



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 96 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of claim dated 24th September, 2013.

The respondent in a Memorandum of Defence dated 24th January 2014 denies the claim and prays that it be dismissed with costs.

The claimant's case is that she is a registered trade union under the Trade Unions Act representing workers in the agricultural sector of the Kenyan economy. The respondent engages in tea farming and export in Kericho.

The claimant's further case is that the parties herein have entered into a Collective Bargaining Agreement for the period in which this cause of action arose.

The claimant's other case is that the grievants worked as general workers of the respondents and resided at Kapgwen estate. They were dismissed on 15th November, 2011 on grounds of having fraudulently acquired sick off forms thereby defrauding the company. The respondent accused the grievants of having colluded with one Cladius Chege of the medical department at Unilever general hospital to enable them attain payment for days not worked.

The claimant's penultimate case is that despite intervention by their union and a reference to the minister for labour, nothing came out of it and the conciliator came out with a Certificate of Disagreement.

The claimant's submit a case of discrimination in dealing with their cases in that some other workers implicated in this collusion were paid their gratuity while this was refused to them.

She prays as follows;

4.1 This honourable court do order the respondent to reinstate the Claimants to their former positions without loss of benefits.

4.2 This honourable court do order the respondent to pay the claimants their terminal dues as follows (in the event that it does not grant Order No.4.1 above as prayed):

- a) Gratuity*
- b) One months pay in lieu of notice.*
- c) Annual leave travelling allowance*

4.3 This Honourable Court do order the respondent to pay the Claimant 12 months' salary as compensation for wrongful termination of services.

4.4 This Honourable Court do order the Respondent to pay the costs for this suit

The respondent admits that she entered into a Collective Bargaining Agreement with the claimant and this provided for summary dismissal without benefits at clauses 24 and 30 as follows;

e) *"If an employee knowingly fails or refuses to obey and lawful and proper command which it was within the duty of his scope to obey issued by his employer or any person placed in authority over him by his employer;*

g) *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 his employer or his employer's property."*

" An employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity."

It is the respondent's further case that she conducted an audit and investigation which revealed irregularities on sick offs obtained by employees. They were thereafter requested to furnish written explanations on the same which they did between 20th and 21st July, 2011.

The respondent's further case is that after the preliminary investigations were concluded by the Estate Manager, the respondent assembled a team in which the claimant was represented by shopstewards to further investigate the matter. This revealed that the employees had fraudulently and unprocedurally obtained sick off sheets for which the respondent paid thereby occasioning substantial loss on her part.

The respondent's further case is that between 7th October, 2011 and 12th November, 2011. These employees were given a fair hearing in the presence of their shop stewards or witnesses of their choice and each was awarded an opportunity to explain the irregularities outlined herein. In these proceedings some employees admitted fault and gave an accurate account of the participation thereby assisting in accurately concluding the investigations and hearing. Those represented by the claimant however misled the interview panel with some who had admitted wrong doing now changing cause and denying culpability. These were summarily dismissed and paid as follows;

a. *Wages earned up to the last working day;*

b. *Pro-rata leave earned; and,*

c. *One way bus fare*

The respondents other case is a denial that the termination of the employees was unfair as alleged or at all. This is on the following grounds.

a. *The concerned employees were invited to a hearing by the Respondent, along with a witness of their choice, to present their accounts of the fraudulent conduct;*

b. *The Respondent held a fair hearing for the Employees before arriving at the decision to summarily dismiss them on account of misconduct;*

c. *The concerned Employees were found to have committed acts of gross misconduct;*

d. *The Employees had concealed vital information with a view to mislead the Respondent's investigations;*

e. *The Respondent's management held a hearing with the Employees who sought to reverse the decision but the Respondent's decision was upheld;*

f. *There was loss of mutual trust between the Respondent and the Employees;*

g. *Extensive investigations were carried out by the Respondent and an elaborate and lawful procedure employed in coming to the conclusion of summary dismissal; and*

h. *All actions taken by the Respondent were in line with the Agreement between the parties.*

The matter came to court variously until the 20th June, 2018 when the parties decided 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 her written submissions dated 13th June, 2018 submits that the 18 grievants on various dates obtained sick sheets at the respondents medical centre where they were attended as a result of the various ailments. This is as follows;

7. We submit the example of Esther MokeiraSamwel, a Grievant herein, who was diagnosed with high blood pressure by the Respondent's medical officer and who often attended the Respondent's medical facilities for monitoring and medication since the year 2008. (Paragraph 3 of the Witness Statement of Esther MokeiraSamwel dated 19th March, 2015.)

8. We submit that the Witness Statement of Esther MmokeiraSamwel dated 19th March, 2015 where she states at paragraph 7 that around January 2011 the Respondent's manager informed all workers to seek treatment from any of the Respondent's medical facilities which shows that in fact it was not unusual for employee of the Respondent to seek treatment at Kerenga Medical Center.

9. We submit that the Respondent has falsely alleged that the sick sheet obtained by the grievants were fake or irregularly obtained. The same Respondent contradicts herself by admitting in paragraph 11 of the Witness Statement of Dr. Peter Githua dated 3rd September, 2015 that the sick sheets obtained by the employees were indeed from Kerenga Medical Centre which is the designated treatment center of the Respondent's employees.

10. Further, that the Respondent has alleged that the said sick sheets were not recorded and do not appear in any of the registers of Kerenga Medical Centre. We submit that it was not the Grievants' duty to keep any of the alleged records. The Respondent did not produce the said record for this court to determine that indeed the names of the 18 Grievants were not there. Further, the 18 Grievants did not author any of the said sick sheets. Therefore, they could not have obtained them fraudulently.

The claimant's further submission is that the grievants were never issued or served with show cause letters and neither were they afforded an opportunity to defend themselves against allegations made against them in any formal disciplinary hearing.

The claimant submits that the documents dated 3rd October, 2011 produced by the respondent purportedly inviting the grievants to a meeting held on 7th October, 2011 were in the nature of an internal memorandum and would not come out as a show cause letters or invitation to disciplinary hearings. These were as follows;

"The purpose of this meeting is to gather more information regarding the issue and your role in the situation and the aforementioned personnel will be asking you questions to fulfill this goal."

The claimant seeks to buttress her case by relying on section 41(2) of the Employment Act, 2007 as follows;

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

Further,

45. (1) ...

(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. that the reason for the termination is a fair reason-

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

The claimant further sought to rely on the authority of **Kenya Union of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** at paragraph 17 where the court observed as follows;

Whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal. The section states; 41. (1) subject to section 42(1), an employer shall, before termination 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.

The respondent in her written submissions dated 27th June, 2018 justify summary dismissal by relying on clause 24 of the Collective Bargaining Agreement (supra.) It is the respondents case that the grievants did not pursue her medical reporting procedure which is three tiers as follows;

i. *The patient reports to the medical center for treatment and their names are entered in a register;*

ii. *Where the condition is one that requires greater attention, the nurse in charge of the medical center gives authority for the Patient to be moved to the Hospital. This is done through a 'passenger manifest' to the hospital and the patients are taken by the staff ambulance;*

iii. *Upon reaching the hospital, the patient's names are entered into a register and where necessary sick-off sheets are issued. These are serialized.*

The respondent in further support of her case submits a case of admission by Richard Langat and Mary Chepkurui besides citing contradictory statements made by Thomas Mongare and Norah Moraa. She also *in toto* faults the sick off forms for being signed by a non existence personnel and also belonging to different estates.

The parties have made frantic efforts to build their respective cases. I, however, find the claimants case overwhelming and outweighing that of the respondents. The claimant clearly points out at contradictions in the evidence adduced by the respondent. This weakens the respondent's case to a point of not being sustainable. Like is observed in the celebrated authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** the law does not award the employer a choice on disciplinary procedure before termination of the services of an employee. It is candid and succinct. The employer must observe all procedural requirements in disciplinary proceedings against the employee. She has no choice whatsoever. There are no points of departure or deviation. It is a straight jacketed process. Here the court observed as follows;

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

I therefore find a case of unlawful termination of the employment of the grievants by the respondent and find as such. The absence of procedural fairness did it all. 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 won on a case of unlawful termination of employment she becomes entitled to the relief sought.

This matter offers a side issue for determination. This is because the pleadings by the claimant do not disclose monthly emoluments which this court would apply in a computation of relief sought. Our previous practice has been to leave the matter open: not involved in a computation of the relief sought on the basis of the absence of pleaded monthly salary of the claimant or like in the present case, the grievants. This must now change. It has so far aggravated injustice to litigants who succeed in their cases but suffer the default of not having provided their monthly or other periodic emoluments in their pleadings.

In this departure I wish to invoke the provisions of section 10 of the Employment Act, 2007 which burdens the employer to provide the particulars of the contract of service. Section 10 (2) (h) and (i) further support a case of particulars of remuneration as follows;

h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

i) the intervals at which the remuneration is paid; and

j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

k) any other prescribed matter.

In this constitutional dispensation, it would be all unfair to penalize a litigant on the basis of data that may not be in its possession. Article 22 (3) (b) of the Constitution of Kenya, 2010 provides for absence of formality in proceedings touching on the enforcement of the bill of rights as follows;

22 (3) The chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that –

a) ...

b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

The constitution comes in to alleviate the suffering and consequential injustices of past legal process where courts were sticklers of formality and procedure. This is now a thing of the past and has been overtaken by the societal quest for justice as expressed in our transformative constitution and dispensation. This shift is therefore inevitable and welcome in employment and labour relations.

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

- i. One (1) months salary in lieu of notice...
- ii. Eight (8) months salary as compensation for unlawful termination of employment...
- iii. The Commissioner of labour be and is hereby ordered to, with the involvement of the parties, compute relief in (i) and (ii) above and file a report to court within 120 days of today.
- iv. Mention on 31st October, 2018 for a report on computation.
- v. The costs of this cause shall be borne by the respondent.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ashubwe instructed by Eshiwani Ashubwe & Company Advocates for the claimant.
2. Mrs Wetende instructed by Kaplan & Stratton Advocates for the respondent.