



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 65 OF 2018

KENYA PLANTATION &

AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The claimant is a trade union registered to represent workers in the Agricultural section in Kenya. It brought this suit on behalf of Mr George Obwoga Omondi (herein after called the grievant) who was employed by the respondent from 1998 to 29/12/2016 when he was dismissed for gross misconduct. The suit seeks the following reliefs:

- a) A declaration that the Grievant's dismissal was unfair and unlawful.**
- b) Maximum compensation by way of damages for wrongful and/ or unfair dismissal.**
- c) Special loss amounting to Kshs 736,998.60/-.**
- d) Payment of the Grievant's gratuity by the Respondent.**
- e) Interest in [b] [c] and [d] above.**
- f) That the costs of the suit be borne by the Respondent.**
- g) Any other relief that the court shall deem fit and just to grant.**

2. The respondent filed defence on 22/8/2018 admitting that it employed the grievant's from 1998 until 29/12/2016 when it dismissed him for gross misconduct. It further averred that the reason for the dismissal was valid and the grievant was accorded a fair hearing before the dismissal and later on his appeal. It contended that the dismissal was fair in relation to the law and the collective Agreement (CBA), and therefore prayed for the suit to be dismissed with costs.

3. Marete J. heard the suit on 29/1/2019 when both parties tendered evidence and thereafter filed written submission. The parties agreed to have the matter continue from where it had reached and I gave direction to that effect.

Evidence

4. The grievant testified as CW1 and basically adopted as evidence in chief his written statement and bundle of documents filed with the statement of claim. In brief, his case is that he was employed from 1998 and rose through the ranks to become factory clear grade II in March 2009 earning Kshs 11,699 per month which was later increased to Kshs 20,520.

5. On 11/12/2015, he was appointed in acting capacity to the position of a Pay Roll clerk up to 29/12/2015. From 8/10/2016 to 14/11/2016, he was appointed again in acting capacity to the position of Accounts clerk I. On 17/12/2016, he was suspended on allegations that he accessed the Pay Roll computer, made changes to the password and did a number of deletions in the payroll without authorization.

6. On 29/12/2016, he was invited to a disciplinary hearing but no fair hearing was held because the issues raised at the hearing were new and no witnesses were called to accuse him. Therefore he contended that the dismissal was unfair because the alleged misconduct was not established and the procedure followed was not fair but a violation of the rules of natural justice.

7. On cross - examination CW 1 admitted that he was invited to disciplinary hearing and he attended with a representative Mr. Joseph Kabatha. He responded to questions and his representative was also given opportunity to respond. However, the representative never asked any question. He further admitted that he appealed against the dismissal and he attended the hearing but the dismissal was upheld. He responded to questions and his representative was also given opportunity to respond. However the representative never asked any question.
8. The respondent called two witnesses including Ms Natalie Metto respondents' Senior Estate Manager testified as RW1. She also adopted her written statement and list of documents filed by the respondent as her evidence in chief. In brief, her evidence is that the grievant was employed by the respondent from 18/5/1998 as an Estate Worker but later served in other rolls including acting Pay Roll Clerk from 11/12/2015 to 29/12/2015, and from 6/8/2016 to 5/9/2016. Again on from 8/10/2016 to 14/11/2016 he served as acting Accounts Clerk grade I.
9. She further stated that in November 2016 it was brought to the respondent's attention that the grievant failed to discharge his duties in good faith and had accessed the payroll computer change the password and made a number of deletions from the pay roll without authorisation. As a result, he was suspended on 17/11/2016 with full pay to pave the way for investigations. The investigations confirmed he accessed the Payroll system and made deletions in the payroll without authorisation contrary to clause 13(a) of the CBA.
10. She further stated that the Grievant was called for disciplinary hearing on 29/12/2016 with a representative of his own choice and witnesses. He attended with his union representative Mr Joseph Kabatha but after consideration of his response, the employer concluded that there was sufficient reasons to believe that the grievant breached clause 13 (c) of the CBA and discussed him vide the letter dated 29/12/2016.
11. She contended that the claimant was given the right of appeal but his appeal was dismissed after hearing. She maintained that the dismissal was fair because it was done in accordance with the law and the CBA. Therefore she prayed for the suit to be dismissed with costs for want of factual or legal basis.
12. On cross-examination, the PW 1 maintained that the due process was followed at the disciplinary hearing. She contended that the grievant was given the right to call witnesses but he failed to do so. He admitted that the warning letter dated 30/10/2014 was only valued for 12 months. She contended that very few employees had access to the computer
13. She stated that at the time the claimant changed password he was not allowed to access the computer. She admitted that it was the duty of the IT department to bar the Grievant from accessing the computer. However, she maintained that the claimant knew that he had no right to access the payroll system.
14. Mr Charles Orina, respondents' Chief internal Auditor, testified as RW2. He also adopted his written statement and documents filed by the respondent as his evidence in chief. In brief he stated that on 17/11/2016, he was instructed to the respondents' operation Director to investigate the incident that led to the suspension of the grievant. The incident was that the grievant was suspected of accessing the payroll computer between 7th and 9th November 2016, changing password and made a number of deletions from the payroll without authorization.
15. RW1 further stated that he reviewed Daily Works Allocation Task Sheet, Attendance Check List, Leave Check List, Harvest IT User Check List, Audit Trail and the Grievant' Warning Letter. From the review of the said documents he established that the grievant accessed the payroll computer on 2/11/2016 without authorisation and changed password when his authority to access the payroll computer lapsed had on 5/9/2016 as per the appointment letter dated 10/8/2016; and that the grievant's password was used to access the payroll computer on 6th and 9th November 2016, and again between 7th and 9th November 2016 and awarded leave to employees who were absent without authority. Those awarded leave including 10 employees on 7/11/2016, 3 employees on 8/11/2016 and 1 employee on 9/11/2016. The review also confirmed that the grievant was issued with a warning letter on 30/10/2014 for making 6 employees as of duty when they were in fact absent.
16. After review RW1 went on to interview the grievant, the Pay Roll clerk and employees who appeared as having been granted leave between 7th and 9th November 2016 without authorisation. From the interview he established that the Grievant did not share his password and therefore he was responsible for anything done using his password; that the grievant accessed the payroll room between 7th and 8th November 2016, took printed copies of the absenteeism Reports for 7th and 8th November 2016 from the pigeon hole and deleted the backup absenteeism reports from the payroll computer; and that employees confirmed that they were absent without permission between 7th and 9th November 2016, and that one of them admitted that he asked the grievant to mark him as being on leave and he accepted to do so without hesitation and in the absence of any authorization form.
17. In the end he made the opinion that the claimant had committed the said 3 offences and contrary to clause 13 © of the CBA and prepared an investigation Report and forwarded to the HR for action.
18. On cross examination, RW2 maintained that the grievant accessed payrolls computer outside the expiry authorized period. However, he admitted that at page 89 of respondent's documents (Investigations Report) he noted that it was not possible to know who made the deletions in the computer because many people had access to the computer

Submissions

19. The claimant submitted that the respondent has not proved that he committed the offence of awarding authorised causal leave to employees. It relied on section 45 of the Employment Act and the case of **Walter Ogal Anuro v Teacher Service Commission [2013] e KLR** to urge that the employer has the burden of proving the reason for dismissing his employee.
20. As regards the alleged access to pay roll computer and changing of password, the claimant submitted that there was no valid misconduct because it was ordinary for the grievant to access the payroll computer and change his password. It contended that the grievant was granted

access to the pay roll system from 2004 and had continuous access until 2016 during which period he changed his password over 144 times. It argued that the grievant had to access the payroll computer to change his password because it was about to expire.

21. As regards the deletions in the payroll without authorization, it submitted that the respondent had admitted that access to the payroll was not restricted and many people had access to the computer. Finally, it submitted that the warning letter dated 20.10.2016 was not relevant to the dismissal of the grievant because it had lapsed.

22. As regards the procedure followed, the claimant submitted that it was not fair because the grievant was provided with the investigations report in time to enable him prepare for the hearing. It further submitted that issues dealt with at the hearing were new and different from the ones raised by initially in the suspension letter. Consequently, it submitted that the dismissal was unfair and the grievant is entitled to the reliefs sought.

23. For emphasis it relied on **Samson ole Kisirkor v Masa Mara University & 3 other [2018] e KLR Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture & Technology [2014] e KLR** and **Nicholas Muasya Kyula v Farmchem Ltd [2012] e KLR** where the courts were anonymous that employers is bound by the law to follow a fair procedure before dismissing his employee from employment.

24. On the other hand the respondent maintained that the reason for dismissing the grievant was valid because it has adduced evidence to show that the grievant accessed the payroll system and changed his password without any express authority to do after the period allowed for him to access the system had expired; that the grievant confirmed that he did not share his password with other persons and as such he was the only one responsible for the use of the password in accessing the system; and that under the company policy the offences he committed constituted gross misconduct that warranted summary dismissal. It further submitted that in 2014 the grievant had committed the same offence and he was served with a warning letter.

25. For emphasis it relied on the case of **Nazareno Kariuki v Feed the Children Kenya [2013] e KLR** and **Judicial Service Commission v Gladys Boss Shollei & Another [2014] e KLR** where the courts held that the court should not substitute its own views with that of the employer and that the test to apply is that of reasonable employer.

26. As regards procedural followed, the respondent submitted that it followed a fair procedure it contended that the grievant was invited to a disciplinary hearing and given the right to come with a representative and witnesses; and that he was given opportunity to state his case and the same was considered before the dismissal was decided. Thereafter he was given a right of appeal and his appeal was considered after the hearing but it was dismissed. It maintained that the Grievant was accorded a fair hearing before the dismissal as required by the law and the CBA. Consequently, it argued that he is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

Issues for determination

27. Having considered the pleadings, evidence and submissions, it is clear that the grievant was employed by the respondent from 1998 to 29/12/2016 when he was dismissed for gross misconduct. The issues in contest are-

a) Whether the reason for the dismissal was valid and fair

b) Whether a fair procedure was followed

c) Whether reliefs sought are merited

The reason

28. The dismissal notice dated 29/12/2016 cited the reason for the dismissal as: -

“Accessing the payroll computer, making changes to your password and doing a number of deletions in the pay roll without authorization.”

29. The claimant admitted that he accessed the payroll computer and changed his password but contended that the exercise was normal and he had done so since 2004 when he was given the right to access the system. However he denied that he deleted any entries in the payroll system as alleged by the respondent. He maintained that it was part of his duty to access the pay roll computer.

30. The respondent on the other hand contended that the claimant had no authority to access the payroll computer since his authority to do so had expired on 5/9/2016. However, the respondent admitted that it was not possible to establish from the audit trail who made the deletions complained of because many other people were able to access the payroll computer.

31. I have carefully considered the arguments and evidence tendered by both sides on the validity of the reasons for the dismissal. It is indeed true that the RW2 admitted in the investigations report that it was not possible to from the audit trails to tell who exactly made the deletions of casual leave on the 3 days. He explained that the only way to tell who did so was if he had access to the backup data for the three days. He further admitted in the report that access to the pay roll room is unrestricted and weighbridge clerks had access to it to print documents.

32. The foregoing notwithstanding the claimant admitted in his statement recorded during the investigation on 26/11/2016 that he accessed the payroll system on 2/11/2016 without authority and changed his password. Even if the audit trail could not confirm who tampered with the payroll to grant leave to undeserving employees, the grievant admitted that he accessed the system without authority and changed his

password.

33. He also admitted that he never shared his password which incidentally was used to make 4 deletions in the payroll system on 6/11/2016 meaning that it was him who used it to make the deletions. Consequently, I find that the employer has proved the three offences committed by the grievant and which justified his summary dismissal. The said offences amounted to gross misconduct within the meaning of section 44 of the Employment Act.

Procedure followed

34. Section 41 of the Employment Act provides-

“(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.”

35. In this case the grievant admitted in evidence that he was suspended vide a letter, which stated the offences he had allegedly committed. Thereafter he was invited by the investigator to record a statement and he did so admitting the offence cited. Thereafter he was invited to disciplinary hearing by the letter dated 21/12/2016 citing the same misconduct and giving him the right to attend with a representative and witnesses. Further, he admitted that he attended the hearing with his own representative and both were given opportunity to answer questions from the panel.

36. Although he contended that new charges, not contained in the suspension were raised at the hearing, I am of a contrary view. I am also persuaded that, even if the committee raised new issues during the hearing, the same did not form part of the reasons for the termination. It is clear that the reasons cited for the suspension and in the hearing notice are the same reasons cited in the dismissal notice. Therefore, I find that the respondent has also proved that it followed a fair procedure before dismissing the grievant from employment.

Reliefs:-

37. Having found that the respondent has proved that dismissal was justified by a valid reason and that fair procedure was followed, I decline to declare that the dismissal of the grievant was unfair and unlawful as prayed. I also decline to award salary in lieu of notice and compensation for unfair dismissal under section 49(1) of the Employment Act because the summary dismissal was fair and lawful within meaning of section 45 of the Act

38. I further decline to award gratuity for 18 years' service because clause 36(c) of the CBA disqualifies any employee dismissed for gross misconduct from payment of gratuity.

39. In the end, I find that the suit is devoid of merits and proceed to dismiss with no order as to costs considering that the grievant went home empty handed after the summary dismissal.

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 Rule 28 (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