REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.18 OF 2019

PATRICK ONCHOKE NYABUTO.....CLAIMANT

VERSUS

RAINFOREST FARMLANDS (K) LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as supervisor earning Ksh.32,937 per month and based at Naivasha upon employment in April, 2014.

On 18th June, 2018 the claimant was suspended from duty for 2 weeks, this was extended on 2nd July, 2018 for 2 weeks over alleged sexual assault of a minor of one of the employees at the farm. The claimant was them dismissed from employment.

The claim is that the alleged criminal charges were manufactured by the human resource manager, a fellow supervisor Teresia Wangui in collusion with another employee, the guardian of the minor alleged to have been sexually assaulted. The motive was to deny the claimant a promotion opportunity that had arisen.

The claim is that the summary dismissal from employment was unfair as it was meant to be detrimental to the claimant's progress and thus contrary to fair labour practice, lacked good cause and violated his rights. The breaches relates to the suspension without justifiable cause, dismissal from employment without due process and contrary to fair administrative action and subjecting the claimant for unlawful disciplinary action by barring him from accessing the premises without justifiable cause.

The claimant is seeking for a declaration that his suspension and summary dismissal were unfair and unlawful; payment of damages for unfair dismissal, general damages for breach of Employment Act Cap 226, general and aggravated damages for violation of the claimants rights under articles 28, 28, 29, 30, 39, 41, 47 and 50 of the constitution and costs.

The claimant testified that on 18th June, 2018 while at work he was called to the human resource office where Teresia Wangui said another employee had reported to the office the claimant had sexually assaulted her child in the allocated accommodation on 24th April, 2018 when the claimant was not at work as he had been allowed time off to assist his wife who had just been delivered of a child.

The claimant also testified that he was suspended without any explanation but the human resource manager said he was being given time to go and resolve the allegation son sexual assault. The claimant was arrested and charged over the matter and later released on bond and upon return to work the suspension was extended to 18th July, 2018 and upon reporting the claimant was issued with letter of disciplinary hearing on the grounds that he had sexually assaulted a minor, a matter unrelated to his employment and falling outside of the employment relationship. The hearing was scheduled for 20th July, 2018 at 10.30pm which was strange to hold a meeting at night but the claimant went to the gate and was denied access. The next day he went to enquire if the human resource had made a mistake setting the meeting at night but was not allowed access into the premises.

The claimant has since made great effort to report to work to no avail. He later learnt that his letter of summary dismissal was sent to his home address on the allegations that for 42 days he absconded duty which was not true as he had been denied access into the premises.

The defence is that upon the employment of the claimant he was issued with several warnings attributed to poor performance of his duties.

On 18th June, 2018 the respondent received a complaint from one of its employees that the claimant had defiled her daughter aged 13 at Nduru Trading Centre and was reported to the police. As a result and based on the human resource manual and claimant was suspended from duty to allow for police investigations for two weeks. The suspension was extended for two weeks.

The claimant was arrested on 19th June, 2018 and charged in court for defilement.

On 18th July, 2018 the claimant was invited to a disciplinary hearing for 20th July, 2018 and erroneously indicated for 10.30pm instead of 10.30am but this was read and explained to the claimant upon whom he signed on signifying his acceptance.

The claimant failed to attend at the hearing. He did not communicate on the failure to attend.

The respondent opted to give the claimant more time to show cause he failed to attend as invited.

Despite the expiry of the suspension period the claimant did not attend work for 42 days.

On 31st August, 2018 the claimant was issued with another notice to show cause letter to explain why he remained absent from work. The letter was sent to the last known address P.O. Box 37 Nyamache Kisii and also scanned and sent to the claimant's email address.

On 4th September, 2018 the respondent received an email from the claimant's advocates informing them that the claimant would be reporting to work on 5th September, 2018 but he failed to report.

On 13th September, 2018 the claimant was summarily dismissed from his employment for being absent from duty and a copy sent to the labour officer.

The claims made are without justification and should be dismissed with costs.

In evidence Emma Nyarangi testified that the human resource manager testified that on 13th September, 2018 the claimant was dismissed from his employment for being absent. The letter was sent to his postal address in Kisii and copied to hi email address. Before the summary dismissal the claimant had been issued with a notice to show cause and he confirmed receipt for being absent for 42 days following his suspension and invitation to attend disciplinary hearing which he failed to attend on 20th July, 2018.

The respondent followed due process sin addressing the claimant's case but he refused and or failed to attend without any good cause and the summary dismissal issued was justified. The claims made should be dismissed with costs.

Ms Nyarangi also testified that the letter dated 18th July, 2018 was issued with an error for hearing at 1030pm. The respondent's offices closes at 5pm but at times when the respondent is exporting flowers there is work at night. When the letter was sent with an error the claimant did not question it and in any event he did not attend then or soon thereafter. Upon failure to attend on 20 th July, 2018 the claimant was issued with another notice to show cause which he failed to address and instead sent letter through his advocates.

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

The court has analysed the pleadings, the evidence and the written submissions and the issues which emerge for determination can be summarised as follows;

Whether the suspension of the claimant was lawful;

Whether there are constitutional violations;

Whether the sanction of summary dismissal is justified; and

Whether the remedies sought should be issued.

An employer is allowed the prerogative to suspend an employee on good basis. In the case of **Grace N Akinyi versus Narok County government Cause No.67 of 2019 (Nakuru)** the court held that;

> *....the employer has the prerogative of taking administrative action in form of a suspension, forced leave or interdiction to allow for investigations or as the case may require and the purpose is to remove the employee from the workplace to allow for investigations. Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work as held in* ***Bernard Mwaura Mbuthia versus Nyahururu Water Sanitation Water Company Limited & another, Cause No.53 of 2019*** *and where the court reiterated findings in* ***Elizabeth Cherono Kurgat versus Kenya Literature Bureau [2014] eKLR.***

In this regard, by letter dated 18th June, 2018 the claimant was suspended and given the reasons for such administrative action which he has not challenged save that he asserts the issue of alleged sexual assault of a fellow employees child is a matter outside of his work relations and should not have been addressed by the respondent as a basis to send him on suspension. The respondent holding the prerogative to issue the suspension, acted on a complaint made by its employee against another employee, the claimant. To allow for investigations, the suspension applied. This was followed by an invitation for the claimant to defend himself. Where there was no good cause with regard to the lodged complaint, this ought to have been addressed at the scheduled hearing.

There is no constitutional violation with regard to rights secured therein by the issuance of the letter and notice of suspension. Such is an

administrative prerogative of the employer and in this case the same is found to have issued on good basis.

With regard to alleged constitutional violations, the claimant asserts that his rights under various constitutional provisions were violated by the respondent when he was invited to a disciplinary hearing at 10.30pm which was alleged to have been an error. That by being called for a hearing at night this was in violation of his rights and then his employment terminated on a day before the scheduled hearing on 20th July, 2019.

Indeed the respondent admitted they issued the claimant with letter and notice of disciplinary hearing dated 18th July, 2018 to attend on 20th July, 2018 at 10.30pm. Ms Nyarangi testified that his was issued with a typing error but even after such date the claimant did not attend work.

The defence is also that the claimant was issued with a letter dated 18th July, 2018 with a typing error but he accepted it and singed in acknowledgement.

The court reading of the subject letter is that the claimant acknowledged receipt of the letter of invitation to attend disciplinary hearing on 20th July, 2018 at 10.30pm and not upon an explanation on the error.

In any event the letter issued to the claimant and filed as annexure 12 to the Memorandum of Claim is not acknowledged while the same letter annexed to the defence is singed but the signature is totally different from what the claimant has in his Verifying Affidavit. To the naked eye, the signature attached to the document on the respondent's documents is not authentic.

The evidence by the claimant thus that he understood the disciplinary hearing to be at 10.30pm into the night is therefore correct. His fears in attending at such an hour is justified noting Ms Nyagangi testified that the work hours were 8am to 5pm unless there was night packing of export goods in the months of December to February and in this case it was July, 2018 hence no night work.

Upon noticing the error or mistake in the disciplinary hearing notice, the respondent as the employer did not reissue the same with a correction. The requirement upon the claimant to attending a hearing at 10.30pm was not reasonable.

The alleged error in the subject letter if it were to be taken as such is negated by letter and notice to show cause dated 31st August, 2018 where the claimant was notified that;

> *It is reported that you have absented yourself from work without proper communication and authorisation from supervisor, production manager and or head of production department.*
>
> *Per the HR Documents in your personal file, you were to report to HR office on 20th July, 2018 for a hearing at 10.30pm, you did not show up nor communicate to the management.*
>
> *You have been absent from duty without written permission of the management since 20th July, 2018 to date a total of 42 days. …*

The claimant testified that he made effort to attend the disciplinary hearing the next day but was denied access at the gate.

The assertion that the claimant failed to attend disciplinary hearing on the night of 20th July, 2018 at 10.30pm thus reiterated in the letter dated 31st August, 2018 confirms the claimant was not allowed back at work after such date.

This amounted to an unfair labour practice prohibited under the provisions of article 41 of the Constitution, 2010.

There was however no sanction taken against the claimant as he was issued with notice to show cause dated 31st August, 2018 the claimant was invited to show cause why he failed to attend work since 20th July, 2018.

The damage occasioned to the claimant with regard to invitation to attend a disciplinary hearing on 20th September, 2018 at 10.30pm was addressed by default. He was now invited to show cause why his employment should not be terminated for being absent from work.

Such a procedure is what is contemplated under the provisions of section 44(4)(a) read together with section 41(2) of the Employment Act, 2007. That before summary dismissal from employment for gross misconduct and for being absent from work for no good cause, the employee should be invited to attend and defend himself.

> *(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.*

See also **Faiza Mayabi versus First Community Bank Limited [2019] eKLR** and in **Kenfreight (E.A.) Limited Versus Benson K. Nguti (2016) eKLR** where it was held that;

> ***…****no decision to terminate the services of a worker for reasons relating to the worker's conduct or performance can be taken without providing him with an opportunity to defend himself on the allegations*

The claimant having been issued with notice to show cause failed to address, attend or give good cause as to why he was absent. He opted to instruct his advocates who wrote email dated 4th September, 2018 to the effect that the claimant had received the notice to show cause dated 31st August, 2018 and would report back to work on 5th September, 2018.

The intervention of the claimant's advocates in internal disciplinary matters was premature. The claimant ought to have attended at the shop floor to resolve the matters set out in the notice to show cause before invoking third parties as contemplated under section 41 of the Employment Act, 2007.

In addressing a similar issue, the court in the case of **Nathan Kipruto kemboi versus University of Eldoret Cause No.1 of 2019 (Nakuru)** that;

> *work place misconduct should invariably be addressed within the meaning of section 41 of the Employment Act, 2007.*
>
> *(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.*
>
> *Internal disciplinary proceedings should remain subject to parties at the shop floor. Under such provisions and taking section 41 of the Employment Act, 2007 into account, at the shop floor the employee is allowed the benefit of having another employee or a shop floor union representative present. To open the shop floor to third parties and be allowed to raise preliminary objections, seek statement particulars and the sanction for the charges made only changes the texture and tenure of such proceedings from employment and labour relations to a procedure akin to criminal proceedings where evidence is required to be proved beyond reasonable doubt. Far from it, at the shop floor and where the employee has the benefit of having the trade union representative and availed at the shop floor, parties can source the best evidence within the context of ensuring industrial peace. To bring third parties the employer only invites an escalation of the allegations made to charges and counter-charges.*

The claimant therefore failed to attend and show cause as invited by the employer on the notice dated 31st August, 2018. There is no effort even in these proceedings of him explaining why he failed to reply to the same within the allocated time.

Where the claimant had the advantage of seeking legal advice from his advocates to write to the respondent vide email dated 4th September, 2018 then he had good cause and advice leading to his failure to respond to the notice to show cause as invited by the employer to address.

Without giving good cause why the claimant was not at work as required, section 44(3) and (4) red together with section 41(2) of the Employment Act, 2007 as set out above, the respondent as the employer had good basis to issue letter of summary dismissal. The summary dismissal and the process leading thereto thus addressed above removes the respondent from the alleged violation of the claimant's constitutional rights. The lapse that existed with regard to the notice requiring the claimant to attend hearing on the night of 20th July, 2018 was cured in good time but the claimant failed to taken lawful and proper instruction from the employer to show cause why his employment should not be terminated.

Termination of employment by summary dismissal is hereby found justified.

On the claims made for damages for unlawful termination of employment, the payment of damages for unfair dismissal, payment of general damages and aggravated damages for violation of constitutional rights is found without a foundation.

The claimant testified that upon his suspension he was not paid his wages. This is not pleaded. This issue is addressed in the written submissions thus denying the respondent a fair chance to give its defence on the matter. Without pleading such a claim, this cannot be introduced in the written submissions as to do so would be to go contrary to Rule 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires a claimant to urge his case and plead all matters to allow the respondent file its defences on the same.

Accordingly, the claims made are found without merit and dismissed on its entirety. Each party shall bear own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: .....

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