



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 234 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated by way of a Memorandum of Claim dated 3rd September, 2015. The issues in dispute are therein cited as;

Unlawful, wrongful and unfair dismissal of Michael Njoroge and Leonard Odindo

The respondent in a Memorandum of Defence dated 10th November, 2015 denies the claim and prays that it be dismissed with costs.

The claimants case is that the parties have a recognition agreement by dint of which they have negotiated several Collective Bargaining Agreements (CBAs) stipulating the terms and conditions of employment for employees who are members of the respondent.

The claimants further case is that on 12th March, 1997, the respondent employed the grievant, Michael Njoroge as a general worker and deployed Kepchomo Tea Estate. On 1st October, 2016, the grievant was promoted to the position of Stores Assistant III and transferred to the Central Workshop Stores. Again, on 1st January, 2010, he was promoted to Grade II stores clerk.

The claimant's further case is that on 6th September, 1997 the respondent employed the second grievant, one, Leonard Odindo as a general worker and was deployed to Kipkoimet Estate. In 1998, he was promoted to the position of Check Roll Clerk and deployed to Kibware Estate. In 2001, his position was changed to that of stores clerk within Kibware but was subsequently transferred to the Group Central Workshop in the same capacity.

The claimant's other case is that on about January, 2013, the engineering technician requested for forty – two (42) items for which Mr. Odindo prepared an issue note. This note was authorized for issuance by the Manager. The items were then collected by the technician.

The claimants other case is that on 22nd July, 2013 the grievants were issued with notices suspending them from employment with effect from 22nd July, 2013 to 31st July, 2013. The suspension notices were accompanied by notices to attend disciplinary enquiry scheduled for 1st August, 2013. These disclosed the four charges preferred against the grievants.

The grievants further aver that they attended the disciplinary proceedings and presented their evidence. However, no evidence was presented before them and linking them to the loss of the items allegedly lost. They were thereafter issued with summary dismissal letter. At the time of dismissal, Njoroge earned Kshs.17,757.01 while Odindo earned Kshs.22,406.11.

This matter was reported to the claimant who reported the matter to the cabinet secretary for labour. A conciliator was appointed and recommended a reduction of the sentence to mere termination and therefore pay of the grievants terminal dues but this was declined by the respondent forcing an issue of a Certificate of Disagreement.

The claimant's penultimate case is that they were not the only employees with access to the store and that the investigations conducted were discriminatory and aimed at dismissing them. This is as follows;

14. The grievants herein are not the only employees who worked at the store. The investigations by the Respondent were discriminatory, selective and targeted to procure the dismissal of the grievants herein. All the employees working in the store,

including the manager were neither interviewed nor were they subjected to the disciplinary process subjected to the grievants herein.

Again, the respondent had not instituted controls where lost items were kept. No investigations were conducted on the loss. The claimant further faulted the respondent's case as follows;

17. None of the grievants was in possession of the keys to the store in question. The keys to the store were always in custody of the store's manager and the GCW accountant and there is no way the grievants could pilfer the items in question. The two persons who had custody of the keys were not subjected to disciplinary enquiry like the grievants herein.

18. During the show cause enquiry, no evidence was given by the Respondent to the effect that the grievants herein were involved in the loss of the alleged items. The duties of the grievants involved receipt of items and issuance thereof and every time such issuance was necessary, the manager's approval was sought. It was however the duty of the Respondent to put in control systems as to who could access the store.

19. Despite the alleged high value of the lost items, the Respondent did not take any steps to have criminal investigations commenced with view of ascertaining who was behind the loss of the items. Clearly, the grievants herein were blamed for offences propagated by other persons.

She prays as follows;

1. A declaration that the dismissal of the grievants herein is unlawful, wrongful and unfair in the circumstances.

2.(a) An order compelling the Respondent to reinstate the grievants unconditionally and without loss of benefits;

(b) An order directing the grievant to pay the grievants their monthly salaries and other entitlements for the entire period they were out of employment.

3. An order (in the event prayer (2) herein above fails) directing the Respondent to pay the grievants as follows:-

a. Gratuity/Service as per the CBA;

b. Payment in Lieu of notice;

c. Days worked but not paid;

d. Leave due but not taken;

e. Leave travelling allowance;

f. Overtime;

g. Damages for wrongful and unfair dismissal;

4. Interest on 2(b) or 3(a) – (g) at court rates

5. Any other relief that this Honourable

The respondent's case is a denial of the claim. She states as follows;

2. The Respondent denies the Claimant's allegations and claims in this cause and states as follows;

i. The claimant's summary dismissal was genuine, warranted and justified in the circumstances.

ii. The Claimant's summary dismissal was procedurally fair and in accordance with the applicable provisions of the law and the Collective Bargaining Agreement (hereinafter 'CBA').

iii. The Claimant's claim is false, misleading and misadvised.

iv. The Claimants are not entitled to the Orders sought herein.

It is her case that on 9th December, 2009, Mr. Odindo was issued with a warning letter due to loss of 14 GCI sheets 21/2m x 28. On 19th April, 2010, the grievants were given warning letters due to the loss of an injector pump for a Massey Ferguson tractor that went missing from the stores they worked.

The respondent's other case is as follows;

9. Sometime in June 2012, the Respondent placed an order for steam fittings with Spirax Sarco Ltd. For the Respondent's Kepchomo factory steam line.
10. In October 2012, the Grievants received the steam fittings at the Respondent's Group Central Workshop's main store. See Appendix 1; a copy of the supplier delivery note.
11. In June 2013 when the steam fittings were being installed, the Respondent discovered that there were insufficient steam fittings to complete the work.
12. Upon checking the main stores it was discovered that a number of the steam fittings that had been received by the Grievants in the Group Central Workshop's main store were missing.
13. The Respondent through its officers conducted investigations and confirmed that the steam fittings were missing and not misplaced. The value of the missing steam fittings was Kenya Shillings 2,232,279.95. See Appendix 2; a copy of the valuation report for the lost items.
14. A number of employees were interviewed in an effort to ascertain the events leading up to the loss of the steam fittings. The employees recorded statements and signed them as a true record of the interviews. Police officers from CID were called in and confirmed that there was no sign of forceful entry. See Appendix 3; copies of statements by the interviewed employees.
19. The Respondent considered the representations made at the said hearing and in a verdict issued on 31st July 2013 all the charges leveled against the Grievants were confirmed. They were informed of their right of appeal. See Appendix 8; copies of the verdicts
20. The Grievants vide letters dated 2nd September 2013 appealed the decision of the disciplinary hearing. See Appendix 9; copies of the appeal letters
21. The Respondent scheduled an appeal hearing which was held on 11th September 2013 and duly notified the Grievants vide a letters dated 9th September 2013. They acknowledged receipt of the appeal notifications and confirmed attendance of the hearings. See Appendix 10; copies of the appeal hearing notifications and acknowledgement letters.
22. The appeal hearings were held on 11th September 2013 as scheduled and were conducted in a fair and impartial manner which it was concluded that the charges had been proven on a balance of probabilities and thus the decision to summarily dismiss them was upheld. See Appendix 11; copies of minutes and the verdict of the appeal hearings
23. Following the outcome of the disciplinary process, the Grievants were summarily dismissed vide letters dated 26th September 2013. See Appendix 123; copies of summary dismissal letter
24. Thereafter, the matter was referred to the Minister for Labour who appointed a Conciliator to help resolve the dispute. The parties met on 30th October 2014 for the purpose of conciliation but failed to agree.

The issues for determination therefore are;

1. Was the termination of the employment of the grievants 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 grievants was wrongful, unfair and unlawful. The claimant in her written submissions dated 16th February, 2018 reiterates her case as pleaded and presented. It is the claimant's submission that investigations conducted by the respondent were discriminatory, selective and targeted to procure the dismissal of the grievants. These investigations did not involve everyone who had access to the store where the steam fittings were kept. The store keys were always in the custody of the store manager and the accountant. This dismissal flouted the provisions of sections 43 (1) and 45 (1) and (2) of the Employment Act, 2007 which provides as follows;

43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

45(1) No employer 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. That the reason for 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 submits a contravention and breach of section 41 of the Employment Act, 2007 on procedural fairness. This was occasioned by the respondent's bar of the grievants access to fellow employees who were potential witnesses in their favour until after the disciplinary hearing. Section 41 provides as follows;

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42 (1), an employer shall, before terminating 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.

(2) 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.

On this the claimant seeks to rely on the authority of **Rebecca Ann Maina & 2 Others v. Jomo Kenyatta University of Agriculture & Technology (2014) eKLR** where the court observed that for a disciplinary process to pass the fairness test set out in Section 41 of the Employment Act as follows;

...the charges made against the employee must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.

It is her further case that the disciplinary hearing was intimidating to the grievants due to the absence of their witnesses and also that the reasons for termination were not established in compliance with section 43 of the Employment Act, 2007.

The claimant further faults the respondent's case by submitting that the documents filed by the respondents are inadmissible for being uncertified copies. On this she relies on section 68 of the Evidence Act, Chapter 80, Laws of Kenya which provides as follows;

68. Proof of documents by secondary evidence (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases – 68 (f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence (c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.2(c)

Further, the claimant submits that these documents are not letter headed and therefore of doubtful sources and should be struck out and disregarded in evidence. She particular takes issue of the letter addressed to Leonard Odindo dated 9th December, 2009 which letter was not signed by him. The signature affixed to this letter is denied by the grievant and in all, the grievants deny responsibility for transporting the GCI's sheets received at Kapsumbeiwa. She therefore forments and submits a case of unlawful termination of employment.

The respondent in her written submissions dated 11th May, 2018 submit a case of lawful termination of employment. It is her case that the grievants being experienced store clerks had vast knowledge of the respondent's policies and operations. Leonard Odindo had been in employment for sixteen years at the time of his summary dismissal, twelve of which he served as stores clerk. Michael Njoroge had put in fifteen years, seven of which he was Stores Assistant with the respondent. This is confirmed by a letter dated 8th March 2006 by Odindo.

The respondent's case is further presented as follows;

Leonard Odindo further confirmed by the letter dated 8th March 2006 that he had long experience in stores handling, having served as a Stores Clerk at Kibwari Estate from the year 2001. (see a copy of the letter at page 1 of the Respondent's Supplementary bundle of documents dated 3rd May 2016 and filed on 6th May 2016).

In particular, the Grievants admitted during their disciplinary hearings that they failed to undertake the documented procedures and/or common practice to control the physical movements of the goods. The Grievants additionally confirmed that they failed to give adequate explanation for the omissions, which acts and omissions to fraudulent activities against the Respondent. (see pages 77 – 78 of the Respondent's Bundle of documents).

Leonard Odindo further confirmed that both Grievants, in their positions as Store Clerks, were in charge of the stores and that when items in the store disappear, the store clerks should be held responsible. (See page 92 of the Respondent's Bundle of documents). Michael Njoroge on the other hand confirmed that in all stores it was the responsibility of the Store Clerks and the Store Manager to keep records of items in the stores (See page 101 of the Respondent's Bundle of documents). He further stated that though they were not exclusively responsible for the dispatch of the items exclusively, he was honestly sorry for the loss of the items. (See page 105 of the Respondent's Bundle of documents).

Based on the reports, the Respondent suspended four members of the Group Central Workshop staff, the Grievants herein included. They were all required to attend disciplinary hearings. (See pages 62 – 65 of the Respondent’s Bundle of Documents). The submission by the Grievants that they were singled out for dismissal is therefore without an iota of truth, misleading and is in bad faith. At the close of the disciplinary hearings, all charges against the Grievants were confirmed and the panel in its verdict recommended the summary dismissal of the Grievants.

The respondents again submit that the grievants in cross-examination confirmed familiarity and knowledge of their duties and also failure to undertake documented procedures and common practice to control the physical movement of items in the respondents Group Central Workshop Main Store resulting in the loss of Kshs.2.2 million. The latter was also acknowledged and admitted at the disciplinary hearing.

The respondents also express the provisions of section 44 (4) (g) of the Employment Act, 2007 being the ingredients of a case for gross misconduct as follows;

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause:

(e)...

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.

The respondent further sought to rely on the authority of **Joseph Wambugu Kimenchu vs Attorney General [2013]eKLR** where the court observed as follows;

“...strict rules of evidence and procedure would not apply to internal disciplinary process...in disciplinary proceedings all the management needs is some preponderance of probability that the accusations leveled might have occurred.”

In an expression of the requirement of procedural fairness she sought to rely on the authority of **Anthony Mkala Chitavi v Malindi Water Company Ltd [2013] eKLR** where the court observed thus;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

The cases of the parties lead to a conclusion of a case in favour of the respondent.

This is because her case overwhelms that of the claimant. It is clear and discernible from the evidence tendered that the grievants were charged with engaging in acts and omissions amounting to negligent and fraudulent conduct against the respondent. This is overtly admitted by the grievants in their case and even at the hearing. Thanks to the elaborate disciplinary proceedings exhibited in the respondents list of documents this comes out very clearly. On a balance of probability and preponderance of evidence, this case tilts in favour of the respondent. I therefore find a case of lawful 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 not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

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 20th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ashubwe instructed by Eshiwani Ashubwe & Company Advocates for the claimant.

2. Mr. Ng’eno instructed by Kaplan & Stratton Advocates for the respondent.