



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 10 OF 2017

(Before D. K. N. Marete)

JOSPHAT ARATI ONGERA.....CLAIMANT

VERSUS

GIANCHORE TEA FACTORY COMPANY LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated vide a Memorandum of Claim dated 17th January, 2017. The issue in dispute is therein cited as;

In the mater of the unfair, unprocedural and unlawful (constructive) dismissal from service of Josphat Arati Ongera

The respondent in a Reply to Memorandum of Claim dated 30th August, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent in the year 2008. The claimant further case is that on 11th January, 2014 the respondent production manager issued him with a show cause letter to which he responded on the same day.

The claimant further case is that vide a letter 21st January, 2014 and without a hearing on the allegations against him, noted the following;

6.1 Placed him on suspension for the offence of "theft by servant" effective 21st January, 2014 for a period "not exceeding three months pending further investigation and action"

6.2 Directing him to "report to the FUM Ithat is to say "the Factory Unit Manager') on 22nd April, 2014 for instruction"; and,

6.3 Placing him on half salary effective 21st January, 2014

The claimant's other case comes out as follows;

8. The claimant avers that he has been constructively dismissed from the respondent's service without just cause and unprocedurally as follows:-

8.1. Having disputed allegations contained in the show cause letter the claimant should have been afforded a hearing on matters alleged against him.

8.2. The claimant was condemned unheard as no hearing took place;

8.3. The claimant's suspension is indefinite and thus amounts to (illegal) constructive dismissal of the claimant;

8.4. The claimant has never been aware of the nature of and the manner in which the alleged "further investigation and action" has been undertaken, if at all, and has never participated in the same,

8.5. The respondent's reasons for suspending the claimant are unfair, mischievous and dishonest as the respondent made definitive and conclusive findings against the claimant in its letter dated 21st January, 2014 and yet in the same breath place the respondent

under suspension for 3 months “pending further investigation and action”.

8.6. *The respondent’s conduct is an affront to the terms of the Collective Bargaining Agreement (at page 11 – 45)*

He prays as follows;

a. A declaration that the indefinite suspension of the claimant is for all intents and purposes a constructive dismissal of the claimant from service and that such dismissal is unprocedural, unfair and unlawful.

b. Payment of the claimant’s full salary for the period during suspension until declaration of the suspension as a constructive dismissal.

c. Maximum general damages for unprocedural, unfair and unlawful termination of the claimant’s employment.

d. Costs of and incidental to this claim.

The respondent’s case is a total denial of the claim.

The matter came to court variously until the 21st of June, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

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

The 1st issue for determination is whether there was a termination of employment of the claimant by the respondent. The claimant does not file any supporting written submissions in this cause. Perhaps he chose to rely on his case as pleaded and presented.

The respondent in her written submissions dated 26th June, 2018 however makes a turnaround in the presentation of her case. Inasmuch as she had made a total denial of the claim and the allegations of suspension, and in an attempt to answer the claimant’s concession that he was suspended pending determination of investigations into an incident where the respondents tea was stolen, the claimants submits that the claimant was afforded a chance to be heard and is evident from items 1 and 2 of the claimants list of documents dated 17th January, 2017.

She submits that the claimant was afforded a chance to be heard and the reasons for his suspension clearly communicated to him. He therefore cannot be heard to complain.

What would amount to disciplinary proceedings in the circumstances? Does the communication to the claimant and the explanation amount to disciplinary proceedings in terms of section 41(1) and (2) of the Employment Act, 2007. This is a tall order. This communication cannot amount to disciplinary proceedings as such.

I however note that the respondent submits a case of premature institution of this suit in the circumstances. The issue therefore is whether the claimant pursued all avenues and disciplinary processes before filing of this suit. My answer is that he did not. Further, the claimant has not on a balance of probability established a case of termination of employment as required by section 47(5) of the Employment Act, 2007. This is 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”

I therefore find a case of no termination of the employment of the claimant by the respondent.

On a finding of no termination of employment, the other issues for determination fall by the way side. They are not worthy of any consideration.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 29th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyamorongi instructed by Nyamorongi & Company Advocates for the claimant.
2. Mr. Koech instructed by Bett & Company Advocates for the respondents.