



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.462 OF 2014

LEAR WAIRIMU KIRITU.....CLAIMANT

VERSUS

MARIDADI FLOWERS LIMITED.....RESPONDENT

JUDGEMENT

The background to the claim herein is that the claimant was on 4th May, 2010 employed by the respondent as a general worker at a monthly wage of ksh.10, 100.00 and on 26th May, 2014 the employment was unfairly terminated. That the claimant was identified for victimisation on account that she was among the ring-leaders of a union, a fact that was no genuine. The claimant had not participated in any strike to justify termination of employment.

Without prejudice, the claim is also that there was a general industrial and workers unrest at the respondent's place of work and singling out the claimant and a few others for termination of employment was discriminatory and unfair. The right to associate under article 36 of the constitution was compromised and the actions of the respondent went contrary to fair labour practices.

The claimant is claiming for notice pay; severance pay; and compensation for unfair termination of her employment.

The claimant testified that on 26th May, 2014 she was dismissed from her employment with the respondent when she refused to sign a warning letter following a strike that involved all employees but she was only caught up when she tried to enter the workplace and had no knowledge of the strike.

The claimant also testified that she was issued with a notice to show cause after failing to sign and accept the warning and then issued with letter of summary dismissal.

That on 23rd May, 2014 there was a strike by all employees and when she refused to accept the warning letter a notice to show cause was issued. The issue relating to the strike was not addressed in the show cause notice and she was not called to answer to the same but required to respond to why she refused to accept the warning letter. Such was wrong and without justification as the matters now addressed in the notice to show cause were strange to the claimant and had nothing to do with her.

The claimant also testified that she refused to sign the warning notice because when she was on her way to work other employees were on strike and she stopped to find out why they were on strike and before she could establish the same the police came and dispersed them. The respondent did not wait for her explanations before issuing notice of summary dismissal.

The claimant also testified that she was a member of the union and there was a collective agreement and under clause 16 allow for an appeal against an unfair warning but she did not know about it then. She was called to a meeting to state why she declined to sign the warning letter and present was the union representative and the workers representative Ms Stella who confirmed she had explained to the claimant the contents of the warning letter. The claimant also signed the minutes following the meeting.

Defence

The defence is that on 23rd May, 2014 the claimant together with other employee participated in an unprotected strike which lasted a whole day occasioning heavy losses to the respondent whose primary duty is to grow export roses which are perishable and time sensitive in terms of harvesting and shipment. The respondent thus invoked the provisions of section 80 of the Labour Relations Act and commenced disciplinary proceedings.

On 26th may, 2014 the claimant was issued with a warning letter for participating in an unprotected strike but she refused to sign it. The claimant had participated in the strike as a leader and was among the employees issued with a warning letter and other signed and returned to work save for the claimant. Of the 300 employee who engaged in the strike, 288 accepted the warning and were returned to work. The claim

that the claimant was singled out for victimisation has no basis and is made with malice.

The defence is also that upon the failure by the claimant to accept the warning and return to work she was issued with a notice to show cause why her employment should not be terminated and against she refused to accept the same prompting summary dismissal. Such action is allowed under section 44(4) (e) of the Employment Act read together with clause 16 of the collective bargaining agreement.

The claims made are without justification and should be dismissed.

In evidence the respondent called Susan Wanjiru Kihara the human resource manager and who testified that following an industrial unrest on 23rd May, 2014 the claimant was issued with warning and she refused to accept it whereas of the 300 other employee, 288 signed and are working with the respondent. As a result a notice to show cause was issued and the claimant refused to sign it. There is a collective agreement which regulate such matters and when an employee fails to abide lawful directions of the employer such is subject to summary dismissal which was done with regard to the claimant.

Under the collective agreement terms the claimant as invited to a hearing and present were the union representative and the workers representative and she signed to confirm attendance a disciplinary hearing. The claimant was found not remorseful and had no good reason(s) as to why she refused to accept and sign the warning letter and summary dismissal was justified.

Section 80 of the Labour Relations Act, 2007 declares that an employee who takes part in a strike which is unprotected is in breach of the employment contract. The claimant testified that on 23rd May, 2014 while on her way to work she found other employees on strike and went out to check and before she could establish the cause the police came and dispersed them.

Why then was the claimant not at work but out following those who were on strike?

In her submissions the claimant has relied on the case of **Henry Isaiah Onjelo versus Maridadi Flowers Limited [2015] eKLR** that failure of the employee to cooperate with the employer should not be subject to summary dismissal. However the context of the full suit and subject judgement should be put into account and the attendant judgement upon appeal therefrom. An employee who engages in an industrial action that is unprotected cannot justify the same under the provisions of the Employment Act.

Following the strike taking place within the business on 23rd May, 2014 the claimant was issued with a warning letter. She refused to sign it. She was issued with a notice to show cause why her employment should not be terminated. The matter thus escalated from the warning and refusal to sign to refusal to sign the new notice to show cause why employment should not be terminated.

This became a serious issue for the claimant to address as where there was no good cause shown, her employment was at stake.

The fallacy that by accepting a notice of whatever form from the employer is incriminating mirth. The claimant testified that she was not involved in the industrial action taking place on 23rd May, 2014 and did not accept the warning letter issued to her. Following such refusal to accept the warning, she was issued with a notice to show cause why her employment would not be dismissed. A notice to show cause thus was to give the claimant an opportunity to explain her circumstances and why she felt she was being made to sign and accept a warning over an industrial action which caught her unawares and while she was reporting to work.

To refuse to accept the notice to show cause why disciplinary action should not be taken against the claimant then left her exposed. The mere refusal to take the notice left the employer with no option as failure to take lawful instructions from an employer when called to respond to any matter and touching on misconduct is subject to summary dismissal under the provisions of section 44(4) (e) of the Employment Act, 2007;

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;

By her own words the claimant admitted to refusing to accept the notice to show cause. She invited the summary dismissal upon herself. No notice and compensation is payable.

On the claim for severance pay, such pay is not due in a case of summary dismissal.

Accordingly, the claim is hereby dismissed with costs to the respondent.

Delivered at Nakuru this 14th day of November, 2019.

M. MBARU

JUDGE

In the presence of: