



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1024 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 27th June, 2018)

ROBERT MACHARIA KINYANJUI.....CLAIMANT

VERSUS

GACHEGE TEA FACTORYRESPONDENT

JUDGEMENT

1. The Claimant filed suit on 14th June 2012 through the firm of M/S J.Ngumo Mbogo & Co. Advocates seeking damages for unlawful dismissal and non-payment of dues owed.
2. The Claimant avers that on 1st August 2006, the Respondent retained him as a factory worker through a letter dated 27th July 2006 and notwithstanding the stressful environment within which he was required to work, he performed his employment responsibilities in an exemplary manner and his contribution to the success of the Respondent company was recognized by his peers.
3. He further avers that on or about 28th July 2009 the respondent company maliciously and without justification reported to the police through its agents and/or servants that he was involved in stealing of tea leaves from the said company which allegation were later found to be unfounded. He was suspended from work on 10th August 2009 with allegations of theft.
4. He states that the Respondent or her agents never appeared at any one point to give evidence and he was acquitted. At the time of him being dismissed, he was drawing a monthly salary of Kshs. 11,364.90 which the Respondent at the time of dismissal had failed to pay from the month of August 2009 to date. He made efforts to resolve the matter at the party's level but it could not bear fruits since the Respondent never gave it a chance and despite notice of intention to sue being served upon the Respondent, she has neglected and or refused to make good his claim.
5. The Respondent filed their Statement of Response where they deny each and every allegation of fact set out and contained in the Statement of Claim. They aver that the incident of theft was, as would be in any other case reported to the police. This was after the Claimant was found in possession of made tea without any authority and contrary to the rules and regulations governing the operations of the Respondent's employees.
6. They also state that the Claimant was accorded an opportunity to defend himself after which the Respondent considered his defence and found the same not convincing and thereafter terminated his services for gross misconduct and processed his terminal dues as by law required.
7. They further state that the claimant is misleading this court by stating that he was acquitted yet on the contrary he was discharged under Section 87(a) of the Criminal Procedure Code. The Respondent also deny the entire submissions by the Claimant and state that all the terminal dues owed were paid as outlined in the letter of termination dated 16th September 2009 and that the claim filed is malicious, ill intended and meant at casting aspersions into the credibility of the Respondent company and tarnish its otherwise good employment record/reputation.

Submissions

8. The Claimant filed his submissions where he submits that he was not served with a termination letter and neither was he paid his dues as required by the law as evidenced by the defence witness making this a case of unfair termination as provided for under Section 45 of the Employment Act 2007.

9. He avers that his contract of service was terminated without being informed of the reasons behind the termination. He relied on **Industrial Court of Kenya at Nairobi Cause No. 435 of 2013 Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited.**

10. He also avers that through evidence provided for in this Court, he is entitled to compensation in accordance to Section 43(1) of the Employment Act 2007 as he has brought before this Court all necessary evidence to prove his case on a balance of probability. There was also no evidence tendered that either a reprimand or warning had been given to him in regard to performance before termination of his employment. He therefore urges the court to award damages as submitted here before.

11. The respondent filed their submissions where they submit that in exercising its mandate, the Respondent in all its circumstances ensured that it informed the Claimant of the offence against him and gave him a chance to explain his case hence being placed on suspension after contents of his defence were found not convincing which led to his termination for the act of gross misconduct. They relied on the case of **Selvarajan Vs Race Relations Board [1976]1 ALL ER 12 at 19.**

12. They aver that the Claimant is misleading this Court when he alleges in his submissions that he was drawing a monthly salary of Kshs. 11,364.90 which is unfounded and in bad faith. They also deny his allegations that he was not paid for the entire three years contract period that he worked for the Respondent. They relied on the case of **Anarita Karimi Njeru Vs The Attorney General (1979) KLR 154.**

13. In conclusion, the Respondent submit that the matter is one which arose out of the Claimant's acts of gross misconduct and the Respondent provided the Claimant ample opportunity to raise a defence which the Claimant neglected and/or refused to explain himself after being caught attempting to sprit away goods belonging to the Respondent. Through statues as well as the internal mechanism that deal with gross misconduct they were well within their right to summarily dismiss the Claimant. They therefore humbly pray that this Court dismisses this suit with costs to the Respondent.

14. I have considered all the averments of both parties plus submissions filed. I note that indeed the Claimant was an employee of the Respondent.

15. Sometimes on 10th August 2009, the Claimant was suspended by the Respondents and informed the suspension was until further communication. He was later on charged in Criminal case No. 123/2000 for an offence of staling on 27/7/2009.

16. The case never proceeded to hearing and he was discharged under Section 87(a) of the CPC on 25/1/2011.

17. There is no indication that the Respondent ever communicated to him about the suspension. The Respondents avers that they terminated him on 16.9.2009 following the charges in the criminal Court for gross misconduct and even processed his terminal dues as required by law.

18. He Claimant denied ever receiving the termination letter and avers that the Respondent never communicated to him since the suspension.

19. The Claimant however admitted in cross examination that he was invited for disciplinary hearing and he refused to attend because the criminal case was pending in Court.

20. That being the case, it is my finding that the Claimant on his own accord was invited for a disciplinary hearing which he chose to ignore. He also contends that he was on a 3 year contract with effect from 21/8/2006 and it was to end on 21/8/2009, so by the time he was charged 27/7/2009, the contract was about to terminate.

21. However a look at the contract letter shows that he was a permanent employee.

22. The fact that the Claimant himself omitted going for the disciplinary hearing where as he had been accorded an opportunity to do so renders his case untenable.

23. It follows that the Respondent had opted to give him a fair chance to be heard and he refused all by himself.

24. In the circumstances, I find the Claimant has case against the Respondents without merit. I therefore dismiss the Claimants case save for what was payable to him as per the termination letter being salary for days worked, 2 months salary in lieu of notice, pay in lieu of accrued leave on prorata basis and gratuity for years served.

25. There will be no order as to costs.

Dated and delivered in open Court this 27th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oketch holding brief for Gachuhi for Respondent – Present

Michuki holding brief for Mbogo for Claimants – Present