



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO. 24 OF 2018

(Before D. K. N. Marete)

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 19th February, 2018. The issue in dispute is therein cited as;

Wrongful dismissal of the grievant by the respondent.

The respondent in a Response Memorandum of Response dated 16th April, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that she represents unionisable workers within the agricultural sector. The respondent is a member of the Kenya Tea Growers Associations by which virtue she has a valid recognition agreement with the claimant. The parties have a valid Collective Bargaining Agreement in force.

The claimant's further case is that the grievant was her member at the time of termination of her employment by the respondent. She was employed on 1st August, 2006 as a general worker and 2012 she was instructed to carry out the duties of security officer without a letter of appointment.

The claimant's other case is that at all times prior to her unlawful dismissal from employment the grievant had a salaried employment as a security guard and earned a monthly salary of Kshs.10,655.00.

The claimant's further case is that the grievant worked diligently, with commitment and with utmost honesty and was able, ready and willing to continue with service as such.

The claimant's further case is that on or about 10th May, 2016, the grievant was informed of a transfer from her station to Kericho estate by the Human Resource Manager, Finance Manager and Welfare Resource Manager. She informed them that she had paid a years school fees for her youngest school going child and that it would be difficult to obtain a refund for this from the school.

The grievant was instructed to avail the said school fee receipt to the respondent for a refund but this was not to be despite handing over the receipt. At a meeting on 25th May, 2016 she informed the Finance Manager and those present that she had not had a refund of the monies paid to school. At the end of the meeting, she was given a letter to sign but declined on grounds that she did not know contents thereof and prayed for an opportunity to peruse and understand its contents. She was threatened with insubordination and disciplinary hearing for this.

It is the claimant's case that the respondent in considering the transfer ought to have considered her unique circumstances and failure of this was in breach of clause 18 (a) of the Collective Bargaining Agreement as follows;

“All employees undertake as a condition of their employment to work anywhere in Kenya for the employing company or its Associates. Management shall consider an individual circumstance into both before and after any transfer as far as is consistence with the interests of their business, provided that such an employee shall be given within one (1) month notice period in writing before the transfer is affected.

The claimant's other case is that despite incessant pleas in writing to the respondent by the grievant, her cause for reconsideration for withdrawal or suspension of the transfer, these fell on deaf ears. She was threatened with disciplinary proceedings for failing to report to her

new work station.

Her further case is that on 27th June, 2016 she was served a show cause letter on unfounded and baseless claim of absconding duty which was not the case. On 5th July, 2016 she was served with a notice to attend a disciplinary proceedings to take place on 11th October, 2016 at the Finance Conference room at the respondents company. From this meeting, the grievant was summarily dismissed without just cause and in disregard of natural justice. She was also denied an opportunity for early retirement.

The matter was handed over to the claimant who effectively managed it but despite the appointment of a conciliator, nothing useful came out of it.

The claimant's summation of her case is as follows;

38. The dismissal was effected maliciously and without any due regard to the Grievant's welfare and rights accruing to her.

PARTICULARS OF MALICE

- a) Refusing to accept the Grievant's early retirement request*
- b) Failing to heed the Conciliator's recommendations*
- c) Failing to give the Grievant any notice of the intended termination of employment.*
- d) Failing to give the Grievant a fair hearing.*
- e) Humiliating the Grievant by making false accusations against her without giving her adequate opportunity to defend herself.*

39. As a result of the aforesaid, the Grievant has suffered great financial loss, psychological stress and damage.

PARTICULARS OF SPECIAL DAMAGES

- a) One month salary in lieu of notice.....Kshs.10,655*
- b) Accrued leave [27 days August 2016].....Kshs.63,930*
- c) Public holidays.....Kshs.52,560*
- d) Gratuity.....Kshs.78,136*

TOTAL **Kshs.178,281**

She prays as follows;

- a) A declaration that the Grievant's dismissal was unlawful.*
- b) A declaration that the Grievant was entitled to gratuity.*
- c) A declaration that the Respondent withdraws the dismissal letter.*
- d) A declaration that the Grievant's resignation letter be allowed.*
- e) A declaration that the circumstances the Respondent exposed the Grievant to forced her to request for an early retirement.*
- f) Damages for unlawful termination of employment.*
- g) Costs of this suit with interest be awarded to the Claimant.*
- h) Any other relief that the court shall deem fit and just to grant.*

The respondent's case is a denial of the claim. She however admits that the claimant was at all times in her employ as a general worker.

The respondent's further case is that she admits the claimant's nuances on the refund of school fees but avers that this was wholly at her discretion. It is her case that the respondent was provided with transport for transfer but declined to take it up. This was a violation of the Collective Bargaining Act and led to disciplinary proceedings in which she was lawfully dismissed from employment.

The respondent in the penultimate avers that the claimant was dismissed for disobeying lawful instructions, not respecting authority and absenting herself from work. This justifies termination.

The matter came to court variously until 27th June, 2018 when the parties agreed on a determination by way of written submission.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant was 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 discounts this in her written submissions dated 14th June, 2018.

The claimant rubbishes the threshold of the disciplinary proceedings and submits that the twin issues of absenteeism on 10th June, 2016 and not respecting authority were never discussed during the disciplinary proceedings. The only issue discussed was one on transfer and no more.

It is the claimants submissions that she was not awarded adequate time to prepare her defence and further that the disciplinary proceedings were a sham. In further support of a case of unfair termination, the claimant seeks to rely on section 45(1), (2) (c) and 4(b) of the Employment Act, 2007 as follows;

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) ...

(b) ...

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

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) ...

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

In further support of her case the claimant seeks to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the court held that;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

She further buttresses her case by relying on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court observed thus;

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.

The claimant in the penultimate posits a case of unfair termination of employment in violation of the templates of fairness enunciated under clause 18 (a) of the CBA as follows;

“...Management shall consider an individual circumstance into both before and after any transfer as far as is consistence with the interests of their business, provided that such an employee shall be given ONE (1) MONTH NOTICE period in writing before the transfer is affected.”

The respondent in her written submissions dated 20th June, 2018 forments and reiterates a case of fair termination of employment. She posits a case of summary dismissal and relies on section 44 (4) (a) of the Employment Act, 2007 to justify the same. This is 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 (32) 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 relies on section 47 (5) of the Employment Act, 2007 which burdens the employee to proof a case of unlawful termination with an obligation on the employer to rebut the same in the following words;

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"

The respondent does not come out clearly on a case of appropriate disciplinary proceedings in compliance with section 41 of the Employment Act, 2007. Indeed, she does not offer an explanation of the link between the allegations of insecurity made by the grievant and her transfer to Kericho estate. This having been a salient issue in the determination of the transfer, it should clearly have come out in evidence, particularly during the disciplinary proceedings. This also applies to the issues of absenteeism and disrespect to authority.

I would agree with the respondent's submissions but only add that these are not applicable in the circumstances of this case. Here, the claimant's case displays a massive case of injustice meted out to the claimant by the respondent. In a simple case where administrative measures would have been employed to manage the case of the transfer of the grievant in her circumstances, the respondent maintains a hard line stance and ultimately dismisses the grievant for reasons that do not exist. How does one justify this? Impunity?

The claimant's case far outweighs that of the respondent. Indeed the respondents case is overshadowed and overwhelmed on a preponderance of evidence. It would not have any chances of success. I therefore find a case of unlawful termination of employment and hold 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 won on a case of unlawful termination of employment she is entitled to the relief sought.

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

- i. One (1) months salary in lieu of notice.....Kshs.10,655.00
- ii. Twelve (12) months salary as compensation for unlawful termination of employment - Kshs.10,655 x 12Kshs.....Kshs.127,860.00
- Total of claim.....Kshs.138,515.00**

iii. The costs of this claim 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. Muchela instructed by Murimi, Ndumia, Mbago & Muchela Advocates for the respondent.