



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA

AT NYERI

CAUSE NO. 41 OF 2018

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

VERSUS

DEL MONTE (K) LTD.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant, one Gerald Okiri Ogubi, a member of the Claimant union, for unfair termination of the Grievant's services. The Claimant averred that the Grievant was employed by the Respondent at the cannery around the year 2010 earning a gross salary of Kshs. 20,000/- a month. It was asserted that he was employed as a seasonal employee earning Kshs. 137/= per hour. The Grievant was transferred from empty cans department to weighbridge as a weighbridge clerk where he worked for 4 years. It is the Claimant's case that on 4th February, 2015 a regular customer of the Respondent one Alice Chege went to buy pineapple pulp from the Respondent. The Claimant averred that the Grievant noted the lorry carrying the pineapple pulp was overloaded and upon checking realized that the lorry had carried excess product. He therefore prepared the invoice for payment of the overloaded pineapple or in the alternative advised that the customer could offload the excess. It was averred that the client suggested that the Grievant accepts a bribe to let her leave with the excess. The Claimant avers that the Grievant refused to accept a bribe and that the client then went to the security manager and alleged that the Grievant was demanding a bribe. The Grievant was then summoned by the security manager and the production manager where they had a lengthy discussion and the Grievant was instructed to go back to the weigh-bridge. At this juncture the client had left with the overloaded pineapple without paying for or offloading the excess. On 6th February 2015, the Grievant was requested to see the Human Resources Manager who issued him with a suspension letter for 7 days. On 11th February 2015 the Claimant averred that a hearing was held and that the Grievant was called to the office and reported to the HR manager where he found Mr Maleche the production manager, Mr. Wachira the security supervisor, two shop stewards and Alice Chege the customer. It was averred that on 25th February 2015, the Grievant was served with a dismissal letter and he appealed the decision of the HR manager but the Respondent's management declined the appeal before hearing. It was asserted that on 19th March 2015 the secretary general of the Claimant reported a trade dispute to the Cabinet Secretary and the Cabinet Secretary in exercise of his powers under the Labour Relations Act, through the chief industrial relations officer appointed Mr. P. Kamau of Thika office to act as a conciliator. The parties drew and forwarded their memoranda to the conciliator whereupon several meetings were held but these never yielded any resolution prompting the conciliator to issue a certificate of disagreement and a referral certificate to the parties for arbitration of the dispute by this court per the provisions of the Act. The Claimant averred that the Respondent suspended the Grievant before a hearing and that during the hearing the Respondent called two stewards instead of 7. It was averred that the respondent violated Sections 41 and 45 of the Employment Act and also acted unfairly by accusing the Grievant. The Claimant prayed for Kshs. 30,688/- as payment in lieu of notice, Kshs. 10,000/- for days worked, Kshs. 358,980/- being 12 month's compensation, pro rata leave for six months – Kshs. 19,793.76 and costs of the suit.

2. The Respondent filed a statement of response in which it denied the Claimant's allegations. It denied having a Recognition Agreement and a registered Collective Bargaining Agreement between themselves. The Respondent further denied the allegations of unfair dismissal, the claim for salary of Kshs. 20,638/- and that the Grievant was employed at the cannery in 2010 as a seasonal employee earning Kshs. 137/- per hour. It also denied that the employee worked for four years in that capacity and further denied that the customer's canter was overloaded. The Respondent maintained that the Grievant solicited a bribe from the customer. It was averred that two stewards formed a quorum and that the Grievant was heard on his appeal. The Respondent also averred that the Grievant was accorded a hearing but failed to put any tangible evidence to exonerate himself and that investigations carried out conclusively showed culpability on his part. It further asserted that the Respondent's management acted according to the provisions of Section 44(4)(c) and (g) of the Employment Act and therefore the Grievant was not entitled to the prayers sought in memorandum of claim.

3. The matter proceeded to hearing on 22nd January 2019 when the Grievant testified on his behalf and the Respondent called the production Manager Mr. Wachira. The Grievant testified that upon noticing that the canter was leaning on one side, he weighed it and realized that it was 8.5 tonnes yet the client had paid for 5 tonnes. He stated that he informed the customer that she should pay for excess after printing the receipt but the client refused and said that the truck had a mechanical fault. She pleaded with the Grievant to let her leave with the excess

weight. He stated that she then attempted to bribe him but he refused as he had already generated a receipt. He stated that the customer then went to report him at the security manager's office. He stated that the manager accused him of stealing from the company and despite trying to explain that he had demanded for payment or offload from the client, the manager failed to listen to him. He stated that the truck was not re-weighed and the voucher was not returned by the customer. He said that he was then suspended and taken through a hearing before two stewards and was terminated thereafter. He testified that he appealed to the MD but the decision was re-affirmed.

4. The Respondent's witness Mr. Simon Wachira Mwangi, a security manager testified he was called and met a woman who looked agitated. He stated that the lady informed him that she had decided to stop giving money through corrupt means and she named the Grievant as the culprit. He testified that she recorded a statement in which she admitted that she had carried excess and that the Grievant had requested for a bribe to avoid weighing the vehicle. He stated that the lady said that her driver gave the Grievant Kshs. 200/- but the Grievant wanted Kshs. 500/- whereupon she reported the matter to a fellow worker who directed her to Mr. Wachira. The witness stated that it was against the company's policy and the law of the land to give bribes or receive bribes. Further he testified that the Grievant was issued with a suspension notice and a show cause notice and that the Grievant appeared for a disciplinary hearing on 17th February 2015. He stated that the customer and her driver attended the hearing and they gave evidence against the Grievant. He stated that the right procedure was followed, that there was enough evidence and that the Respondent was entitled to dismiss the Grievant as he was involved in a serious criminal offence. On cross-examination he confirmed that Alice (the customer) had already paid for the excess and the receipt was in her custody. He confirmed that he was not present when the incident occurred but stated that he acted on the results from the investigations. On re-examination, he confirmed that there was another person who had complained about the Grievant. He stated that he carried out investigations based on what the customer told him and that the charge leads to summary dismissal.

5. The parties filed submissions and the Claimant's submissions were that the Grievant was dismissed after a conspiracy between the customer Alice Chege, the security supervisor Mr. Wachira and the security Manager Mr. Mathias. It was submitted that upon the Grievant realizing that the canter was overloaded and upon declining to accept a bribe, he issued the customer with an invoice which was destroyed by the security manager and the supervisor so as to favour the client who was the manager's friend. The Claimant submitted that the Respondent's witness gave evidence that the client had paid for the excess but failed to provide any documentary evidence. The Claimant submitted that the Respondent's witness did not produce any tangible evidence in the form of audio recordings or photos. The Claimant maintained that the dismissal was a conspiracy and that is why the Respondent did not place any evidence before the court. The Claimant submitted that all other customers were paying for overloads except for the client who was enjoying protection from the security personnel. The Claimant submitted that the Grievant's termination was unfair/unlawful and against the Employment Act and the parties CBA. The Claimant therefore prayed for the claim to be allowed as prayed.

6. The Respondent's submissions were to the effect that that investigations were carried out and the investigations revealed that the Grievant had committed the offence. It submitted that the Grievant was taken through a hearing in the presence of 5 stewards as opposed to the Grievant's testimony that he saw two stewards. It was submitted that due process was followed before terminating the Grievant. It was submitted further that the evidence adduced at the hearing was overwhelming and therefore the Respondent was entitled to summarily dismiss the Grievant from employment. The Respondent submitted that by not reporting the Grievant to the Police it did not mean that the Grievant did not solicit for bribe. It was submitted that the Grievant's submissions that the security personnel destroyed the invoice is not factual since he did not tender any evidence to that effect. It submitted that it dismissed the Grievant in accordance with Section 44(4)(g) of the Employment Act on reasonable and sufficient grounds and therefore the claim should be dismissed. It relied on the case of **Banking Insurance and Finance Union (K) v Standard Chartered Bank of Kenya Ltd [2013] eKLR**. It submitted that in the event the court finds in favour of the Claimant, 4 month's salary less statutory deductions will be enough compensation. It relied on the authority of **William Kiaritha Gacheru v East African Packaging Industries Ltd [2016] eKLR**.

7. From the foregoing, the issues for determination are distilled as:-

- i. Whether there was a valid reason for the termination of the Grievant.
- ii. Whether the Grievant's termination was fair or unfair.
- iii. Whether the Grievant is entitled to the remedies as prayed for in the memorandum of claim.

8. As to whether there was a valid reason for the termination of the grievant, it should be noted that before an employer can exercise the right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction meted by the Respondent after due consideration of the representation made by the affected employee or his representative in terms of Section 41 of the Employment Act. In the present case the Grievant is accused of soliciting a bribe from a client in order to avoid re-weighing of the customer's truck. The Grievant insists that he was doing his work diligently and that he insisted on re-weighing the truck and upon realizing that it was overloaded he insisted on payment of the extra load and gave the option of offloading to another lorry but the customer refused and opted to bribe him. After he refused the bribe, he asserts that the customer got agitated and went and reported that he was demanding for money from her. The Respondent's defence is that the customer recorded a statement and in it stated that she was asked to give a bribe for her vehicle to be allowed to leave but she refused and requested for a receipt after which she made payment for the extra weight and made a report to the security officers. The Respondent's witness stated in his testimony that he carried out investigations and these concluded that the Grievant was soliciting a bribe. He also stated that the customer had paid for the excess and obtained a receipt. The Respondent however did not produce the said receipt as evidence in court. Also, despite filing the statement of the customer and her driver the Respondent failed to call them as witnesses to come and give their side of the story. However, from the testimony adduced the Respondent called the two in the disciplinary hearing held and the Grievant had an opportunity to ask them questions. It was on reliance of the evidence before the panel and from the Respondent's officials that it came to a conclusion that the Grievant was guilty. Under the Employment Act, the reason or reasons for termination of a contract of employment are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. In view of the foregoing the Respondent discharged the burden of proving that the reason for dismissal was valid. As to whether the Grievant's termination was fair or unfair, Section 45(2) defines unfair termination to include; termination by an employer with failure to prove that the reason for termination is valid, that the reason for termination is a fair reason, relating to the employee's conduct, capacity or compatibility and that the employment was terminated in

accordance with fair procedure. Prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. Section 41 in *parre materia* provides as follows:-

41.(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.

9. The employer is always required to abide by the procedural requirements of the law set out under section 41 of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing. In the instant suit the grievant was issued with a suspension notice and a notice to show cause why his employment should not be terminated. There is evidence that investigations were carried out and a number of people recorded statements which were produced as part of the Respondent's evidence. The Grievant was later summoned to a disciplinary hearing where 5 stewards were present as stated by the Respondent, the Respondent called witnesses and the Grievant was afforded an opportunity to ask questions and defend himself. Two sittings were held in respect to the hearing and the Respondent produced the minutes in court. It is clear that due procedure was followed and that the Grievant was accorded a hearing in terms of the law. As to whether the grievant is entitled to the remedies as prayed for in the memorandum of claim, the Respondent having proved the reason for the termination and that fair procedure was followed, I find and hold that the termination was fair within the meaning of section 45 of the Act. The Grievant worked for 25 days did not go for leave, facts that were not controverted by the Respondent, He would therefore be entitled to be paid Kshs. 10,000/- for the days worked and Kshs. 19,793.76 for pro rata leave. As regards the balance of his claim there is no relief and the suit is therefore only allowed to this extent. He will have costs that I cap at Kshs. 20,000/-.

- a. Kshs. 10,000/- for the days worked
- b. Kshs. 19,793.76 pro rata leave
- c. costs of the suit Kshs. 20,000/-.
- d. Interest on the sums in a) and b) at court rates above from the date of filing suit till payment in full.
- e. The sums in a) and b) above to be subjected to statutory deductions.

It is so ordered.

Dated and delivered at Nyeri this 20th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar