



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 47 OF 2017

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

UNILEVER TEA (K) LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of Memorandum of Claim dated 18th September, 2017. The issue in dispute is thereon cited as;

“Unlawful, unfair and/or illegal termination of Alfred Ochieng”

The respondent in a Respondent’s Memorandum of Response dated 18th October, 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 other case is that the grievant was employed by the respondent on 18th May, 2011 as a seasonal employee for 5 months and on 1st November, 2011 he was issued with a letter of confirmation.

The claimants further case is that on 29th September, 2014 the grievant signed off duty and was supposed to report back at midday or 1400 hours of the following day depending on the team leaders instructions as there was a two and a half shift work schedule. He decided to rush to his rural home for his off duty.

It is her other case that on 30th September, 2014, his team leader sent him a text message requesting that he calls back. He did not have credit units and therefore rushed to avail some. He called at about 800 hours whereupon the team leaders asked for his whereabouts as according to him, the grievant was supposed to report to duty. He explained that he was not within the respondent’s premises but the team leader hanged up and cut off the conversation. Further attempts to get him on phone were fruitless.

The claimant’s further case is that the grievant decided to travel back to his workplace and arrived late. He decided to take casual leave by telephone but this went unanswered. On 1st October, 2014, he reported to the Assistant Manager, who sought to know where he had been on 29th September, 2014. He explained and was asked to sign a written version of his explanation. On 2nd October, 2014, he was summoned before the manager and issued with a show cause letter to be responded to by 100 hours on 4th October, 2014.

The claimant’s other case comes out as follows;

12. The grievant showed cause and submitted the letter on 03/10/2014. He was then asked to see the team leader in charge of Kando job for allocation of duties.

13. The claimant further avers that on 10/10/2014, he was issued with a letter summoning him for a disciplinary hearing meeting which was scheduled on 14/10/2014, at the Unilever Tea Kenya International Training Centre, Kericho. Appendix 4 is a copy of the letter.

14. The Claimant avers that on 23/10/2014 the Respondent unlawfully, unfairly and/or illegally dismissed the grievant herein

summarily on account of gross misconduct. Appendix 5 is a copy of the dismissal letter dated 23/10/2014.

The claimant's further case is that the grievant reported the matter to the union who requested for an appeal meeting with the respondent. This was held on 27th November, 2014 with the respondent upholding her position of summary dismissal. Thereon, the matter was referred to the Minister of Labour who appointed a conciliator to pursue conciliation in the matter but this was at the end unsuccessful.

Her penultimate case is that the grievant had worked for the respondent for 8 years and that at the time of dismissal earned Kshs.10,378.00 per month.

She prays as follows;

1. *An Order directing the Respondent to do the following;*

- a) *To unconditionally reinstate the grievant herein;*
- b) *To pay the grievant for the entire period within which he was dismissed;*
- c) *To pay the grievant in respect of all the leave days due to him as the time of reinstatement;*
- d) *To pay the grievant leave travelling allowance;*

2. *Should prayer 2 above fail, 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 monthly salary for a period of twelve (12) months;*
- c) *Pay the grievant in lieu of leave for the period dismissed;*
- d) *Pay the grievant leave travelling allowance for the period of dismissal;*
- e) *Pay the grievant an equivalent of two months' salary in lieu of notice of termination;*
- f) *Pay the grievant damages for unlawful, illegal and unfair dismissal;*
- g) *Pay the grievant the costs of the cause;*
- h) *Interest on (a), (b), (c), (d), (e) and (g) above.*
- i) *Any other relief this Honourable Court deems fit to grant.*

The respondent's case is one of denial of unlawful termination of the grievant's employment. She avers that the grievant was dismissed from employment after having been given a notice to show cause as to why he should not be dismissed and also having been given a chance to defend himself. The grievant failed to show cause why he should not be dismissed despite the opportunity to defend himself on accusations of breaching the code of business principles. He preferred and forwarded an appeal against dismissal but this also failed.

The respondent's further case is a denial that the claimant was at the material time on off duty, that is between the 29th September, 2014 and 30th September, 2014. It is her case that the termination of the services of the grievant was lawful she having subjected the grievant to appropriate disciplinary proceeding in which all legal and procedural aspects were pursued. This is as follows;

11. The Respondent avers that after the hearing, the panel concluded that the explanations given were unsatisfactory and that the offences amounted to gross misconduct and the Respondent therefore on the grounds and in accordance to section 44 (4) of the Employment Act summarily dismissed the Claimant.

12. The Respondent avers that it duly and lawfully terminated the claimant's employment as envisaged by the Employment Act and paid the claimant's dues pursuant thereto and therefore the suit herein lacks a basis in law and ought to be dismissed with costs to the Respondent.

The matter came to court variously until the 13th April 2018, when the parties agreed on a determination 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 his written submissions dated 27th April, 2018 reiterates his case as pleaded. 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.

It is the claimant's case that the respondent alleges that the grievant failed to work when he ought not to have been at work. This is not justifiable in that the grievant was already off duty when he was called to work on the night of 28th September, 2014 for six hours extra time. The grievant had put in work from 100 hours to 1300 hours and was therefore entitled to off duty for 24 hours culminating at 1300 hours the following day. He would not have been expected to report to work on the eve of 29th September, 2014 from his off day that he had signed the same day in the morning after he had been requested to attend duties the previous night during his off time.

Further, the claimants submits that the respondent does not come out clear or tender evidence on the grievant's supervisor's instructions to the employees to return to work on 29th September, 2014 as alleged. It is the claimant's case that the respondent should have explained whether these instructions, if at all, applied to all workers as they all were taking their off duty on that day or were intended for those who were not taking the off days. This exercise involved many employees and the respondent should have called one or some of them to testify and clarify this contested issue.

The claimant further faults the respondents for undermining the grievants case and evidence of seeking casual leave on phone on realizing that he was late in reporting back and would not make it to work as expected. It is her case that this was normal as the line used, known to employees must have been an official line. This dismissal is therefore unlawful for having been founded on invalid reasons.

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;

13. 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. observed as follows;

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 12th April, 2018 and submits a case of lawful termination of employment. She seeks to rely on section 44 (4) of the Employment Act, 2007 which provides as follows;

44 (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

She further sought to rely on section 45 (5) of the Employment Act, 2007 as follows;

45 (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, the respondent employ the provisions of section 107 of the Evidence Act Cap 80 Laws of Kenya to buttress her case of lack of proof of unlawful termination of employment as follows;

- 1) *Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- 2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person*

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

1. Copy of CBA inter partes signed on 15th May, 2012
2. Letter of appointment letter dated 1st November, 2011
3. Notice to show cause dated 2nd October, 2014
4. Summon for disciplinary hearing letter dated 10th October, 2014
5. Summary dismissal letter dated 23rd October, 2014
6. Proceedings of disciplinary appeal hearing inter partes dated 27 November, 2014
7. Letter to the cabinet secretary reporting the dispute dated 26th October, 2015
8. Letter from the conciliator to the parties dated 22nd 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. The Collective Bargaining Agreement
2. Letter of appointment
3. Notice to show cause letter
4. Summons for disciplinary hearing
5. Letter from the Ministry of Labor & EAC Affairs dated 22nd July, 2016
6. Letter to the claimant dated 7th November, 2016.

She also enlists witness statement by Wilson Sigei.

The claimant however denies receipt or knowledge of the respondents letter dated 7th November, 2016 mitigating the sentence of summary dismissal by the respondent as follows;

...the Respondent alleges that it sent the Claimant a letter dated 7th November, 2016 following the conciliators recommendation of the management reducing the dismissal to normal termination under the termination clause in the CBA and in addition pay 3 months' salary in compensation for loss of gainful employment. The letter as attached by the Respondent has not been received by the Claimant, as it does not even have the Claimant's received stamp; it is the first time that the Claimant is seeing this letter from the Respondents bundle of documents.

The claimant admits being taken through disciplinary proceedings and therefore this is not disputed. However, the respondent does not furnish a copy of these proceedings as evidence in court. The court is therefore disadvantaged in an assessment of the quality, veracity and viability of the disciplinary proceedings. It would not be possible to gauge the degree of compliance of these proceedings with section 41 of the Employment Act, 2007 regarding substantive and procedural fairness. It was always the respondent's duty to file this in court as a buildup of a case of lawful termination of employment.

Overall, this case tilts in favour of the claimant. A test of a balance of probability and preponderance of evidence as presented by the parties rests a case of unlawful 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. Having succeeded on a case of unlawful termination of employment, she is entitlement to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. Two (2) months salary in lieu of notice, that is Kshs.10,378.00 x 2 = Kshs.20,756.00.

ii. 6 months salary as compensation for unlawful termination of employment, Kshs.10,378.00 x 6 = Kshs.62,268.00

Total of claim = Kshs.83,024.00

iii. The costs of this claim shall be borne by the respondent.

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. Muli instructed by Murimi, Ndumia, Mbago & Muchela Advocates for the respondent.