



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.276 OF 2015

KENYA PLANTATION & AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

KONGONI RIVER FARM LIMITED..... RESPONDENT

JUDGEMENT

Issues in dispute – victimisation and wrongful, unlawful and unfair dismissal of Boniface Shikuyu Shikule, the grievant.

The claimant is a registered trade union under the provisions of the Labour Relations Act, 2007 and with a Recognition Agreement with the respondent a member of the Agricultural Employers Association with who the claimant has negotiated collective agreements (CBA).

The respondent employed the grievant on 27th November, 2007 as a general worker and deployed him at Longonot horticulture division. In June, 2014 the respondent changed its human resource officer with Frederick Kaloki who introduced changes to the grievance handling mechanisms. In January, 2015 the respondent informed its employees that they would only be paying a maximum advance pay of Ksh.2,000.

The employees of the respondent requested their representative to discuss the issue with the respondent with a view of imploring it to rescind the decision and when the representative approached the respondent it declined and the human resource officer started harassing the chief shop steward, the grievant herein with demands to withdraw from pursuing the issue.

On 6th March, 2015 the respondent wrote to the shop stewards informing them a worker's meeting to be held on 8th May, 2015.

On 20th April the employees' representative wrote to the respondent Manager requesting for a meeting to address nine (9) issues affecting employee. There was no response.

On 8th May, 2015 the employee held a meeting where they raised the issues they wanted addressed by the respondent through their representative. The employees were concerned that the Gender Committee was in cohorts with the respondent to dismiss employees and that its members were participating in disciplinary proceedings and in all such cases the affected employee(s) would be dismissed. The employees requested that the employee facing disciplinary proceedings be allowed to choose a representative of choice and the gender committee to only address gender and discrimination and sexual harassment cases.

The claim is that the grievant learnt that the respondent consulted with the gender committee to record statements to the effect that he had abused them, which was not true. The gender committee members were being used to harass and victimise the grievant.

On 16th May, 2015 the grievant wrote to the manager reminding him of the requests by employees and on 18th May, 2015 he went to the human resource officer to plead for assistance regarding the burial of a deceased employee and when he was issued with a notice to show cause stating he had used demeaning language, attacking and abusive language towards the gender committee members during the workers meeting on 8th May, 2015.

The grievant replied to the notice and denied the claims made. He was summoned to attend before the disciplinary committee and was informed that the response would be considered and issued with a communication but at around 4.21pm he was called to the officer office and issued with letter to the effect that he had been invited to the disciplinary hearing and declined to attend and on 21st May, 2015 he was issued with letter indicating he had refused to accept letters from the office and he proceeded to his work duties and at 3.30pm he was called to the office where he found the human resource officer, farm manager, members of the gender committee, Jane Muthoni, Vincent Moracha and Charles Ayuaya where he was required to defend himself and upon which he requested to be allowed to call witnesses but was informed this would be considered later.

The grievant was then handed a letter of summary dismissal on the grounds that he had used abusive language against members of the gender committee and failed to attend disciplinary hearing.

The claimant reported the matter to the labour officer who made effort to conciliate but the respondent declined to attend.

At the time of summary dismissal the grievant was earning ksh.9,440 per month.

The claim is that the grievant was victimised for representing fellow employees and following up on correct procedures as the workers' representative. This led to unlawful and unfair termination of employment.

The claimant is seeking for the reinstatement of the grievant without loss of benefits and in the alternative the payment of terminal dues;

- a. Days worked and not paid Ksh.7,080;
- b. Gratuity Ksh.58,932.57;
- c. Overtime not paid Kshs. ...
- d. Bonus earned Kshs. ...
- e. Unspent leave Ksh.8,765.71;
- f. Notice pay Ksh.15,171.43;
- g. Compensation;
- h. Certificate of service;
- i. Costs.

The grievant testified in support of the claims made.

The defence is that the respondent had drawn up a schedule of meetings on an annual basis among the employees' representatives and between the management and the representatives for purposes of discussing any issues that may have been raised by the employees with respect to work and to enhance good work relations. The respondent hence held meetings with the representatives and at no time was the issue of victimisation raised.

The letter by the grievant dated 20th April, 2015 was in breach of procedure as it was addressed to the regional human resource manager whereas it ought to have gone to the human resource officer. The need for the scheduled meeting was to ensure constant consultations and the requests by the grievant for a meeting was an ambush while aware there was a forum for meetings per the schedule.

The defence is also that the grievant was not victimised, he was treated fairly and with respect.

On 18th November, 2014 the grievant convened an authorised meeting in which he used demeaning and attacking language towards supervisors and managers of the respondent. on 22nd number, 2014 he was issued with a notice to show cause and instead of responding he wrote letter in which he made frivolous allegations against the respondent.

On 22nd April, 2015 the grievant wrote to the farm manager in response to a complaint raised by his supervisor and asked the manager to remind the supervisor that he was the workers representative as chief shop steward. This letter meant the grievant was untouchable and he was insubordinate.

The grievant as an employee was bound by work regulations which he failed to abide.

On 10th May, 2015 the respondent received statements from seven members of the gender committee to the effect that the grievant had used abusive language towards them during the general workers meeting held on 8th May, 2015. On 18th May, 2015 the grievant was issued with a show cause letter requiring him to explain he had taken such action but he denied the same. The grievant was then allowed to visit the claimant's offices the next day to allow for consultations.

On 20th May, 2015 the grievant resumed duty with a strike notice based on wild allegations that the respondent had curtailed employees' freedoms. On the same day he was invited to the disciplinary hearing at 2pm and when he demanded that the entire group of employees at the meeting to attend as his witnesses. This was found unreasonable and was advised to pick one or two witnesses. The hearing was rescheduled.

On the appointed date for hearing the grievant failed to attend and the disciplinary hearing proceeded with him absent with the gender committee members giving evidence.

The grievant was issued with notice to show cause why he refused to attend disciplinary hearing, he picked the letter and left never to return.

On 21st May, 2015 the claimant was summoned with regard to his conduct and leading to events of 20th May, 2015 where he had disrespected the respondent's officer but he declined to accept the same which was witnessed by 4 employees.

On his conduct, the claimant was issued with letter of summary dismissal. Upon clearance the grievant would be paid his terminal dues as advised.

The claimant reported the matter to the labour officer following the filing of Petition No.5 of 2015 with regard to the Notice of strike and not the issue of the dismissal of the grievant who had been accorded hearing in accordance with the law.

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

In evidence the respondent called Vitalis Owira Osodo the Group human resources who testified that the grievant was found to have grossly misconducted himself in the year 2014 and on 8th May, 2015 he used demeaning language against members of the gender committee who made statements with the respondent and the grievant was issued with show cause notice and hearing notice but he failed to attend. When he was issued with letter to explain why he failed to be at the disciplinary hearing, he grabbed it and left to consult with the claimant and upon return he issued a strike notice leading the respondent to file Petition No.5 of 2015.

Due to the gross misconduct, the grievant was dismissed. His was advised to clear and be paid his terminal dues;

- a. Pay for days worked until 21st May, 2015;
- b. Overtime hours worked;
- c. Bonus;
- d. Leave days untaken; and
- e. Certificate of service.

The grievant was required to attend for clearance and undergo a medical assessment to avoid claims upon termination of employment. As the chief shop steward he was aware of these procedures but he failed to attend and his claims should be dismissed

Both parties filed written submissions.

By letter dated 21st May, 2015 the grievant was summarily dismissed from his employment with the respondent on the grounds that 7 gender committee members had made complaints against him to the human resource office that he had used abusive and demeaning language against them during the general workers meeting held on 8th May, 2015. That he was served with a show cause letter on 18th May, 2015 and in response he denied the allegations and on 20th May, 2015 he was invited for a disciplinary hearing where he failed to attend but the complainants were heard. That on 21st May, 2015 the grievant was served with letter of absconding disciplinary hearing which he refused to receive and for the noted misconduct and use of demeaning and abusive language his employment was terminated by summary dismissal

The grievant's case is that he was targeted for victimisation due to his role as the workers representative, he had written to the respondent seeking to have a meeting to address various concerns by the employees but there was no response. When the workers meeting was held on 8th May, 2015 the gender committee members were being used to harass him and they made false allegations against him leading to his summary dismissal which was unfair and resulted in victimisation.

To the Memorandum of Claim, the claimant has attached letter dated 22nd April, 2015 by the grievant referenced;

Being undermined by the supervisor

...

Therefore with these few remarks I need your officer to get on the matter before it gets worse and to remind the supervisor to know that am the worker's representative "chief Shop Steward". ...

Things do not seem to have improved after this communication as the grievant wrote twice to the respondent manager demanding for a meeting without a response. There was a workers meeting held on 8th May, 2015 following which several members of the gender committee lodged complaints against the grievant with regard to his language against them said to be demeaning and abusive.

The first letter to the respondent's manager is dated 20th April, 2015;

REF; URGENT MEETING

We the Kongoni River Ltd Trade union committee take this opportunity to request your office to organise for a very urgent meeting between management, branch office and the union committee officials because of the following issues;

...

Therein are nine (9) items.

The second letter is dated 16th may, 2015;

RE: REMINDER LETTER

...

We feel that you have neglected the trade union, the government and employer's agreement i.e. (CBA) and the FLO standard. Workers are suffering due to lack of proper representation and thus why we are urging your office to made the necessary and urgent arrangements before we take the next legal step. ...

The upshot of these communication on the face of the claim made by the claimant herein is that the grievant was urging matters relating to their unionisation and representation at work and the CBA in force. These are matters ordinarily to be addressed by the trade union and the employer and not to be left to the shop stewards at the shop floor.

Where the grievant and other shop stewards/workers representatives felt the need to have collective matters addressed and to avoid any victimisation as alleged, recourse was to their trade union, the claimant. To take matters at their hands and write communications as cited above, the language, texture, tempo, and character border on insubordination.

Where the grievant was placed at Kongoni River Limited, Longonot the starting point before sending letter threatening legal action if no action was taken ought to have been addressed with the supervisor, the human resource office at the shop floor or with the claimant union to urge his case as part of the collective.

Following the workers meeting on 8th may, 2015 several complaint were made against the grievant with regard to his use of demoining and abusive language. He was issued with a show cause notice and he responded. The grievant was then issued with notice to attend disciplinary hearing at 20th May, 2015 at 2pm. He received the notice filed as annexure 7 to the claim.

The grievant did not attend at the disciplinary hearing but instead wrote back as follows;

RE: RESPONSET O INVITATION FOR A DISCIPLINRY HEARING

I wish to respond to your invitation of a disciplinary hearing on 20th 05 2015 at 2pm to answer on allegation tabled against me by the gender committee.

I feel all the present Kongoni River farm employees are my witnesses against the few gender committee workers representatives present in our union meeting that day.

I do urge your office to arrange for a works disciplinary hearing, few gender representatives and the farm shop stewards. ...

Effectively, the grievant did not attend at the disciplinary hearing as invited by the respondent.

The matter at hand and the notice to show cause was directed personally to him. the charges related to his conduct and not the collective. Where the grievant required the attendance of witnesses to support his defence, he did not state so but opted to have apply condition that the entire team of employees should attend. Even where the grievant should have raised such demands and conditions during the disciplinary hearing, he failed to attend.

Section 44(4) (d) and (e) of the Employment Act, 2007 allow for the summary dismissal of an employee who uses abusive language and who fails to abide the lawful instructions of the employer;

d. an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued *by his employer or a person placed in authority over him by his employer*;

The grievant was invited for disciplinary hearing to urge his defence and exonerate himself from the allegations made against him but he squandered the opportunity.

In the case of **Jackson Butiya versus Eastern Produce Limited Cause No.335 of 2011**, the court held that an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated. Well advised to attend disciplinary hearing on 20th May, 2015 accompanied by a fellow employee/witnesses of his choice the grievant opted to make unreasonable demands to have the entire workforce attend as his witnesses. the grievant lost his chance to a hearing at the shop floor. He cannot then turn around and assert his right to a hearing was violated. See **Kenya Union of Commercial Food & Allied Workers Union versus Menengai**

Oil Refineries Limited Cause No.476 of 2017 (Nakuru).

Being the chief shop steward, the grievant was conversant with the internal disciplinary procedures of the respondent and where he misconducted himself, he was not exempt from the same procedures. In the case of **Aggrey Murumba & 13 others versus Teachers Service Commission & another Kenya National Union of Teachers Wilson Sossion, Knut Executive Secretary General (Interested Parties) [2019] eKLR** the court held that;

The jurisprudence shows that employers now have a fundamental right to discipline union officials for just and reasonable cause (*see Richmond Lions Long Term Care Society v Hospital Employees Union BCLRB No. B375/94) where the Tribunal held that ...*

the boundaries of steward immunity must be drawn in a manner that balances the need to preserve the viability of the employment relationship with the legitimate right of the union to carry out its responsibilities without undue interference from the employer.

In **National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd (2010) 3 BLLR 281 (LC)** the court held that;

When shop stewards are dismissed for alleged misconduct committed while performing their duties as shop stewards, the first issue that must be established is whether or not they were, in fact, committing misconduct as employees or whether the alleged misconduct was merely an action ancillary to the duties of a shop steward. Furthermore, where it is established that the shop steward was indeed committing misconduct in relation to his duties as a shop steward, the limits of the immunity from disciplinary action that should be extended to shop stewards must be determined.

In **Mondi Paper Co Ltd v PPWAWU & Another (1994) 15 ILJ 778 (LAC)**, the shop steward was dismissed for deliberately disrupting a meeting with management. The Court held as follows;

No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However, this is no license to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to „mitigate? conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.

And the court above concluded that;

...Union officials, in their conduct must not go beyond the limits of what is lawful. ... An employee who is a union official has a difficult balancing act to carry. He must robustly play his role as a union official for the betterment of the terms and conditions of service as agreed with the employer while alive to the fact that as an employee he must not be insubordinate to the employer.

Similarly for the grievant, his best chance to urge his defence, whatever grievances he may have had was before the internal disciplinary forum which he opted to squander. The sanction of summary dismissal is found justified and lawful.

On the claims made, reinstatement or compensation are not available to the grievant.

On the other claims made, upon the summary dismissal of the claimant, he was invited to undertake clearance with the respondent so as to be paid for days worked including 21st May, 2015;

- a. Overtime hours earned;
- b. Bonus earned;
- c. Leave days earned; and
- d. Certificate of service.

The grievant lost his right for a gratuity following the summary dismissal herein found justified.

Accordingly, the claim is hereby dismissed. Each party shall bear own costs.

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU

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 March, 2020 the Order herein shall be delivered to the parties via emails. this 21st May, 2020 at 0900

hours

M. MBARU

JUDGE