



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 2 OF 2018

(Before D. K. N. Marete)

MOSES OCHIENG.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of claim dated 18th January, 2018.

The respondent in a Respondent's to Memorandum of Response dated 19th March 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that he was offered employment in the capacity of ungraded employee in 1999 where he would be called upon to undertake various tasks in the company such as masonry, operation of machines and other manual tasks like arranging firewood in the shade. He earned Kshs.17,981.60 per month.

The claimant's further case is that during his stint of employment he doubled as a shop steward. On 11th July, 2016, there was a strike at the respondents company lasting until 25th instant. In this period, the respondent had hired policemen to guard company property and quell any aggression arising from the strike.

On 27th July, 2016, the claimant was informed by the chief clerk on telephone that the manager requested to see him. He took a meeting for 1100 hours. At this hour, the claimant went to the factory and upon entry found 3 police vehicles and as he traversed towards the manager's office he bumped into some policemen who engaged him in a light conversation. The policemen were carrying new shoes and on examination, he realized that these were intended for distribution to the workers in accordance with the Occupational Safety and Health Act. On enquiry of the placement they informed that they had been gifted by the respondent.

The claimant's further case is that on reaching the manager's office he saw him engaged by the commanders of the police and therefore opted to go to the Chief Clerk office instead. The Chief Clerk informed him that the manager just wanted to give him show cause notices in respect of Nelson Amiani and Peter Ochieng for their alleged involvement in the strike. In the meantime the shoes were being distributed openly and workers at the factory witnessed this.

On 8th October, 2016 the claimant was summoned to a meeting for shop stewards by the manager. He was requested to organize the other shop stewards with Ruttoh collecting the agenda from the other shop stewards. This meeting took place but omitted agenda No. 3 which was on the complaint of issuance of shoes to the police officers. The claimant objected and offered to testify on the agenda as he had witnessed the distribution of shoes to the police officers. The manager was silent on this revelation.

On 10th November, 2016, the claimant was approached by one, Joyce Rop, Assistant Manager at his place of work and informed of a meeting between the management and employees of Chagaik Factory which he was to attend and represent the employees on the same day. He went to Chagaik and was shocked to find that there was no meeting. On calling Joyce Rop, she insisted there was a meeting and she would send somebody to direct him. The watchman offered to direct him instead and he was taken an office where she found a lady called Joyce Ochieng who introduced herself as a code officer.

Joyce Ochieng proceeded to refer to the meeting of 12th October 2016 and informed him that she would like to take a statement from him on

how the events unfolded. He made a disclosure of the deliberations of the meeting. Ochieng further raised issues on agenda No. 3 on distribution of shoes but he explained that the meeting confined to the agenda's raised by employees.

On 12th January, 2017 the claimant was served with a notice of show cause for making a malicious and false report that the company property was being misappropriated thereby breaching the code of business principles. He was later served with summons on disciplinary hearing and on 13th February, 2017, he was subjected to summary dismissal.

It is the claimant's further case that the summary dismissal was irregular and unlawful as the respondent had no probable cause and that his dismissal was precipitated by witch hunt. Shop stewards who felt aggrieved by this dismissal appeal the decision and inform the branch secretary with the said branch secretary raising his intention to appeal against this dismissal.

The claimant's other case is that an appeal hearing was slated for 12th April, 2017 but the respondent upheld the decision of summary dismissal on the basis that the claimant was in breach of code of business principles. Strangely, the manager who was overseeing the distribution of the shoes was sacked yet the respondent insisted on termination of the claimant services.

Attempts to approach the Minister of Labour for purposes of conciliation also failed thereby prompting this action.

The claimant avers that his summary dismissal was unfair and unlawful and occasioned loss and damage. This is as follows;

22. As a result, the claimant believes that his termination was not only unlawful but unfair.

PARTICULARS OF UNLAWFUL TERMINATION

- a) Terminating the claimant's employment without reasonable cause
- b) Terminating the claimant's employment on unsubstantiated grounds
- c) Failure to give the claimant reasons for his termination
- d) Failure to prove the reasons for termination
- e) Engaging in witch hunt to unlawfully terminate the claimant's services

23. The claimant avers further that as a result of the unlawful termination, he has suffered great economic loss, damage and prejudice as regards his financial affairs.

PARTICULARS OF DAMAGES OF SUFFERED BY THE CLAIMANT

- a) Damages for unlawful termination
Kshs.17,981.60 x 12 months.....=Kshs.215,779.20
- b) 2 months salary in lieu of notice
Kshs.17,981.60 x 2 months..... =Kshs.35,963.20
- c) Unpaid leave for the month of August 2017
Kshs.17,891.60 x 1 month.....=Kshs.17,981.60
- d) Kshs.936.14 being end month pay for February.....=Kshs.936.14
- e) Transport allowance.....Kshs.2,464
- f) Gratuity
Kshs.17,981.60 x 18 years.....Kshs.323,668.80
- g) Lost salary from 13-2-2017 to the year 2036
Kshs.17,981.60 x 12 months x 19 years.....=Kshs.4,099,804.80
- TOTAL.....=Kshs.4,696,597.74**

The respondent's case is one of denial. She however admits employment of the claimant as specified in the claim.

The respondent's further case is that on 11th August, 2016, it hired policemen to forestall possible damage by workers on strike. The respondent further sequentially admit and recites the claimants case on his summons, meeting of shop stewards and even agenda 3 to detail. This also included the meeting with Winny Ochieng and all others on show cause and dismissal. This is as follows;

14. *The Respondent denies the contents of paragraph 23 of the Memorandum of Claim to the extent that;*

- a) *The claimant is not entitled to damages for unlawful termination as the Respondent accorded him his right to be heard as per the Company Policy and the Employment Act.*
- b) *The Claimant's prayer for 2 months salary in lieu of notice ought to fail as he was duly served by the Respondent's management with the requisite Notice to show cause as to why he shouldn't be summarily dismissed and was therefore given ample time to respond to the said notice.*
- c) *The Claimant's isn't entitled to unpaid leave for the month of August as he was already facing a disciplinary case as the claimant was served with a notice to show cause dated 12th January 2017 and after being accorded the chance to be heard was summarily dismissed on 13th February 2017.*
- d) *The claimant is not entitled to unpaid leave for the month of August 2017 as he had already been the subject of disciplinary proceedings as he was served with a notice to show cause dated 12th January 2017 and after being accorded the chance to be heard was summarily dismissed on 13th February 2017*
- e) *The Claimant is not entitled to any transport allowance as he was summarily dismissed and thus did not carry out any duties on behalf of the respondent.*
- f) *The claimant is not entitled to any gratuity or loss of salary from 13th February 2017 to the year 2036 as he cannot purport to have foresight of working for that period of time and cannot comprehend.*

Further,

15. *The Respondent in summary avers that the Claimants claim herein should fail as he did not follow proper procedures of enquiry about certain company activities and went on to slander a superior official alleging to have witness misappropriation of company resources. The Claimant was accorded the chance to defend himself as per the Employment Act and Company procedure and was therefore legally and lawfully dismissed.*

The matter came to court severally until the 18th June, 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 by the respondent wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 21st June, 2018 reiterates his case and seeks to rely on the provisions of section 45 (2) (a), (b) and (c) of the Employment Act, 2007 in formenting a case of unlawful termination of employment. This is as follows;

45 (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.

She further seeks to rely on the authority of **Gilbert Mariera Makori vs. Equity Bank Limited [2016] Eklr** where the court observed as follows;

Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the

presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.

After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee.

The claimant 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 respondent in her written submissions dated 20th June, 2018 formulates 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;

The respondent further relies on section 45 (2) (a), (b) and (c) of the Employment Act, 2007 in setting out a case of lawful termination of employment as follows;

45 (2) A termination of employment by an employer is unfair if the employer fails to prove-

(c) that the reason for the termination is valid;

(d) that the reason for the termination is a fair reason-

(iii) related to the employees conduct, capacity or compatibility; or

(iv) based on the operational requirements of the employer; and

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

She further relies on section 47 (5) of the Employment Act, 2007 which burdens the employee to prove 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"

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 respondent's 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. He 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.17,981.00

ii. Six (6) months salary as compensation for unlawful

termination of employment - Kshs.17,981 x 6.....Kshs.107,886.00

Total of claim.....Kshs.125,867.00

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.