



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 40 OF 2018**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION.....CLAIMANT**

**VERSUS**

**DELMONTE (K) LTD.....RESPONDENT**

**JUDGMENT**

1. Mr. Sandik Elim herein after referred to as (the Grievant) was an employee of Delmonte (K) Ltd herein after referred to as (the Respondent) and a member of the Kenya Plantation & Agricultural Workers Union herein after referred to as (the Claimant). The Grievant has through the Claimant sued the Respondent for victimization, wrongful, unlawful and unfair dismissal. It was the Claimant's case that the Grievant was employed by the Respondent on 1<sup>st</sup> March 2010 as a security guard in the Respondent's farm at Thika. At the time of his dismissal, the Grievant was earning Kshs. 21,328/- per month. It was averred that he used to work during the 1<sup>st</sup> shift i.e. from 6.00am to 2.00p.m. On 26<sup>th</sup> January 2016, the Grievant asserts that he attended work as usual and left at the usual time. It was asserted that during the 2<sup>nd</sup> shift, one Antony Mutua was arrested while stealing pineapples from the farm, and after interrogation, the thief said that he was able to steal the pineapples through the help of one of the employees whom he could identify. On 27<sup>th</sup> January 2016, the Grievant reported to work as usual, but his supervisor one Mr. Miano called him and informed him that there was a special assignment outside the field. At around 7.00a.m. the Grievant together with other 7 employees and the supervisor drove to Gituamba police station. While at the Police Station, the suspect one Antony Mutua, was released from the cell and upon the Grievant and the rest of the employees being instructed to form an identification parade, the suspect identified the Grievant as the person who assisted him in stealing the pineapples. The Claimant averred that the accused person pointed at the Grievant saying "*ni huyu mmaasai*" meaning it is this Maasai man. The foreman upon asking the accused if he knew the Maasai man by name stated that he did not. The Grievant knew the accused person since this was not the first time they had met as he had arrested the pineapple thief prior to this incident. The Grievant was thereafter taken to Ndula headquarters and was requested to write a statement and he complied. The Grievant through a letter dated, 27<sup>th</sup> January 2016 sought to resign but the Respondent declined his resignation. On 28 January 2016 the Grievant received a notice to show cause why he should not be dismissed for abetting theft of the Respondent's property. The notice further suspended him from work for 5 days. The Grievant responded to the notice to show cause on 29<sup>th</sup> January 2016 and denied abetting theft and averred that he was only being used as an escape goat since that was not the first time the accused person was apprehended for stealing. The Grievant was thereafter invited for a disciplinary hearing by the Respondent via a letter dated 1<sup>st</sup> February 2016 and the hearing took place on 2<sup>nd</sup> February 2016. The Grievant was represented by a shop steward at the hearing. The Grievant was summarily dismissed on 10<sup>th</sup> February 2016 on account of gross misconduct. After dismissal the Grievant reported the dispute to the Claimant who in turn reported the dispute to the Cabinet Secretary. The Minister for Labour appointed a conciliator and the parties herein met on three occasions but they failed to agree. The conciliator issued a certificate of disagreement in that respect which led to this claim. The Grievant avers that before his dismissal had worked for the respondent for 5 years without any record of indiscipline, he further averred that the action taken by the Respondent to dismiss the Grievant summarily was malicious uncalled for and unfair in the circumstances.

2. The Respondent in its response to the memorandum of claim denied the alleged unlawful unfair and/or illegal dismissal as asserted by the Claimant and averred the dismissal was deserved as per the terms and conditions of employment and the provisions of the Employment Act 2007 in regard to summary dismissal.

3. The matter proceeded on 29<sup>th</sup> January 2019 and the Respondent chose not to call any witness whilst the Claimant called the Grievant herein. The Grievant testified that he was not a Maasai but a Samburu. He also said that he had arrested the thief several times but the thief would somehow always be released. He told the court that he had recorded a statement but he was never called to testify in any case. He denied being in communication with the thief as there was no evidence in that regard. In cross-examination he confirmed that he had arrested the accused several times and that is why the thief had picked on him. He further added that the accused easily knew him because he was working during the day.

4. The Claimant filed submissions on 20<sup>th</sup> February 2019 and reiterated that the dismissal was unlawful and without any valid reason. It argued that had the Grievant wanted to help the accused person, he would have done so while he was on duty so as to guide the accused around the farm. It further contended that it does not make sense that the Grievant would want to help the accused yet he had worked for 5 years with a clean record. The Claimant asserted that the Respondent acted maliciously and that the Grievant was wrongfully identified. The Claimant wondered why the thief who had been arrested several times was still roaming freely and concluded that the Respondent was siding with the thief and used this incident as an excuse to dismiss the Grievant from his employment without any lawful cause. He relied on the case of **Kenya Plantation & Agricultural Workers Union v Del Monte Kenya Limited [2016] eKLR** where the court held that the reason advanced by the Respondent for the dismissal was not valid. The Claimant also relied on the case of **Zephania Nyambane v Nakuru Water & Sanitation Workers Services Company Limited [2013] eKLR**. The Claimant urged the grant of the prayers sought in the claim.

5. The Respondent on its part submitted that the Grievant was fairly dismissed due to his breach of the contract of employment and that the dismissal was in keeping with the Employment Act and the employment contract of the Grievant. The Respondent further averred that the Grievant was given an opportunity to defend himself as provided for both in his contract and the dispute resolution mechanisms in place but offered no viable defence. It submitted that the allegations against the Grievant were grave to the extent that the Respondent could not keep him in employment as he had breached the human resources policy guide of the Respondent. The Respondent maintained that there were grounds under Section 44 of the Employment Act for the summary dismissal that was meted out to the Grievant. Reliance was placed on the case of **Mahapatra v Acciona (2015) FWC5976** and the Respondent thus urged the dismissal of the Claimant's case with costs.

6. I have taken into account the testimony of the Grievant, the pleadings of parties and their submissions. From the foregoing, two issues fall for determination in this matter:-

- i. Whether there were valid reasons to warrant dismissal of the grievant.
- ii. Whether the grievant is entitled to the remedies as prayed for in the memorandum of claim.

7. Section 44(3) of the Employment Act permits an employer to dismiss an employee summarily where the employee has by his conduct fundamentally breaches his obligations arising under the contract of service. Acts that may amount to gross misconduct are as set out under Section. 44(4)(g) of the Employment Act. The Grievant was accused of having aided and abetted the thief to steal pineapples belonging to the Respondent. Section 43 of Employment Act envisages that an employer must prove the reason or reasons for termination and these reasons are matters that the employer at the time of termination of the contract genuinely believed to exist and which reasons caused the employer to terminate the services of the employee. These reasons must in my view be real and tangible and not merely speculative. From the submissions of both parties, it is not in dispute that the Grievant was working in the 1<sup>st</sup> shift during the day and that the accused person was arrested when the Grievant had already left work. No evidence was adduced by the Respondent to show whether any investigations were carried out to confirm if indeed the Grievant aided the accused person to carry out the theft of pineapples. Further no evidence was adduced to show that the accused person was in communication with the Grievant. Similarly, no detailed account was issued by the Respondent on how the Grievant aided and abetted the theft. All these allegations raised against the Grievant remained mere speculations. What was left before the court is a bunch of allegations that are merely speculative. Suspicion however strong cannot be a valid reason to dismiss an employee. There were no valid reasons to dismiss the Grievant. He did not contribute to his predicament and his dismissal was clearly callous. He is entitled to 12 months salary in compensation for unlawful dismissal as well as one month's salary in lieu of notice. He will have a certificate of service plus costs of the suit. Interest on the sum awarded will be from the date of judgment till payment in full.

- a. One month's salary in lieu of notice – Kshs. 21,328/-
- b. 12 months salary in compensation for unlawful dismissal – Kshs. 255,936/-
- c. Certificate of service
- d. Costs of the suit
- e. Interest on a) and b) above at court rates.
- f. The sums in a) and b) will off course be subject to statutory deductions as provided for under Section 49 of the Employment Act.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of March 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**