



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1024 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th September, 2020)

ANTHONY MAINA RURIGA.....CLAIMANT

VERSUS

HILTON HOTEL NAIROBI.....RESPONDENT

JUDGEMENT

1. The Claimant herein vide his Amended Memorandum of Claim filed in Court on 4th October, 2016 maintains that the Respondent herein, a Limited Liability Company unfairly, maliciously and unlawfully terminated his employment due to his vocal engagement in union activities and non-payment of terminal dues and benefits owed to him by dint of his employment with the Respondent.
2. The Claimant avers that he was employed by the Respondent on or about 5th July, 1999 in the position of laundry supervisor. He maintained that he performed his duties diligently and to the Respondent's satisfaction and as a result, he was promoted to the position of Assistant House Keeper in the year 2003.
3. The Claimant further avers that he was also elected to hold the position of Chairman of the works committee for KUDHEIHA Workers Union on 26th February, 2014 for a period of five years. He further maintained that on 17th March, 2015 while in the course of his duties, he received instructions from the said Union to attend to a dispute involving the demotion of one of its union members, one Anne Gatama and effectively negotiated for her reinstatement.
4. He further averred that on 1st March, 2015 the Respondent through its Human Resource Manager did write to the National Chairman of KUDHEIHA Workers Union alleging foul behaviour at the disciplinary hearing, an allegation he disputed.
5. He contended that he was erroneously suspended from service on 25th March, 2015, a suspension that was however lifted on 1st April, 2015. He however maintained that the Respondent forced him to proceed on leave for a period of 10 days pending its final decision.
6. The Claimant avers on 16th April, 2015 the Respondent unfairly and unlawfully terminated his employment on the basis of his involvement in championing for the rights of his colleagues under the umbrella of the union.
7. The Claimant further averred that he did lodge an Appeal to the decision of his dismissal as required under the CBA. However, the Appeal was dismissed on 29th April, 2015 without any justifiable reasons contrary to the provisions of the CBA clause on Appeal.
8. The Claimant maintained that his dismissal was in breach of the provisions of Section 4 & 5 of the Labour Relations Act, 2007, Section 41 of the Employment Act, 2007 and its Collective Bargaining Agreement.
9. Aggrieved by the decision to terminate his services the Claimant filed the instant Claim seeking the following reliefs:-

1. ***That the Honourable Court to be pleased to find the Respondent's decision to dismiss the Claimant's services summarily was unlawful and unfair.***
2. ***That, the Honourable Court be pleased to invoke Section 12 (3) (v), (vi) and (vii) of the Industrial Court Act against the Respondent.***

3. A declaration that the decision to summarily dismiss the Claimant was too harsh and extreme in the circumstances of the case and that the same be set aside and he be reinstated back to duty.

4. A declaration that owing to the unfair, unlawful and false summary dismissal, the Claimant is entitled to compensatory damages for his dismissal at 12 months gross salary being Kshs. 74,780/- x 12 months = Kshs. 897,360/- plus interest thereon from the date of filing this case to the time of full payment.

5. That the Honourable Court be pleased to issue any orders it deems fit.

6. That the Costs of this suit be paid by the Respondent.

10. The Respondent in its Memorandum of Defence dated 16th September, 2015 and filed in Court on 17th September, 2015 admitted having engaged the Claimant in the manner alleged in his Memorandum of Claim. It however maintained that the Claimant's summary dismissal was precipitated by his conduct during the disciplinary hearing of one Ms. Gatama, where he used rude and insubordinate language, which conduct the Respondent maintained amounted to gross misconduct under Section 44 (4) (d) of the Employment Act, 2007.

11. The Respondent contends that the Claimant's unruly behaviour at the disciplinary hearing was confirmed by the members present at the hearing and as a result the union further directed him to step aside from his position.

12. The Respondent further contended that the Claimant's conduct led to a breakdown in the employment relationship and that in the circumstances it would be impractical for this Court to order the reinstatement of the Claimant as pleaded.

13. The Respondent further averred that due process was followed while terminating the Claimant's services and as result, he is not entitled to any of the reliefs sought in his Amended Memorandum of Claim.

14. The Respondent urged this Court to make a finding that the Claimant's dismissal from employment was lawful and fair and to further dismiss the entire Claim with costs to the Respondent.

Evidence

15. The matter thereafter proceeded for hearing on 10/2/2020 with the Claimant testifying and the Respondent calling one witness to testify on its behalf. Parties thereafter filed and exchanged their respective submissions to the Claim herein.

Claimant's Case

16. The Claimant, CW1 sought and was allowed to have his witness statement dated and filed in Court on 1/2/2019 adopted as his evidence in chief. In his statement, CW1 reiterated the averments made in his Amended Memorandum of Claim.

17. On cross-examination, CW1 confirmed being issued with a Notice to Show Cause letter and that it clearly indicated the offence committed. He however maintained his innocence insisting that his conduct at the disciplinary hearing was above board and that he was defending one of the union members.

18. CW1 further testified that he did not say the Human Resource Manager would hit the staff member but merely used her name as an example. He further confirmed having been accorded an opportunity to defend himself of the allegations.

19. CW1 further confirmed receiving some money from the Respondent following his dismissal.

20. On re-examination, CW1 maintained that the reasons given for his summary dismissal were not valid and that his actions at the disciplinary hearing were not tantamount to insubordination. He further urged this Court to allow his Claim in terms of the reliefs sought therein.

Respondent's Case

21. RW1, **Jebet Chesina**, the Human Resource Director, testified on behalf of the Respondent herein.

22. She testified that in the year 2015 during a disciplinary hearing the Claimant exhibited unruly behaviour and even made allegations that she would hit the said employee facing disciplinary hearing. She further confirmed that it was due to this remarks and behaviour that the Claimant was asked to leave the meeting.

23. RW1 further testified that the Claimant was subsequently issued with a Notice to Show Cause and that she made an additional complaint to the union over the incident.

24. RW1 further testified that all members present during the disciplinary hearing recorded statements in which they confirm the Claimant's utterances at the hearing. She further confirmed that the Claimant was accorded a fair disciplinary process prior to the decision to terminate his employment was arrived at.

25. On cross-examination, RW1 stated that the reason for terminating the Claimant's employment was not because he stated that she would

hit the one Ms. Anne Gatama but was due to the Claimant's insubordination and use of rude language against her.

26. On further cross-examination RW1 confirmed the Claimant was a union official and that his attendance in the disciplinary hearing for Ms. Gatama was due to his union membership and that he had a right to represent union members. She however maintained his conduct at the said hearing was unbecoming.

27. She contended that the instant Claim is void of merit and therefore urged this Court to dismiss the same with costs to the Respondent.

28. Parties thereafter filed and exchanged their written submissions to the Claim.

Submissions by the Parties

29. The Claimant submitted that he was subjected to an unfair and un-procedural disciplinary process that was aimed at ensuring his termination from gainful employment. He further maintained that the charges as framed against him were all fictitious, false, unfounded and unproved.

30. The Claimant further submitted that he was not accorded an opportunity to challenge the evidence contrary to the mandatory provisions of Articles 41 and 47 of the Constitution of Kenya, 2010 and Sections 41, 43 and 45 of the Employment Act, 2007.

31. He argued that his case was not handled in accordance with the Collective Bargaining Agreement and the Law and that the Respondent failed to prove its case as against him to warrant the severe punishment of dismissal.

32. He further argued that the Respondent's actions were unfair and unlawful and that his termination was without justification in complete disregard to the law. He further insists that his termination was due to his aggressive participation in union activities.

33. The Claimant maintained that his dismissal was in the circumstances unfair, wrong and unlawful as it was contrary to the provisions of Section 41 of the Employment Act, 2007 and therefore urged this Court to allow his Claim in terms of the reliefs sought therein. For emphasis, the Claimant cited and relied on the decision in the cases of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** and **Nicholas Daniel Ongeru Vs Mombasa Maize Millers Limited (2013) eKLR**.

34. In conclusion, the Claimant maintained that having proved his case as against the Respondent he is entitled to the reliefs sought in his Amended Memorandum of Claim and therefore urged this Honourable Court to allow the same as pleaded.

Respondent's Submissions

35. The Respondent on the other hand submitted that it had valid reason to summarily terminate the Claimant's employment on the grounds of gross misconduct and proceeded to terminate his employment in accordance with the provisions of Section 44 (4) (d) of the Employment Act.

36. The Respondent further submitted that it has by law a right to discipline errand union officials as is the cases of the Claimant herein. This position was amplified in the case of **Richmond Lions Long Term Care Society Vs Hospital Employees Union BCLRB No. B 375/94**, **National Union of Mineworkers and Others Vs Black Mountain Mining (Pty) Ltd (2010) 3 BLLR 281 (LC)** and **Mondi Paper Co. Ltd Vs PPWAWU & Another (1994) 1 5 ILJ 778 (LAC)**.

37. The Respondent maintains that the Claimant cannot rely on his union position for his conduct and that he was rightfully taken through the disciplinary process. For emphasis, the Respondent cited and relied on the case of **Kenya Plantation & agricultural Workers Union Vs Kingoni River Farm Limited (2020) eKLR** where the Court held that a shop steward who misconducted himself was not exempt for disciplinary procedures. The Respondent maintained that this position was reaffirmed in the case of **Aggrey Murumba & 13 Others Vs Teachers Service Commission & Another (2019) eKLR**.

38. On the reliefs sought, the Respondent submitted that the Claimant is not entitled to an order of reinstatement by dint of Section 12 of the Employment Act, 2007.

39. The Respondent further contended that it has demonstrated that the Claimant's termination was for a valid reason and that due process was followed and as a result the Claimant is not entitled to any compensation as pleaded.

40. The Respondent further submitted that the Claim as filed is devoid of merit and therefore urged this Court to dismiss the same in its entirety with costs to the Respondent.

41. I have examined the evidence and submissions of the Parties herein. The main issue for this Court's determination is whether the Respondents had a valid reason to terminate the Claimant's services.

42. From the Claimant's dismissal letter dated 16/4/2015, the Claimant was dismissed due to gross misconduct. It was indicated that the Claimant was rude and used insubordinate language towards the Director Human Resource during a disciplinary hearing of one Anne Gatama in the presence of the Branch Secretary, the Industrial Relations Officer, Hilton Nairobi, Works Committee Officials, Executive Housekeeper and the Human Resource Coordinator.

43. The Claimant was served with a show cause letter dated 25.3.2015 following the alleged incident. He responded to the show cause letter

denying insubordination and insisting that he was defending the grievant during the disciplinary hearing as a Union official and committed no acts of gross insubordination.

44. He was thereafter summoned to a disciplinary hearing held on 30/3/2015 and the Minutes of the meeting are attached. From the proceedings, the Claimant denied acts of insubordination and insisted he only made remarks as indicated in the complaints letter by the Director of Human Resource to prove Anne's case.

45. The Human Resource Director also gave her evidence explaining what transpired. She also produced other statements recorded by the person to prove the case against the Claimant. Those who recorded the statements in question were however not called as witnesses.

46. Section 41 of the Employment Act which provides as follows:-

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.

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".

47. The gist of this provision is that during a disciplinary hearing, the person who make statements accusing an employee of some act or omission should be cross-examined on the statements made.

48. At one point, Anthony the grievant was asked to go out of the meeting as the other members continued to dismiss his issue.

49. The proceedings show breach of protocol where evidence was taken in without witnesses being called and also the grievant excluded from part of the proceedings during the disciplinary hearing.

50. The proceedings were therefore conducted in breach of Section 41 of the Employment act and were therefore unfair.

51. Section 45(2) of the Employment Act 2007 states as follows:-

(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".

52. Given that the Respondents omitted to follow the correct procedure in disciplining the grievant, it is not clear whether they had a valid reason proved to dismiss him during the disciplinary hearing.

In the circumstances, I find the dismissal of the grievant was unfair and unjustified. I therefore find for grievant and award him compensation equivalent to 10 months' salary = 10 x 74,780/= = 747,800/= less statutory deductions.

53. The Respondent will pay costs of this suit.

Dated and delivered in Chambers via zoom this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Upendo holding brief Namada for Claimant – Present

Kilonzo for Respondent – Present