



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.44 OF 2017

(Before D. K. N. Marete)

KENYA PLANATATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGMENT

This matter is originated by way of a Memorandum of Claim dated 2nd August, 2017. The issue in dispute is thereon cited as;

“Victimisation and wrongful, unlawful and unfair dismissal of Nicholas Suguti”

The respondent in a Respondent’s Memorandum of Response dated 20th September, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that she is a registered trade union representing workers within the agricultural sector and has a valid recognition agreement with the respondent. She has also concluded a Collective Bargaining Agreement (CBA) with the respondent.

The claimant’s further case is that the respondent employed the grievant on or about April, 2007 as a driver at Kimari Factory. He was however dismissed on 28th September, 2015 on grounds of gross misconduct which is hereby denied.

The claimant’s other case is that on 20th August, 2015 the grievant as usual reported on duty and started transporting firewood from the yard to the boiler. At 1000 hours the supervisor at the Service Bay, Mr. Akoko asked him to go to Koiwa estate to transport marrum for road repair. He went to refuel at Kaptien and then left for the quarry to transport marrum as instructed. Here, he discovered that the key to the fuel tank was missing and set out to look for it. It was not found.

The grievant would continue working up to 1800 hours and thereafter get back to the factory and attempt to report the missing key to the supervisor but he was not there. The following day, he attempted to report the matter of the lost keys to the supervisor but this was rebuffed. He was chased away and told to continue working.

The claimant’s case further comes out as follows;

11. At around 12 noon, the grievant met the Assistant Manager of Koiwa Estate, one Mr. Jared at field 18 who told him to change from transporting marrum and go transport hardcore at field 15.

12. At around 12 noon, the supervisor in charge of road repair instructed the grievant to take the hardcore to field 19. The grievant decided to follow field 20 since field 18 road was blocked by a contractor who was offloading the marrum.

13. At about 500 metres from the offloading site of the hardcore, the grievant met Mr. Jared, who wanted to know how far he had gone with his work. After he explained to him, they both left.

14. After another 300 metres from where he had met Mr. Jared, the grievant met one of the employees who informed him that he was needed by Mr. Jared, where he had offloaded the hardcore. So, the grievant drove back to the site.

15. At the site, Mr. Jared told the grievant that he had siphoned fuel from the company tractor, the grievant was confused but he told

him that he had not siphoned the fuel.

16. After around 20 minutes, the Kimari Factory Manager and Assistant Manager arrived at the site; Mr. Jared directed the three of them through a path in the tea bushes. After around 15 meters, they were showed fuel in a container and small hose pipes which were covered by a sack. The factory manager took a photo of the container and Jared carried the fuel to the road.

17. The factory manager then asked the grievant to open the side covers of the tractor for investigations, and he found there was nothing showing that fuel has been siphoned from the tractor. The manager then asked the grievant to carry the fuel container and Jared carried the fuel to the road.

18. The grievant, the factory manager, and the assistant manager drove to the factory where the grievant was interrogated and he narrated to them what had taken place.

19. The grievant was issued with a show cause letter dated 28/08/2015, by the Respondent stating that the grievant was found in Tea field number 20 in Koiwa Estate, not the appointed place of work, presence of diesel-fuel, a hose pipe and two unidentified people within the area where he was found, and that he could only present one ignition key instead of two which have been having ignition key and fuel tank padlock key and that he should submit a written explanation by not later than 5:00 pm on 31/08/2015 explaining why disciplinary action should not be taken against him for the said offences. **Appendix 2 is a copy of the show cause notice dated 28/08/2015.**

The grievant answered the show cause letter on 28th August, 2015 and on 1st September, 2015 was served with a letter inviting him to a disciplinary hearing to be held on 3rd September, 2015 to which he attended in the company of a witness. He was served with a letter of dismissal dated 28th September, 2015.

This matter was reported to the claimant who initiated an appeal on the dismissal but this was unsuccessful. Attempts at conciliation were also fruitless with the conciliator, a Mr. P.N Macharia, entering a *certificate of unresolved dispute*.

His penultimate case is that the grievant had worked for the respondent for 8 years and that at the time of dismissal earned Kshs.12,325.00 per month.

He prays as follows;

1. A declaration that the dismissal of the grievant is wrongful, unfair, unlawful and that it amounts to victimization.

2. (i) An order compelling the grievant to reinstate the grievant without loss of benefits;

(ii) An order directing the Respondent to pay the grievant for the entire time he has been out of employment.

3. If prayer 2 above fails, an order directing the Respondent to do the following;

a) Pay the grievant gratuity for the years he has served with the Respondent at the rates provided for in the CBA;

b) Pay the grievant house allowance from the time of dismissal until judgement;

c) Pay the grievant monthly salary for a period of twelve (12) months;

d) Pay the grievant in lieu of leave for the period of dismissal;

e) Pay the grievant leave travelling allowance for the period of dismissal;

f) Pay the grievant an equivalent of two months' salary in lieu of notice of termination;

g) Pay the grievant damages for unlawful, illegal and unfair dismissal;

h) Pay the grievant the costs of the cause;

i) Interest on (a), (b), (c), (d), (e), (f), (g) and (h) above.

4. Certificate of Service.

5. Costs of the cause.

6. Interest on (3) and (5) hereinabove.

The respondent's case is a denial of a case of unlawful termination.

The respondent's further and ultimate case is that the grievant was lawfully and fairly dismissed from employment after having been given a notice to show cause why he should not be dismissed. He had been given a chance to defend himself but failed to show cause as to why he should be dismissed for having breached the code of business principles and even appealed and failed.

The respondent's other case is that he received information that fuel had been siphoned from the vehicle that the grievant was driving. This had been fueled to full tank before the claimant set off to his work. Upon investigation she found a 20 liters jerrican of fuel on the path the claimant had taken and questioned him on the allegation which he denied. The dismissal was therefore lawful, the grievant having been taken through elaborate disciplinary process and having failed to exonerate himself of the misconduct of fuel siphoning.

The matter came to court variously until 13th April, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions dated 30th October, 2017 reiterates his case of unlawful termination of employment. It is his case that the grievant genuinely lost the fuel tank keys and got handicapped and restrained from reporting the same to his supervisor due to existing circumstances. She also denies siphoning fuel from the vehicle he drove and posits that the respondent has not adduced any evidence of anybody who saw him do the fuel siphoning.

She also forments a case of a unlawful termination of employment by relying on section 43 (1) and 45 (1) and (2) (a) of the Employment Act, 2007 as follows;

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

45.(1) No employee shall terminate the employment of an employee unfairly.

(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.

c.

In further support of his case the claimant sought to rely on the authority of **Kenya plantation & Agricultural Workers Union v. Del Monte Kenya Limited [2016]** at paragraphs 13 and 18 where Radido, J. observed as follows;

11. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer is under a duty to prove the reasons for dismissing an employee, and that the reasons are valid and fair.

18. In my view, the report suggests a possibility that the brakes of the lorry failed as contended by the grievant, and therefore the reason advanced by the respondent to dismiss him was not valid. It was equally not fair.

She further sought to rely on the authority of **Zephania Nyambane and another v. Nakuru Water & Sanitation Services Company Limited [2013] eKLR** at page 9 where Ongaya, J. stated as;

Thus to answer the second issue for determination, the court finds that the alleged reasons for termination were never established as they were fictitious as not established to exist at the time of termination and therefore not valid.

The respondent in her written submissions dated 21st February, 2018 as expected forments and submits a case of lawful termination of employment. She submits as follows;

The claimant admitted that he lost the key to the fuel tank and indeed it was his admission that he could not properly state the circumstances in which the key was lost. There indeed was a key that was under the custody of the claimant and it was his duty to take proper care of it. Even if the claimant suggests that he did not siphon the fuel, it now his admission as per his submission that someone could have taken the key and siphoned the fuel. If this is indeed the claimant's submission then it is obvious that the claimant's improper performance of work that led to the company losing the fuel. The CBA which indeed the claimant relies on states at clause 24 (c)

“If an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.”

In the instant case, it is not disputed that the claimant lost the key to the fuel tank. Connecting this to the fact that indeed fuel was lost, it was therefore just to have found that the claimant had violated the conditions for summary dismissal.

The claimant could also not explain who the two individuals he was talking to and were found at the scene were and he did not want to reveal where the key to the fuel tank was giving an inference of guilt on the face of it.

Clause 24 (g) which also gives the grounds for summary dismissal provides

“If an employee commits, or on reasonable and sufficient grounds is suspected of having committed any criminal offence against or to the substantial detriment of the employer or the employer’s property”

In this instant case there was a reasonable and sufficient ground to create suspicion that the claimant had stolen and/or abetted in stealing fuel which indeed was the employer’s property.

Further, the respondent augments her case by analyzing the contradictory evidence of the grievant at the disciplinary meeting as follows;

We also refer your Lordship to the disciplinary meeting (See both the hand written (signed) and typed minutes) in which the claimant admits to losing the key and he also confirms that he was not able to explain the loss of the key because, in his own word “he was confused” he later confirms that he gave contradicting responses on the whereabouts of the key. At some point he said the key was at a place called Kaptien, when the said key wasn’t found at Kaptien he said it was at home, he later changed and said the key had been lost by children. All these lordship proves reasonable suspicion that warranted the claimant to be summarily dismissed.

The respondent further submits that the claimant has failed to establish his case of unlawful termination of employment in tandem with section 47 (5) of the Employment Act, 2007 as follows;

47 (5) “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Lastly, and notwithstanding her submissions above, the respondent posits as follows;

a) The claim for unlawful termination is also unfounded as the claimant’s termination was done in a fair manner both substantive and procedural fairness was observed.

b) The claim for gratuity does not apply as the claimant was summarily dismissed for gross misconduct and as such is not entitled to such compensation.

c) The claim in lieu of notice of termination does not apply either as the claimant having been summarily terminated as anticipated under section 44 (4) of the Employment Act was not entitled to any notice.

d) On the certificate of service, the Respondent is willing to issue the same it is the claimant that has failed to avail himself to collect the same.

The claimant in support of her case annexes the following documents;

1. Copy of CBA inter partes signed on 25th May, 2012
2. Notice to show cause dated 28th August, 2015
3. Letter of answer to show cause by the grievant dated 28 August, 2015
4. Summon for disciplinary hearing letter dated 1st September, 2015
5. Summary dismissal letter dated 28th September, 2015
6. Letter of summary dismissal appeal dated 1st October, 2015
7. Proceedings of disciplinary appeal hearing *inter partes* dated 16th October, 2015
8. Letter of the Chief Industrial Relations Officer reporting the dispute to the parties dated 25th January, 2016
9. Letter from the conciliator to the parties dated 25nd July, 2016 outlining the findings and recommendation of the conciliator.

The respondent on the other hand presents the following in her List of documents dated 12th April, 2018;

1. Typed and Handwritten minutes of the disciplinary hearing
2. Show cause letter dated 28th August 2015
3. Summons for the disciplinary hearing
4. Summons for disciplinary hearing
5. Statement by Witness Jared Odhiambo
6. Correspondence dated 25th July, 2016 from the Conciliator

An analysis of the respective cases of the parties brings out a case in favour of the respondent. This is because the respondent's case overwhelmingly outweighs that of the claimant. The respondent in evidence demonstrates the culpability and involvement of the grievant in the fuel siphoning saga which the respondent was not able to rebut, in the least. Instead, the grievant, as ably illustrated comes out with a very uncoordinated version of defence against the accusation of fuel siphoning. He is not able to explain the loss of fuel tank keys or even why this was not promptly reported to his supervisors. He is unable to explain what the two men he was talking to were doing in the precincts of where the siphoned fuel was found. He merely stumbles over his answers on the subject.

The respondent, through her witness statement by; Winnie Ochieng, Peter K. Ngeno, Jared Odhiambo and Phillip Mutai and also the typed and long hand minutes of the disciplinary proceedings establishes a case of lawful termination of employment and I find as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she is not entitled to the relief sought.

I am therefore inclined to dismiss the claim and order that each party bears their own costs of the same.

Delivered, dated and signed this 18th day of May 2018.

D. K. Njagi Marete

JUDGE

Appearances

1. Miss Omwaka for the claimant union.
2. Mr. Koech instructed by Murimi, Ndumia, Mbago & Muchela Advocates for the respondent.