



REPUBLIC OF KENYA
IN EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO
PETITION NO.7 OF 2018

PAUL KORIR

WESLEY KIPKOECH CHERUIYOT

CHARLES CHERUIYOT KILEL

JOHN ITEMBE

EMMY CHEPKEMOI

PATRICK KIPYEGON CHEPKWONY

PATRICK TOWETT

DANIEL K CHERUIYOT

GEOFREY K RONO

KIPKIRUI SIGEI.....PETITIONERS

VERSUS

TIRGAGA TEA FACTORY CO. LTD 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY.....2ND RESPONDENT

THE CHAIRMAN & BOARD OF DIRECTORS,

TIRGAGA TEA FACTORY CO. LIMITED3RD RESPONDENT

Consolidated with

PETITION NO.5 OF 2018

SAMWEL BARNO

ROBERT YEGON

RICHARD KOECH

WESLEY KIPROB RONO

BERNARD KIBET RONO

JOSPHAT MARUSOI MUTAI

CHARLES KIPKIRUI SIELE

GIDEON KIPKORIR KOROSPETITIONERS

VERSUS

OLENGURUONE TEA FACTORY COMPANY LIMITED...1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY.....2ND RESPONDENT

THE CHAIRMAN & BOARD OF DIRECTORS,

TIRGAGA TEA FACTORY CO. LIMITED.....3RD RESPONDENT

Consolidated with

PETITION NO.6 OF 2018

JOHN K BII

REUBEN MUTAI

BETHWEL K KIRUI

ERIC KIRUI

LEONARD KORIR

RASTON KOSKEY

FRANCIS K MALEL

GEOFFREY BETT

PAUL KIRUI

CHARLES NGETICH

WILLIAM C KIRUIPETITIONERS

VERSUS

KAPKOROS TEA FACTORY COMPANY LIMITED.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY.....2ND RESPONDENT

THE CHAIRMAN & BOARD OF DIRECTORS,

TIRGAGA TEA FACTORY CO. LIMITED.....3RD RESPONDENT

Consolidated with

PETITION NO.8 OF 2018

KORIR KIPLAGAT GILBERT

PETER KIPKIRUI CHERUIYOT

NAHASHON BETT

DOMINIC KIPKIRUI LANGAT.....PETITIONERS

VERSUS

MOTIGO TEA FACTORY COMPANY LIMITED.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY2ND RESPONDENT

THE CHAIRMAN & BOARD OF DIRECTORS,

TIRGAGA TEA FACTORY CO. LIMITED.....3RD RESPONDENT

JUDGEMENT

Background – on 12th November, 2019 the petitions herein, Petition No.5 of 2018; Petition No.6 of 2018; and Petition No.8 of 2018 were all consolidated under Petition No,7 of 2018 for the judgement after hearing directions were issued by D.K. N. Marete, J.

The Cause of action arose in the same series and relating to similar duties held by the petitioners with the respective employers and the 2nd and 3rd respondents being similar. The judgement herein is premised under petition No.7 of 2018 and address issues and matters relating to all the consolidated petitions.

The petitioners are seeking the following orders;

- a) A declaration that the termination arising from the disciplinary process or whatever reason, by the respondent violated the provisions of Article 41, 47 and 50 of the Constitution of Kenya hence null and void, consequently an order is issued that the petitioners be reinstated to resume their duties.*
- b) Alternatively, the petitioner be paid their remuneration/salary, terminal benefits in full, allowances and any other dues effective from the date of their purported suspensions up to the end of their term on attainment of age 65 years as per the letters of appointment an terms of service and that the petitioners be compensated by way of damages for mental, psychological and emotional anguish/torture and suffering they were subjected to by the respondent due to the violation of their constitutional rights.*
- c) Costs of this petition.*

The petition.

The petition is that the petitioners are male adults residing in Bomet and who were employed as Logistics Assistants on various dates and on permanent and pensionable terms. The petitioners were all tasked with the duties to buy good and quality leaf and at the same time driving tea lorries delivering the same to the facility of the 1st respondent. the petitioners drove lorries daily collecting and buying green tea from farmers upon assessing it for quality as required by the employer.

The nature of work required that a tea lorry would be weighed before stacks of tea sacks would be loaded and the PDA kits and weighing machine collected from the factory thereafter each petitioner would head

to farmers collection centres armed with PDA kits and a weighing machine and a benchmarking instrument (Stone) for allowing farmers to verify the status and accuracy of the weighing machine before the leaf purchase could be done. The process would be confirmed by the tea buying centre committees.

The tea buying would be done in an open and public space where a farmer would pack his tea into standard sacks as he petitioners moved around inspecting the same and making verification of quality. The farmers would occasionally check the weights before purchase. The weight of the leaf for each farmer would be noted at the tea buying centre noting the buying centre number. The petitioner would note the farms of special class farmers with large farms but sharing the same number of the tea buying centre.

The weighing machine are such that once the kilos of a farmer are keyed in, the petitioner cannot access records of the same neither can they correct, change or undo the same even where there is a mistake in figures keyed in. it was normal to make mistakes during the purchase process and the same would be corrected by the data clerks at the factory.

All collected tea leaf is delivered at the base centre of the factory where the lorries are each weighed and the leafs purchased by the receiving clerk after which the petitioners would be free to move around for more collections. This stage was crucial as the factory had to verify the kilos and the data clerks has right to access the flow chart of the deliveries and once done the petitioners are deemed to have completed their duties.

The right to access the data was by management and the hierarchy countercheck the same for verification purposes and are deemed satisfied with same hence they release payment to farmers at the end of each month. The farmers were paid each month based on the kilos of tea leaf collected and purchased.

The petition is that around October, 2018 the petitioners received information that some of the directors of the 1st respondent were spreading malicious information that they were thieves looting farmers through PDA kits and tea weighing machines. The petitioners witnessed the 3rd respondent publicizing the narrative that they were thieves out to loot farmers and thus warned them to be vigilant and to treat them as thieves at first sight.

Subsequently the tea buying centres committee were randomly invited to the factory and were shown the data manipulation to qualify the theft narrative against the petitioners which was with malice and meant by the respondents as propaganda against the petitioners.

The petition is also that the 1st respondent jointly with others wrote show cause notices to the petitioners requiring them to show cause why they should not be summarily dismissed for fraud and falsifying the kilos purchased to benefit self and farmers and the same was delivered on a Friday and which required the petitioners to respond within 24 hours which fell over a weekend and were at the same time required to be at work. The petitioner thus applied for more time to be able to respond to the notices.

On 15th November, 2018 the petitioners received letters inviting them to attend before a disciplinary committee on 26th November, 2018 to respond to charges of irregular recording of green leaf with intent to benefit self or the grower.

During the disciplinary hearing the petitioners were ambushed with questions and some falling outside their duties and the data used was out of reach and could not be accessed from the respondents' system. The petitioners sought the representation of the trade union and to call witnesses but this was turned down. The respondents chose not to inform the union of the on-going disciplinary hearings contrary to the collective bargaining agreement (CBA). This was contrary to section 41 of the Employment Act and the rules of natural justice.

After he disciplinary hearings the petitioners were advised to return to work but on 4th December, 2018 they were served with termination of employment notices. There was a deliberate effort to dismiss the

petitioners and have them replaced and the series of event leading to the decision of 4th December, 2018 was premeditated with a flawed disciplinary hearing without any justifiable cause. Such action were in violation of articles 41, 47 and 50 of the Constitution. the petitioners were denied the right to fair labour practices, fair administrative action and representation by their trade union or a chance to call any witness during the hearing.

The petitioners seek the order of reinstatement on the grounds that they have invested careers in the sector and there was abrupt termination of employment without due process and contrary to the rules of natural justice. The 3rd respondent applied propaganda machinery against the petitioners to pre-empt an outcome of the choreographed disciplinary hearing and outcome. This has led to loss, damage and anguish for the petitioners and thus seek payment of damages and compensation.

The petition is supported by the Affidavit of Patrick Towett and who avers that his affidavit is made for and on behalf of the petitioners and on the basis that together with the petitioners he was employed as a Logistics assistant and worked diligently until 9th November, 2018 when each was issued with a show cause notice and required to respond within 24 hours which was too short and efforts to have time extended was without a response. This was followed with invitation to a disciplinary hearing dated 15th November which were conducted on 23rd and 26th November, 2018 and despite seeking to have the union attend and have witnesses called the respondents proceeded with the hearing. Due to the nature of allegations made the petitioners required factory data which was not supplied. On 4th December, 2018 each petitioner was served with letter terminating employment.

Mr Towett also averred that the actions by the respondents were with malice and in violation of their constitutional rights and should be declared null and void and the petitioner issued with an order of reinstatement and in the alternative be paid compensation and damages for constitutional rights violations.

1st respondent

The 1st respondent in response filed the Replying Affidavit sworn by Dr John Kenney Omanga the Group company secretary of KTDA Holding Company Limited, the 2nd respondent and also appointed a company secretary of all the 54 shareholder tea factories, the 1st respondent included, its subsidiaries including KTDA Management Services Limited as the managing agent of all the shareholder tea factories including the 1st respondent and thus conversant with matters herein and with authority to respond to the petition.

Dr Omanga also avers that the 1st respondent is a small scale tea factory engaged in the business of purchase of green tea from small scale farmers, processing of the green tea leaf into tea and scale of the made tea. To carry its mandate he 1st respondent entered into a management agreement with KTDA management services limited, a subsidiary of the 2nd respondent to manage its business and activities being a satellite tea factory of Kapkoros tea factory, Tirgaga Tea Factory, Motigo Tea Factory and Olenguruone Tea Factory the management agreement between the tea factory and KTDA MS applied to it.

One of the 1st respondent's activities managed by KTDA MS is he purchase of green leaf from small scale farmers of which the following transpires;

The 1st respondent through KTDA MS appoints several employee, the Logistics Clerks to inspect, weigh, record and collect good quality tea green leaf delivered by farmers at different buying centres; ensure the purchased green leaf I maintained in good condition until it arrives at the factory; prepare green tea returns as may be required; ensure elimination of green leaf falsification transit losses; promote positive corporate image; careful driving of company vehicles while on duty; and ensuring compliance to traffic laws;

The logistics assistants are provided with a job description upon appointment;

All the petitioners were appointed and assigned duties as logistics assistants;

To undertake duty as required the petitioners as logistics assistants were provided with various tools including PDA machine, weighing machine, printer, lorry and specialised green leaf carrying bags which can accommodate up to a maximum of 16 kilograms of green tea leaf at any given time;

The petitioners as logistics assistants were also assigned by the 1st respondent Filed Services Coordinator a particular route within the 1st respondent's catchment area an area with several tea buying centres for the purchase of green leaf from small scale framers;

In the purchase of green leaf from the small scale farmers at the tea buying centres the petitioners were required to request each farmer with green leaf to spread the same on the table for inspection; inspect the green leaf to ascertain quality, reject it or allow the farmer to sought the good and poor quality; upon inspection issue weighing bags to the farmer to place the accepted tea and where the green leaf exceed the total weight per bag issue another bag for each extra weight; weight each bag and allow the farmer to state the grower number to capacitate the keying in of the details in the PDA machine; the weighing bag is then weighed upon verification of the famer details in the PDA machine and which is digitally connected and where the farmers green leaf collected is in more than one constant weight bag each is recorded consecutively and each weight assigned to the Grover/farmer before totals taken; the logistics assistant then must save the details and print a receipt for the farmer which must have the farmer/grower number and total kilograms off green leaf collected; and this process is repeated for all the farmers at a particular tea buying centre before the logistics assistants can move to the next tea buying centre.

Dr Omanga also avers that upon collection of green leaf from different tea buying centres the logistics assistant then transports the same to the 1st respondent tea factory and adopts the following procedures;

Green leaf is inspected at the offloading factory and re-weighed and total weight from each tea buying centre recorded independently in batches and the PDA information on individual farmer is transmitted to the data base for review to facilitate payments; in purchasing green leaf the only foreseeable error is that the weight recorded by the weighing machine is assigned to a different grower number as the logistics assistant may have heard the details of the grower number wrongly;

In such instances the grower who has the receipt printed with error details but correct weight can present the same to the factory for amendment and correction by the Field Service Administrator and the correct weight is assigned with a correction;

The logistics assistant is not required to ask the farmer to place the same constant weight bag on the weighing machine as the same is recorded and digitally transmitted to the data centre through the PDA machine. In case this happens the weights are manipulated by either being assigned to the same farmer and or different farmer, based on what the logistics assistant keys in the PDA machine;

The logistics assistants with the PDA machine they are the only ones with the particular password for the same and can easily manipulate date and which then lead to irregular weight recording and leaf falsification; and

For such a breach the particular logistics assistant is responsible and this is a disciplinary issue.

Dr Omanga also avers that in handling disciplinary cases against its employee the 1st respondent adopt the procedure of issuing a show cause notice for the subject employee to respond with a written and or oral explanation and in this case the petitioners were required to respond to the factory unit manager and upon consideration of the response made there being no satisfactory answers to the allegations made the 1st respondent issued disciplinary hearing notices and invited the petitioners to a hearing and informed the union.

The petitioners were found in past and different occasions to have been culpable of leaf falsification and irregular recordings leading to loss of green leaf and were issued with warning letters or suspended and

not dismissed. But around October, 2018 the 1st respondent after various complaints by farmers on leaf falsification and irregular recordings conducted an audit to investigate the allegations and which established that there had been massive leaf falsification by different logistics assistants in several tea factories within the same region, the 1st respondent included.

Upon receipt of the audit report the 1st respondent issued the petitioners with notices to show cause to explain the leaf falsification and irregular recording of leaf and all responded but the explanations were found wanting and all were invited to a disciplinary hearing and the trade union informed. All the petitioners attend hearing as required and allowed to make representations on the allegations made. The 1st respondent was not satisfied and the petitioners were found culpable for irregular leaf recordings and falsification of consequently dismissed from employment.

Dr Omanga also avers that the petitioners were not diligent in their duties as alleged, they failed to undertaken their duties as required and falsified green leaf records, delayed in delivery of green leaf to the tea factory, loss of leaf delivered substandard green leaf to the tea factory among other gross misconduct. the petitioners did not ask for more time to prepare for defence and all responded within the allocated time. There was no requires for information of access to the data and records as alleged and at the date of the disciplinary hearing all were aware of the allegations each faced.

The trade union was notified of the disciplinary hearings and were in attendance. The questions asked at the hearing related to the allegations set out in the show cause notices and the petitioners failed to give conclusive and elaborative answers.

The petitioners were taken through the due process having been issued with notices to show cause and failed to give satisfactory responses and upon the disciplinary hearing the 1st respond found there was no longer trust and confidence in the services of the petitioners and the employer-employee relations had been irretrievably broken down. The orders sought cannot issue and the petition should be dismissed. That In the petitioner, the averments by Mr Towett that he has authority to present this petition for and on behalf of other petitioners does not exist as there are notices withdrawing consent to file the petition.

On the responses by the respondents the petitioners filed a Supplementary Affidavit sworn by Leonard Korir and on the grounds that as one of the petitioners he as issued with a PDA machine which has a printer and a weighing machine and a lorry and he was required to follow a given procedure as set out by Dr Omanga but the practice was that each farmer is required to place the sack of green leaf once cleared and okayed by the logistics assistant and it is practically and humanly impossible for the logistics assistant to personally lift the individual sacks and at the same time record the kilos besides driving the tea lorries. He followed the said procedure and practice at the tea buying centres.

Mr Korir also avers that as alleged in the show cause notice it was not practically possible for him to take two recordings of 15.7kg in favour of a grower twice at 12.26.11 unless the PDA machine was faulty and which mistake cannot be assigned to him.

The procedures upon a logistics assistant have bought green leaf from the farmer is that;

The farmer is requested to place the sack of tea in the weighing machine and he PDA kit unlocked so as to captures the weight of each sack;

Upon being measured it is logged into the PDA kit to show the kilos per individual farmer and this is done in the presence of the farmer;

With regard to farmers who have big farms there is a long and or a re-log into the PDA system for additional kilos giving a total number of all taken quantities;

In case of an error the logistics assistant cannot correct the details in the PDA kit, the affected farmer has to report at the factory for a correction;

Upon collection of green tea leaf the logistic officer heads to the base centre of the factory where the weight is taken and green leaf delivered to the receiving clerk; and

There is verification of the kilos and data clerk has access to the flow chart of the deliveries made.

Mr Korir thus averred that upon application of the above process is it not possible to manipulate data as alleged by the respondents. Upon delivery of green leaf to the factory, there is no possibility of change or manipulation of data.

Mr Korir also avers that he was served with a notice to show cause on 8th November, 2018 without details of the allegations or material to enable him prepare his defence. He made request for the provision of details but the respondent declined. Such violated his right to fair administrative action. He attended the disciplinary hearing without full disclosure of material facts on the part of the respondent.

The board of directors admitted liability for the maintenance of reliable and adequate accounting records and presented the same during the annual general meeting for the year ended 30th July, 2018 and did not mention any falsification of data by the logistics assistants or the petitioners herein. There were no losses reported.

The warning letters attached to the defence relates to the year 2013 and unrelated to the current petition. Such warnings do not form the reasons for termination of employment.

At the close of pleadings the parties filed written submissions.

The petitioners submitted that on the notice of objections filed by the 2nd and 3rd respondents with regard to being enjoined in these proceedings, these respondents have been defined as agents of the 1st respondent and therefore proper parties herein as held in the case of **Kenya Hotels & Allied Workers Union versus Welcome Inn Hotels T/A Malindi Investments Ltd & another ELRC No.265 of 2013**. Section 2 of the Employment Act, 2007 define an 'employer' to include the agent of the employer.

The petitioners also submitted that there was unlawful and unfair termination of employment as they were not given sufficient time and notice to prepare the defence, no materiel particulars were given or information for the preparation of the defence. In **Walter Ogal Onuro versus TSC [2013] eKLR** the court held that there were no genuine reasons for terminating employment which is reiterated in the case of **Alphonse Machanga Mwachanya versus Operation 680 Limited [2015] eKLR**.

Under Article 50 of the Constitution parties are to be allowed sufficient time to prepare the defence which was not the case herein. Section 41 and 44(4) of the Employment Act, were not complied with as the petitioners were not given time to prepare for their defences. There were no valid reasons leading to termination of employment contrary to section 45 of the Employment Act and the disciplinary proceedings conducted by the respondent were flawed as held in the case of **Misia Manuguti Kadenyi versus Maasai Mara University & 3 others [2018] eKLR**. the petitioners are entitled to the prayers and remedies sought.

The petitioners filed their list of authorities.

The 1st respondent submitted that following complaints by farmers with regard to massive leaf falsification the 1st respondent conducted an audit which revealed the same to be correct, there were falsification of green leaf and the petitioner were implicated together with the farmer's beneficiary of the fraudulent weight. Each petitioner was give the report and notice to show cause setting out the specific allegations of green leaf falsification;

By letter dated 7th November, 2018 Richard Koech was called to show cause with regard to two recordings 8.0kgs in favour of Grover KP0610742 on 12th March, 2018 on the recording of 14.4 kgs in favour of grower number KP0630404. On 25th May, 2018 he made two recordings of 3.7kgs each in favour of KP0640338;

By letter dated 7th November, 2018 Bernard Kibet was called to show cause why on 14th May, 2018 he made two recordings of 11.7kgs in favour of grower KP0610742 and on 9th May, 2018 he made three recordings of 12.7kgs in favour of grower KP0610742. On 2nd May, 2018 he made two recordings of 11.3kgs in favour of KP0640338; and

Vide letter dated 7th November, 2018 Charles Kipkirui Sile was called to show cause why on 19th February, 2018 he made two recordings of 14.3kgs in favour of grower KP0610742, on 21st June, 2018 he made two recordings of 14.3kgs in favour of grower KP0610803, on 2nd June, 2018 he made two recordings of 13.3kgs in favour of grower KP0610803.

By letter dated 8th November, 2018 Restone Koskei was called show cause why on 29th May, 2018 he made two recordings of 14.5kgs in favour of grower KP0010033 and he failed to respond, he was invited to a hearing by letter dated 5th November, 2018 and attended on 26th November, 2018 and was unable to explain his actions;

By notice dated 8th November, 2018 Reuben Mutai was called to show cause why on 24th January, 2018 he made two recordings of 15.0kgs in favour of grower KP0010033;

By notice dated 9th November, 2018 Paul Korir was called to show cause why on 24th April, 2018 he made two recordings of 15.7kgs in favour of grower KP0110554 and to which he responded that it was possible to similar weights. He was invited to a hearing on 26th November 2018 which he denied it was not possible to record exact weights at the same time which was the same defences given by Geoffrey Rono, John Itembe, and Patrick Chepkwony.

By notice and letter dated 9th November, 2018 Wesley Korir was called to show cause why on 23rd November, 2017 he made two recordings in favour of KP0240818 and where he failed to and was invited to a hearing on 26th November, 2018. The same procedures were applied with regard to Charles Cheruiyot, Patrick Towett, Daniel Cheruiyot and Kipkirui Sigei.

By letter dated 19th December, 2018 Daniel Cheruiyot denied authorising any person to act on his behalf similarly to Geoffrey Rono, Kipkirui Sigei, Patrick Chepkwony and Charles Kilel.

On 9th November, 2018 Nahashon Bett was called to show cause why on 9th May, 2018 he recorded 201kg for grower KP0510361 transaction number 253 at a backdated timestamp against immediate preceding transaction number 252 of time stamp 15:20:03 and failed to show cause and was invited to a hearing on 27th November, 2018 and when he failed to give satisfactory responses.

All the petitioners received their detailed notices with the relevant information. Each petitioner responded with Bernard Ronoh, Wesley Ronoh, Robert Yegon and Josphat Marusoi denying the allegations while Samwel Barno, Richard Koech and Charles Siele apologised for the mistakes and allegations made against them. Gideon Koros requested for more time and by the time the disciplinary hearing was conducted he had not responded.

Upon the responses by the petitioners, by letters dated 15th November, 2018 the respondent wrote to all of them to attend disciplinary hearing on 27th November, 2018 where the shop steward was present. During the disciplinary hearing;

All the petitioners were in attendance and denied the allegations made;

With regard to Gideon Koros who had not responded to the notice to show cause he denied the allegations made against him that he had not weighed the green leaf twice as stated. He failed to show cause or give a defence as to why on 4th December, 2017 he had made two recordings of 12.3kgs each in favour of a grower KP0640338; and

Charles Siele wrote to the 1st respondent indicating that he had heard that his colleagues had gone to court and that for him he was satisfied. There was no authority from him to file the current suit.

The 1st respondent also submitted that there are no constitutional questions addressed by the petitioners contrary to the principles laid out in the case of **Revital Healthcare (epz) Limited & another versus Ministry of Health & 5 others [2015] eKLR** and in the case of **Chalika Farmers' Co-operative Society Limited versus George Odhiambo (1987) eKLR**.

With some petitioners challenging they are not properly enjoined in the petition the same becomes incompetent and should be removed herein.

The respondent followed the due process of the law in addressing the grounds upon which the termination of employment was premised, due process was followed and there was compliance with the provisions of section 45 of the Employment Act. the 1st petitioner relied on the cases of **JSC versus Gladys Boss Shollei & another [2014] eKLR**; **Sotik Highlands Tea Estates Limited versus Kenya Plantation & Agricultural Workers Union [2017] eKLR**.

On the remedies sought, the 1st respondent submitted that reinstatement of the petitioners cannot issue as there were substantive grounds leading to termination of employment. The claim for compensation for mental anguish is not given basis as no breach of any of the petitioners constitutional rights have been established and the petition should be dismissed with costs.

The 2nd and 3rd respondents submitted that are not proper parties herein and though described as agents of the 1st respondent there was no employment relationship as held in the case of **City Council of Nairobi versus Wilfred kamau Githua t/a Githua Associates & another [2016] eKLR**. the 2nd respondent cannot be sued as agent where there is a disclosure of the principal employer and no cause of action is disclosed. The 3rd respondent not being a legal person cannot be sued as held in **Geoffrey Chege Kirundi versus Disputes resolution Committee of Kenya Tea Development Authority Agency Holdings & another [2017] eKLR**. there is no prejudice visited upon the petitioners by the form of the 2nd and 3rd respondents and employment was by the 1st respondent only.

On the petition and affidavits thereof; the responses by affidavits by the respondents, the written submissions and the objections filed by the 2nd and 3rd respondents, the issues which emerge for the court determination can be summarised as follows;

Whether the 2nd and 3rd respondents are proper parties herein;

Whether there was unlawful, unfair termination of employment; and

Whether the remedies sought should issue.

By Notice dated 28th January, 2019 the 2nd respondent raise objections to the sued on the grounds that as the managing agent of the 1st respondent for and on behalf of the 1st respondent as principal the duties carried out by the 2nd respondent are in the capacity of managing agent of the 1st respondent which is the known principal and there is no wrong committed by the 2nd respondent which is not an independent persona to hold liability.

The 2nd respondent is not assigned any particular description in the petition.

In the prayers set out in the petition, there is no direct or indirect link to the 2nd respondent.

Employment was by the 1st respondent save under paragraph 17 the petitioners avers that the 1st respondent jointly with other wrote a show cause notice. paragraph 28 of the petition is that the respondents shall fill the vacancies and positions held by the petitioners and should be stopped pending the hearing of the petition.

More details are offered by Dr Omanga in his affidavit that the 2nd respondent is the group holding company under which the 1st respondent is a shareholder and which employed the petitioners. He attached the letters of appointment for all the petitioners from pages 1 to 48.

The letters of appointment are issued to each petitioner under the name of *Kenya Tea Development Agency Limited* and through *Leaf Base Manager, Kapkoros/Tirgaga / Motito/ Olenguruone* – the 2nd respondent and the 1st respondent with the 3rd respondent being the chairperson of the 1st respondent. section 2 of the Employment Act, 2007 defines ‘employer’ as follows;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company; for purposes of employment and labour relations and for connected purposes, an agent, foreman, manager or such person responsible for the employee work performance fall under the definition of an employer. The 2nd respondent therefore defined as an agent falls under this purview and cannot be extricated from the 1st respondent.

There is therefore a nexus between the respondents and for the effectual and final determination of the matters herein, the court finds no prejudice to be visited upon any of the respondents maintained as such. In my view the context of who the ‘employer’ was in the referenced case by the respondents in **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** the context was foundationally different from herein.

On whether there was lawful or unfair termination of employment, termination of employment must be based on genuine, valid and fair reasons. Such reasons must be proved by the employer as otherwise, the termination is unfair. Where such reasons do not exist, the termination, by whatever reason(s) stated by the employer without prove, this amounts to unfair termination of employment in terms of section 45 of the Employment Act.

The Court of Appeal in addressing the issue of termination of employment in the case of **Nation Media Group Limited versus Onesmus Kilonzo [2017] eKLR** held that;

... an employer may terminate the employment of an employee upon giving him notice for other valid and fair reasons which the employer genuinely believes to exist and related to employees conduct, capacity or compatibility or based on operational requirements of an employer and upon according the employee fair procedure before termination (S.43(2); 45(2)).

There must exist valid and fair reasons leading to termination of employment and beyond having such valid and fair reasons ensure procedural fairness. In the absence of such substance and procedures, the termination of employment is unfair and the employee is entitled to the remedies under section 49 of the Employment Act, 2007. See **Oi Pejeta Ranching Limited versus David Wanjau Muhoro [2017] eKLR** and in **Kenfreight (E.A) Limited versus Benson K. Nguti [2019] eKLR** the court held that;

... under Sections 43(1) and 47(5), the burden of proving unfair termination rests on the employee while the burden of justifying the grounds of termination rests on the employer. Additionally, that a party who relies on a contractual term to terminate a contract of employment in accordance with Sections 35 and 36 of the Employment Act, such a party cannot be said to not have a valid reason or not to have justification for termination.

The rationale is that at the time the employer takes the decision to terminate employment, there must exist a genuine and reasonable cause existing and leading to the taking of such a decision. Section 43(2) of the Employment Act, 2007 succinctly captures this as follows;

(2) The reason or reasons for termination of a contract 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.

It is not a scientific finding, a finding beyond reasonable doubt or both combine, based on the shop floor operations and the employer having good cause over matters that *the employer at the time of termination of contract genuinely believed to exist*, termination of employment is allowed. Once challenged, the

employer then must prove the reason(s) for termination of employment giving the justification.

The Court of Appeal in the case of **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR** held that;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores

In this case the petitioners pleaded and submitted that the rights to fair administrative action and the right to a hearing were violated by the respondents when they were issued with letters and notices to show cause why employment should not be terminated and were required to respond within a very short time and without being given time to prepare for defence. That such denied them the right to fair administrative action and fair hearing under the provisions of Articles 47 and 50 of the Constitution, 2010.

The respondents have submitted an audit report dated 20th November, 2018 relating to *Tirgaga Tea Factory – Green Leaf Review*. The audit was undertaken from 24th September, 2018 and covered the period of 12 months from July, 2017 to June, 2018. The outcome of the audit was that;

- i. There was high prevalence of GL (green leaf) buying malpractices/falsification involving leaf buying clerks and growers whose list was provided as suspects ...*
- ii. The numbers raised by the whistleblowing report were noted to be falsifying weights. The number KP01160248 Simon Kibet Ngetich was noted in this report under the duplication issue and over productivity issue. The number KP0070419 was noted to be on the grower’s database however no transactions were done using the number. KP0110414 was not a grower registered in Tirgaga T Factory.*
- iii. Abnormal weight and data manipulation.*

The auditors also made detailed findings with regard to collection of green leaf where there were double weights with a review of individual transactions and which revealed instances of falsified weights within the same time. There were noted inflated weights through duplication.

There is a detailed list of the transaction, the weight, dates and time, the subject grower details and the number and the involved clerk. The list comprise pages 447 to 450 of the 1st respondent’s documents and Affidavit of Dr Omanga. At page 450 is the list of the clerk, the name and total weights duplicated and which list includes all the petitioners.

Based on the findings of the audit, the petitioners were each issued with a notice to show cause for *irregular recording of green leaf weights*.

Paul Korir was issued notice dated 9th November, 2018 with regard to events of 24th April, 2018 where he made two recordings of 15.7kgs each in favour of grower KP0110554 and 25th April 2018 he made two recordings of 15.7kgs each in favour of grower KP0110554 and on 14th May, 2018 he made two recordings of 15.7kgs in favour of grower KP0160248;

Wesley Kipkoech Cheruiyot through notice dated 9th November, 2018 with regard to 23rd November, 2017 where he made two recordings of 16.0kgs in favour of grower KP0240818, on 25th January, 2018 he made two recordings of 15.5kgs each in favour of grower KP0240818, on 17th April, 2018 he made two recordings of 15.3 each in favour of grower KP0240818;

Kipkirui Sigei through notice dated 9th November, 2018 as noticed double transactions taking place on 23rd June, 2018, 9th June, 2018 and 30th May, 2018 with regard to growers KP0310217 and KP1000205 respectively;

Geoffrey Kiplagat Rono was notified of tarnation's taking place on 31st March, 2018, 11th July, 201 and 6th September, 2018 with regard to growers KP0470706, KP0310254 and KP0470838 respectively;

Emmy Chepkemboi, John Itembe, Daniel Ckeruiyot, Patrick Towett Patrick Chepkwony all these lists and details were issued stating the subject dates, the time, grower number and the double weights in green leaf allocated through irregular green weights recordings.

The petitioners responded and all denied the allegations made save for Charles Siele.

Paul Korir replied to his notice on 11th November, 2018 and asked for more time to be able to respond;

Emmy Chepkemboi denied the allegations made and that some growers arrange their many bags and there may be a mixing of transactions;

Geoffrey Rono replied on 11th November, 2018 that similar transactions are common and can happen practically in the PDA *version were are using without intention of falsification or knowledge as stated in the letter. A grower can weigh five bags or more of the same weights which follow each other and one cannot develop ...;*

John Itembe replied on 17th November, 2018 that it was possible to make the same transactions using the PDA and he never knew it was wrong that making such transactions and wished the PDA could be fixed so that I could not accept such consecutive weights;

Kilel Charles replied on 10th November, 2018 the time to reply was short as he had a weekend in between and the records needed were with KTDA and if he could get enough information to be able to reply;

Patrick Chepkwony replied that the PDA had been changed to capture up to 4 bags in one minute and once recorded cannot be deleted and it was his intention for this to happen. The records captured only one centre and in given day he would serve several centres. He was sorry for his actions and promised to avoid the same in future;

Patrick Towett replied and pleaded for more time to be able to make a well informed response;

Wesley Cheruiyot pleaded for more time to be able to reply;

Kipkirui Sigei asked for more time to reply;

kipngeno Rono replied that he did not know it was a mistake to record a weight exceeding what PDA was allowed and he would be extra keen in the future;

Daniel Cheruiyotho replied that he needed more time to reply; and

Chelule replied that he had maintained his records and did not know it was an offence to take the same records from a given grower and practically it was possible to taken double recordings and unless a software organiser is developed the vice is developed they would be experiencing the same problems again and again.

In total, the petitioners each got notice with details of allegations and save for Kipkirui Sigei, Wesley Cheruiyot, Patrick Towett, and Paul Korir all replied to the show cause notices. Even the ones who pleaded for more time, up and until the invitation to attend before the disciplinary hearings on 26th and 27th November, 2018 none had applied for any form of access to information or taken the time to offer any form of defence to the allegations made.

The essence of section 41 of the Employment Act, 2007 read together with section 47(5) of the Act is to allow the employee whose misconduct is notified of him or her to cause to have a reply and defend himself/herself at the shop floor. The invocation of article 47 and 50 of the Constitution, 2010 taken into account, within the work environment, employment and labour relations are best addressed at the shop floor and where section 41 is the correct template to apply as the proceedings therefrom are not akin to criminal proceedings requiring strict proof or proof beyond reasonable doubt. At the shop floor the employee is allowed the right to have another employee present or have the union representative present.

The tenets of fair administrative action can therefore best be addressed under the provisions of section 41 of the Employment Act, 2007 with regard to employer and employee relations;

(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.

In this case, the court finds there were valid and genuine reasons leading to the petitioners being called to show cause why employment should not be terminated by the notices issued to each of them, they failed to show good cause and were all invited to a disciplinary hearing. Present at such hearing was a union representative.

The provisions of section 41, 43 and 47 of the Employment Act, 2007 were met.

There existed substantive grounds leading to disciplinary hearing.

At the disciplinary hearings, the petitioners failed to explain their conduct with regard to irregular green leaf weighing, recording and collecting from buying centres and delivering the same to the 1st respondent tea factory. Such was classified as gross misconduct and arose out of improper conduct of duty. The respondents then took the option of termination of employment as against summary dismissal and offered to pay each petitioner;

Salary for days worked;

Pay in lieu of leave pro-rated;

Two months' pay in lieu of notice;

Service gratuity.

This is a generous package noting the reasons leading to termination of employment. Where the petitioners were aggrieved, the referenced Collective Bargain Agreement should have been put in motion which is not the case here. There must be good basis when the provisions of the CBA are not invoked. Such can only be because there existed good and justifiable reasons leading to termination of employment.

The court finds no basis to challenge the findings made by the respondents.

On the remedies sought, on the findings that there were justifiable grounds leading to termination of employment, the remedy of reinstatement is not available to the petitioners.

On the alleged constitutional rights violations, the petitioner’s case is best addressed under the provisions of the Employment Act, 2007 where the court has addressed above.

On the claim for payment of terminal dues until retirement, with employment having lawfully been terminated, the payment of 2 two months in notice is generous. Even where the court may have made an award, under the provisions of section 45(5)(b) of the Employment Act, 2007 the court is required to address the work history and culpability of the petitioners in their work performance. There is a litany of misconduct.

The petitioners submitted that the warnings and cited cases of misconduct go back to the year 2013 and thus unrelated to the subject leading to termination of employment. Far from its, section 45(5)(b) is couched in mandatory terms that;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

The court *shall* consider the procedure adopted by the employer to reach its decision to dismiss or terminate the employee from employment, the culpability of the employee, the compliance with statutory requirements, and fundamentally the previous warning letters issued to the employee.

There was therefore procedural justice. No compensation is due.

Several petitioners have since filed notices to withdraw and petition.

Charles Siele and Daniel Cheruiyot filed notices that they had not given authority to file the petition. Similarly to Geoffrey Rono, Kipkirui Sigei, Patrick Chepkwony and Charles Kilel filed their notices. These petitioners should not be made to bear the weight of the petition against their wishes.

Accordingly, the petition herein is found without good basis and is hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 17th day of December, 2019.

M. MBARU

JUDGE

In the presence of:

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