to her that they had been forced to check out from duty at 10.00 am. Three days later she talked to the Team leader to check whether there were changes in the routine plucking time and quantity per day, but the Team leader dismissed her stating that the question had already been answered to the workers and she was not answerable to her.
6. On 13/10/2016, a committee member Joyce told her that she had been sent by the Team leader, Evelyn to enquire, why she had abused her. However, Joyce could not tell her when the alleged abuse was made and she left.
7. On 22/11/2016, she was served with a show cause letter accusing her of insulting her Team leader Evelyn Chepkirui on 12/10/2016 at Kapkatungor in the presence of other employees of Team BB. She responded on 23/11/2016 and on 25/11/2016 she was invited to a disciplinary hearing. However, during the hearing, she was not informed what the alleged abusive words were. She maintained that she had no problem with the employer.
8. After the hearing, she was dismissed from employment. She maintained that the dismissal was unfair and unlawful because she was dismissed for representing other employees as their Shop steward. She appealed against the dismissal but the appeal was dismissed. Thereafter the union referred the dispute to the labour office for conciliation but the employer rejected the Conciliator's proposal.
9. As result of the foregoing matters, the union brought this suit. Since the dismissal, she has been jobless and therefore prayed for the reliefs sought in the claim.
10. On cross-examination CW1, reiterated that she was served with show cause letter and responded; that she attended disciplinary hearing and thereafter signed the minutes of the proceedings. However, she contended that she never understood what was going on because she was not told why she had been called to the hearing. She further stated that other witnesses said things, which she never understood. She was accompanied by a union representative but she never called any witness.
11. She further stated that the Team leader had taken her husband Mr. Kimetto and all other workers had ganged against her. However, she admitted that she never raised the issue of her husband during the disciplinary hearing. Finally, she denied ever threatening the Team leader and that she never quarreled with her nor did she refer to him as a widow.

Respondents' case

12. Mr. George Momanyi, respondent's HR Manager testified as DW1. He also adopted his written statement and 3 documents as his evidence in chief. His case was that, on 13/11/2016 he received a report that the Grievant had insulted her Team leader, one Evelyn Chepkirui which amounted to insubordination and breach of the respondent's code of ethics.
13. Investigations done confirmed that the Grievant had in deed breached the work Ethics and she was served with show cause letter on 22/11/2016, and she responded. Thereafter she was called to a disciplinary hearing with the option of being accompanied by a union representative.
14. At the hearing, evidence was tendered by the investigator who collected statements from volunteer witnesses. Five witnesses wrote statements to confirm that the Grievant uttered the said abuse words. The words meant that the claimant would harm the team leader. The claimants defended herself at the hearing and shop steward accompanied her. After the hearing, she Grievant was found guilty for breach of the respondent's code of conduct by disrespecting her supervisor and a dismissal letter was issued against her.
15. Thereafter the Grievant appealed but the appeal was dismissed because the issue of love triangle between the two ladies and a watchman Mr. David Kimetto was not raised during the disciplinary hearing and as such it was treated as an afterthought. According to the respondent the new issue was not relevant to the dismissal of the Grievant.
16. On cross-examination, DW 1 contended that the claimant was dismissed for gross misconduct. He admitted that the abusive words were said in the presence of other workers but the team leader was absent. He contended that the insult amount to insubordination. The remarks were about a woman having lost a husband.
17. He admitted that there were other women without husbands but contended that there was reference to the Team leader. He confirmed that the appeal committee upheld the dismissal. He further confirmed that conciliation was done but the dispute was not resolved. Finally, he contended that even if the words uttered did not refer to the Team Leader they were still wrong.

SUBMISSIONS

18. The claimant submitted that the respondent has not proved the reason for dismissal of the grievant was valid and fair as required by section 45 of the Employment Act. It contended that the respondent has not proved that the alleged abusive words complained of amounted to an insult, and that the words were in reference to her Team Leader. It further contended that the employer did not consider that the grievant had worked for over ten years without any warning letter and that the dispute stemmed from her role as a defender of the rights of her colleagues at work. It also argued that she was not given a Certificate of Service as required by section 51 of the Act.

19. The claimant further submitted that the investigations report referred to certain witnesses who were not called to give evidence. It urged that the Code of Business and the Respondent's Sanction Guidelines were not produced as evidence in this case.

20. It further contended that the dismissal was not in accordance with the procedure set out under section 41 of the Employment Act. For emphasis he relied on **Ioice Otieno v Kenya Commercial Bank [2013] eKLR**. It further relied on **Rayond Cherokewa Mrisha v Civicon Limited [2014] eKLR**

21. Consequently the claimant maintained that the dismissal of the grievant was unfair and in breach of the rules of Natural Justice. For emphasis it relied on the Court of Appeal decision in **Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR** where it was held that a termination of employment is unfair in terms of section 45 of the Employment Act if the employer fails to prove a valid and fair reason and that the termination was in accordance with a fair procedure.

22. Finally the claimant urged the court to award the reliefs sought in the Claim plus costs.

23. On the other hand the respondent submitted that the grievant was dismissed summarily under section 44 (4) (d) of the Employment Act which entitles the employer to do so "if an employee uses abusive or insulting language or behaves in a manner abusive to his employer or to a person placed in authority over him by his employer." It contended that the dismissal was fair and lawful, and fortified that submission by citing the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where the court held that the employer has a statutory obligation not to dismiss an employee without a valid reason and without following a fair procedure.

24. According to the respondent, the disciplinary committee found that there was overwhelming evidence that the grievant insulted and threatened her Team Leader, which amounted to gross misconduct. Witnesses attended the disciplinary hearing and testified that they heard the grievant saying that a woman who doesn't have a husband was digging a grave for her. They also testified that the grievant further said that if she is dismissed from work, she would take Eveline Kirui to the grave and that she would sell for Kshs 500 and use Kshs 300 as fare and kshs 200 to destroy someone.

25. As regards the procedure, the respondent submitted that a fair procedure was followed including serving the grievant with a show cause letter on 22.11.2016 and thereafter according her a hearing on 30.11.2016 before a disciplinary committee where she was allowed to be accompanied by another employee or union representative. At the hearing she was given opportunity to defend herself and thereafter her representations were considered before she was dismissed.

26. It further submitted that the grievant was given the right of appeal and indeed she appealed but the same was dismissed after a hearing held on 31.1.2017. The grievant was issued with a Certificate of Service and was also paid her terminal dues. Therefore the respondent prayed for the suit to be dismissed with costs.

Issues for determination and analysis

27. Having carefully considered the pleadings, evidence and submissions, it is a fact that the grievant was employed by the respondent as a Tea Plucker from May 2006 to 8.12.2016 when she was dismissed for gross misconduct. The issues for determination are:

- a) Whether the reason for the dismissal was valid and fair.
- b) Whether a fair procedure was followed.
- c) Whether the reliefs sought are merited.

Reason for the dismissal

28. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

“(1) No employer shall terminate the employment of an employee unfairly.

(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.”

29. The reason cited for the dismissal was that the grievant insulted and threatened her Team Leader Ms Evelin Kirui. The alleged insulting words complained of were never stated in the Show Cause letter, Hearing Notice or the dismissal letter. However, they were stated by witnesses who recorded statements before the investigator. Some of the witnesses said the insulting words were, ***“better one who has***

*already buried hers” while the others heard the grievant say, “ she will sell bananas for 500 shillings and spend 300 shillings as fare and 200 is enough to destroy someone”.*The Team Leader was not present when the words were uttered but she was told by other employees and assumed that they referred to her.

30. The Team Leader did not talk to the grievant directly about the alleged insult but used proxies and the Estate Manager. The grievant maintained that she never insulted the Team Leader and the said words did not refer to the said leader. The burden of proof was therefore upon the respondent to prove that the said words amounted to an insult and that they referred to the Team Leader.

31. Having considered the evidence tendered by the respondent, I find that the said words did not amount to any insult within the meaning of section 44 (4) (d) of the Employment Act, and there is nothing to show that they referred to the Team Leader, Ms Evelin Kirui. Even anything, the said words were directed to no one and were picked from an idle talk by gossipers including those who went to gossip further with the Team leader against the grievant. Consequently, I hold that the respondent has not proved that the reason for the dismissal of the grievant was valid and fair as required under section 43 and 45 (2) of the Act.

32. I gather support from the Court of Appeal decision in **Pius MachafuIsindu v Lavington Security Guards Limited [2017] eKLR** 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.”

Procedure

33. Section 41 of the Employment Act provides that:

“(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 shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions 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.”

34. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, the Court of Appeal held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

35. In this case the grievant was served with a show cause letter citing the misconduct allegedly committed. Thereafter she was invited to an oral hearing before a disciplinary committee where she was allowed to be represented by another employee or a union official. There is dispute that she attended the hearing and defended herself but the committee dismissed her. Thereafter she appealed against the dismissal but the appeal was dismissed.

36. Having considered the foregoing against the provisions of section 41 of the Employment Act and the cited precedents, I am satisfied that the employer has proved that a fair procedure was followed before dismissing the grievant.

Reliefs

37. Having found that the respondent has failed to prove that the dismissal was grounded on a valid and fair reason, I make a finding that the dismissal was unjustified and unfair within the meaning of section 45 of the Employment Act and the grievant is entitled to remedy.

38. The claimant prayed for unconditional reinstatement withback pay or in the alternative compensatory damages. However, that reinstatement is not available by dint of section 12 of the Employment and Labour Relations Act which bars reinstatement after the lapse of 3 years after the date of separation. In this case the dismissal was done on 8.12.2016 and as such three years lapsed in November 2019.

39. The claimant is therefore awarded compensation for the unfair dismissal plus salary in lieu of notice pursuant to section 49(1) of the Employment Act. The grievant worked for over 10 years and as such under Clause 23 of the CBA, she was entitled to two months’ notice before termination of her contract of service. Considering her long service without any warning letter, and the fact that she was dismissed for no valid reason, I award her six months’ salary as compensation for unfair dismissal.

40. In addition the grievant is entitled to gratuity under Clause 30 of the CBA at the rate of 22 days' pay for every completed year of service because she served for over ten years.

41. However the claims for salary arrears, leave and leave travelling allowance are declined because they lack both particulars and supporting evidence.

42. In conclusion, I enter judgment in favour of the claimant and against the respondent in the following terms:

- (a) Two months' salary in lieu of notice
- (b) 6 months' salary as compensation for unfair dismissal
- (c) Gratuity at the rate of 22 days' pay per year for 10 years.

43. The claimant did not plead what salary the grievant was earning before the dismissal save for the starting salary of Kshs.515 per month. It also did not produce her payslips as prove of earnings and therefore I am unable to compute the awarded items. Consequently, I direct employer to compute the said items based on the grievant's pay as at November 2016 and pay her within 30 days less statutory. On account of the said lacuna in the claimant's pleadings and the trouble given to the respondent to compute the damages payable, I decline to award costs to the claimant.

44. If the respondent fails to comply within 30 days, the claimant will be at liberty to compute the award for adoption by the court and file the payslip for the court to verify, in which case the award will attract interest at court rates from the date of the judgment.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF DECEMBER 2021.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE