



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.476 OF 2017

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

MENENGAI OIL REFINERIES LIMITED.....RESPONDENT

JUDGEMENT

The claimant is a registered trade union representing Peter Nyakiogora Obonyo, the grievant. The respondent is a limited liability company. The parties have no formal Recognition Agreement.

The grievant was employed by the respondent on 11th October, 2013 as an operator of a backhoe/grader JCB with a gross wage of ksh.16, 000 per month. On 1st April, 2014 the wage was increased to ksh.21, 000 and on 1st August, 2015 increased to Ksh.25, 000 per month.

On 11th October, 2016 the grievant was issued with a notice to show cause dated 8th October, 2016 on allegations that he dragged a tractor on 11th October, 2016. He responded on 17th October, 2016 and to which the respondent noted was not satisfactory and thus invited for disciplinary hearing on 19th October, 2016 but no employee wished to accompany him at the hearing for fear of victimisation. The hearing was postponed.

The claimant made a follow up on the matter on 14th November, 2016 seeking for the disciplinary hearing but there was no response. On 25th November, 2016 the grievant received a phone call inviting him for the disciplinary hearing but upon reporting to work he was served with letter terminating employment.

The claimant requested for a meeting to amicably address the matter but the respondent failed to respond. The matter was reported to the Minister and a conciliator appointed but the respondent failed to attend. The matter was referred to the court.

The claim is that employment of the grievant was unfairly terminated as there was no due process;

- a) Notice pay at Ksh.25, 246;
- b) Salary underpayment Ksh.110, 681;
- c) Annual leave 2015/2016 Ksh.17, 672;
- d) October salary ksh.25, 246;
- e) Compensation;
- f) Certificate of service; and
- g) Costs of the suit.

The grievant testified that upon employment by the respondent he worked diligently and on 10th October, 2016 the garage supervisor told him to remove the trailer from the shop floor and he used a machine as he had been directed to use all possible means to remove it. On the left side the trailer had no wheels and it rubbed on the cabros. Following these directions, on 11th October, 2016 he was issued with a notice to show cause that he had not done his work well. He replied but the respondent was not satisfied and he was invited for a disciplinary

hearing. He attended with the claimant union representative but the respondent postponed the meeting and on 25th November, 2016 he was called and issued with notice terminating employment. This was without due process.

The grievant also testified that he was a member of the claimant and paid his union dues monthly. When he was invited to the disciplinary hearing he opted to be accompanied by the union representative. He was sent away without being allowed a hearing.

The defence is that the grievant was employed by the respondent as backhoe/grader operator from 11th October, 2013 at a wage of Ksh.16,000 inclusive of house allowance and by the time he left employment he was earning ksh.21,740 basic pay and ksh.3,260 house allowance.

On 8th August, 2016 the grievant was assigned duties and in the process he dragged a tractor trailer around the garage area and damaged a cabros and the floor around the garage area. The grievant was supposed to be in control of the JCB machine but he performed his duties carelessly and for this reason he was issued with notice to show cause why his employment should not be terminated. The claimant replied and admitted that indeed he was instructed to perform his duties to arrange the garage but his explanation was not acceptable since he blamed his supervisor who had given him instructions.

On 18th October, 2016 the grievant was invited to attend disciplinary hearing to be accompanied by a fellow employee but on the due date, 19th October, 2016 the grievant opted to attend with a stranger instead of a fellow employee and refused to attend the hearing and opted to walk away.

On 25th October, 2016 the respondent issued the grievant with a letter terminating employment having squandered his opportunity for hearing and on the grounds that he had failed to exonerate from any wrong doing after damaging the respondent property and for insubordination. Such amounted to gross misconduct.

The defence is also that under the provisions of section 2 of the Labour Relations Act, 2007 the claimant lacks the legal capacity to represent the grievant because there is no recognition agreement between the parties. Without mandate the claim should be dismissed with costs.

Peter Karenje the assistant human resource testified that the grievant was an employee of the respondent and while operating a grader he made a mistake and was issued with a notice to show cause why his employment should not be terminated and he failed to give satisfactory responses and hence was invited to a disciplinary hearing. The grievant came to the gate with a stranger called Ochola who had no union identification known by the respondent. the claimant union has no recognition agreement with the respondent.

The grievant was paid his terminal dues at ksh.21, 740 for notice pay, leave days due and salary for October, 2016. Had the grievant followed the due process termination of employment was not necessary. The claimant has no standing with the respondent and not allowed to attend internal disciplinary hearings.

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

The claimant union pleaded that it has a recognition agreement with the respondent hence the filing of proceedings herein for and on behalf of the grievant.

Whereas every employee has the right to join a trade union of choice, for the trade union to gain access within the shop floor, recognition by the employer is imperative under the provisions of section 54 of the Labour Relations Act, 2007 to allow for negotiations over the terms and conditions of employment for the unionisable employees.

The parties herein do not have a recognition agreement.

It is common cause that on 8th August, 2016 while the grievant was on duty he was said to have performance his duties negligently and was issued with a notice to show cause why his employment should not be terminated for gross misconduct. He replied and was invited to attend a disciplinary hearing on 19th October, 2016 with a fellow employee of his choice. The defence is that the grievant attended with a stranger and not as directed and thus squandered his chance for a hearing. The claim is that the grievant was accompanied by the claimant official and thus should have been given a hearing.

Who then should attend during internal disciplinary hearing at the shop floor?

Section 41 of the Employment Act, 2007 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 a shop floor union representative of his choice present during this explanation. [underline added].

Internal disciplinary proceedings should remain as such, *internal*. The shop floor being the best source of evidence, upon the grievant being invited to attend internal disciplinary hearing and advised to bring a fellow employee of choice, the law under section 41 of the Act allowed for him to the right of being entitled to *have another employee or a shop floor union representative of his choice present*.

The union representative must be at the shop floor to attend internal disciplinary hearing. The link then between the recognition of an

employer and a trade union get relevance here as without it, The trade union does not have representatives at the shop floor. The grievant testified that he was paying for his union dues directly to the claimant hence such party was unknown to the respondent.

For the grievant To therefore bring the claimant to the internal disciplinary hearing was to act contrary to section 41 of the Employment Act, 2007 despite being correctly advised by the employer. Indeed as submitted by the respondent, in the case of **Jackson Butiya versus Eastern Produce Limited Cause No.335 of 2011**, an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated. Well advised to be accompanied by a fellow employee of his choice but opted to bring a third party, the grievant lost his chance to a hearing at the shop floor. He cannot then turn around and assert his right to a hearing.

For failure to attend disciplinary hearing, the resulting termination of employment ought to have been summary dismissal. The respondent took the option to terminate employment and paid notice pay. This was generous.

The respondent raised the issue of standing of the claimant in these proceedings but waited until the hearing to address the same in cross-examination. This is a matter which ought to have been gone into instantly. Without recognition, without any linkage between the respondent and the claimant, the grievant having failed to establish his relationship with the claimant save for his membership card dated 8th September, 2016 a month after the Notice to show cause was issued to him, to introduce the claimant in these proceedings was irregular,

As Mr Kanenje testified, where the grievant had followed the due process and attended at the disciplinary hearing as directed, his employment would have been secured. That chance is now lost. The relationship has since been severed. The grievant frustrated his own employment with the respondent.

On the claims made, the grievant has since been paid for notice, leave days owing and wage for October, 2016. On the claims for underpayment, there were no particulars as to how these arose.

Accordingly, the claimant's case for the grievant is hereby found without merit and dismissed. In the notice terminating employment for the grievant dated 25th October, 2016 he shall undertake the handover and collect his Certificate of Service.

Delivered at Nakuru this 20th day of February, 2020.

M. MBAR?

JUDGE

In the presence of: