



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 242 OF 2015

(Before D. K. N. Marete)

MICAH KIPKOECH TERER.....CLAIMANT

VERSUS

THE SOTIK TEA COMPANY LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of an Amended Memorandum of Claim amended on 27th March, 2014. It does not disclose an issue in dispute on its face.

The respondent in a Respondent's Amended Memorandum of Defence dated 30th May, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that in the year 2009, he was employed by the respondent as an Assistant Manager in the Engineering Department. He served diligently and thereby earned commendation. He continued a cordial relationship until the 21st February, 2013 when upon promotion of various employees, he wrote a letter questioning the criteria of promotions in which he was not a beneficiary. He felt that this was unfair as he had performed exceptionally well which included working beyond normal working time yet he was not considered or recognized. This is as follows;

7. The Claimant's position was that a reward process in any organization should be done in a transparent manner where promotions are done after due staff appraisals had been conducted a practice that was being done in the case of the Respondent's unionisable employees.

8. The Claimant had always done his work as per schedule and did any tasks given to him satisfactorily and he is always known to work for on average for 12 hours per day.

The claimant's further case is that instead of addressing the issues raised in the letter of complaint, the respondent opted to institute disciplinary proceeding against the claimant by an issue of show cause letter. This was witch hunt and a smokescreen tailored towards nailing and getting rid of the claimant. He thus expresses this;

23. The Respondent's actions are actuated by malice, was a complete witch hunt and trampled on the Claimant's Constitutional rights.

24. The conduct of the Respondent was unlawful, premature and without any just cause and incomplete disregard of the rules of natural justice.

25. The Claimant avers that at all times he performed his duties to the best of his capabilities and to the betterment of the Respondent.

26. The Claimant avers that he has faithfully performed his duties over four years of employment with the Respondent and that he has never been involved in any activities that could have amounted to gross misconduct to the detriment of the Respondent which would constitute justifiable/lawful grounds for his dismissal.

27. At the time of the aforesaid termination, the claimant was earning a consolidated sum of Kshs.108,269/=(See Annex 9)

He prays thus;

32A By virtue of the unfair and unlawful termination, the Claimant has lost his dues in form of compensation for breach of contract, underpayment and unpaid Bonus:-

a. Compensation for breach of contract	Kshs.1,824,244/=
b. Underpayment (Overtime)	Kshs.11,620,072/=
c. Unpaid Bonus	Kshs.400,000/=
TOTAL	<u>Kshs.13,844,316/=</u>

Claimants Humble Prayers

A (i) A declaration that the termination of his contract of employment was unconstitutional, unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs.13,844,316/= as aforesaid.

B. Costs of the claim and interest

The respondent's case is a denial of the claim in toto.

4. The Respondent states that the Claimant vide its letter dated Thursday 21st February 2013 complained to the Respondent's Senior Engineering Manager that he had allegedly been overlooked in the recent promotions that had been carried out in the Respondent's company and that the promotions were therefore unjustified. [Please refer to Appendix 2 of the Claimant's bundle of Documents attached to the Memorandum of Claim]

5. Before the Respondents management could respond to the aforementioned letter the Claimant sent the Respondent's Deputy General Manager – Field department (hereinafter referred to as "DGM-F", Mr Silas Njibwakale, an abusive and aggressive text on 24th February 2013 in which he alleged inter alia that this manager intended to frustrate him. A transcript of the said text is as follows;

"Silas, since I came to tis company I had bn hearing tat u r gud in frustrating people especially thos who are ambitious in life. Many people have left This gd company because of u. I wil nt b wrong to assume tat u r te one behind my problem. My performance in ti co speaks fo it self. I av put all systems n place to propel tis co fwd n achieve its desitned goals and objectives. I follow companies set procedures n policies all te time. Pls kindly don't target me for being jealous of my achievement n that of my family cox u wdnt succeed- I USUALLY PRAY TAT MY FUTURE WILL NOT B PREVENTED BY ANYONE. We r all here for a living. Let credit b given wher it is due n do not interfere where u wil nt benefit. I hav some resentment for learning tat u r want to frustrate me! Please enda polepole n lets do our work."

10. In his response, the Claimant had also state inter alia that he felt annoyed, ill-treated and resentful towards the Respondent. Consequently, the Senior Engineering Manager requested the Claimant vide email to take an ex-gratia break from 1st March 2013 to 7th March 2013 and return to work on 8th March, 2013, when he would have a meeting with the Managing Director to discuss the various issues he had raised.

Annexed hereto and marked Annexure 3 is a copy of the e-mail dated 28th February 2013 by Senior Engineering Manager.

14. After the meeting, the Respondent was of the view that the Claimant's conduct towards his superior was without any merit and was disrespectful. Further, the electrocution and death of the Respondent's electrician was a serious issue which had partly been caused by the Claimant's negligence. The Respondent therefore issued the Claimant with a notice to show cause letter in which it informed the Claimant that the Respondent was considering terminating him from employment and that he should attend a hearing on 17th April 2013 in which he had a representative on the reasons for termination.

16. The Respondent also carried out further investigations into the issues that the Claimant had raised and in particular into the tragic accident had occurred. The Respondent found entries in the Claimant's duplicate book in which he had directed the payroll clerk to deduct money from a subordinate employee within the Claimant's department. This duplicate book had been submitted by the Claimant to the management during the preliminary accident investigation meetings. It was discovered that the Claimant's wife operated a business in which she let money to the Respondent's employees under an interest charging scheme at exorbitant rates and that the Claimant in turn made arrangements do have the loan sums deducted from employee's pay packet without their approval. The Claimant's request for deduction of the loan amounts from the employees salary and the said deductions be given to him gave rise to a conflict of interest.

Annexed hereto and marked Annexure 8 is a copy of the extracts from the Claimant's day book relating to the employee deductions.

17. During the notice to show cause hearing of 17th April 2013, the Respondent informed the Claimant of its findings on the potential conflict of interest arising from his request for money to be directly deducted from an employee's final dues to be paid to his wife. The Claimant was given time to prepare to make representations on this particular issue and he was heard

on the same at 3 p.m of that day.

23A. *The Respondent also avers that the issue of the investments by Mr. William Chepyegon and Mr. Munyao in the Claimant's wife's loan sharking business is immaterial. If indeed it was genuine claim and/or the Claimant was of the view that there were any issues which would have created bias against him, he should have raised the same during the various notice to show cause hearings and/or in his several letters and e-mails to the management. This claim is an afterthought, in bad faith and appears to be merely a witch-hunting exercise by the Claimant.*

24C. *Without prejudice to the foregoing, the Respondent further avers that the Claimant's claim for overtime dues between the year 2009 and August 2010 are time barred.*

24D. *Further this claim is merely an afterthought as the Claimant had never made any claims prior to his termination for the same. In particular, in his e-mail to the Respondent dated 28th February 2013, he claimed that he worked voluntarily for long hours due to the passion he had for his duties and that he would not claim overtime. Please see annexure 2 page 7 of the Amended Memorandum of Defence. The Claimant reiterates this comment in Paragraph 29 of the amended Memorandum of Claim where he states that he was engaged to work for 8 hours but worked for an average 12 hours due to the passion he had for his job.*

25. *In the foregoing, the Respondent denies that the Claimant is entitled to the orders sought in its Memorandum of Claim on the following grounds:*

i. The reasons for the termination were fair and justified. The Claimant had sent an abusive text message to the Respondent's deputy general manager – field department. The Claimant had also performed his duties negligently which resulted in the electrocution of one of the Respondent's employees. Finally, the Claimant had also given unlawful instructions for the eviction of one of the Respondent's subordinate employees.

ii. The termination procedure was fair and in accordance with the provisions of the Employment Act. The Respondent explained to the

Claimant the reasons for which he was being considered for termination and gave the Claimant several opportunities to make representations both in writing and verbally on the allegations that had been made against the Claimant. It is only after hearing the Claimant and considering the representations that he had made that the Respondent terminated him from employment.

The matter came to court variously until the 6th of December, 2017 when the parties decided to proceed to a determination by way of written submissions. This was in the stead of a hearing which had been earlier initiated.

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 claimant was wrongful, unfair and unlawful. The parties hold opposing positions on this.

The claimant in his brief written submissions dated 13th June, 2018 reiterates his case of unlawful termination of employment. It is his case and submission that he performed his duties perfectly and even outdid himself by offering an average of twelve working hours per day. He submits non compliance with the requirements of substantive fairness the threshold of section 43 of the Employment Act, 2007. He also seeks to rely on the authority of **Moses Kaunda Moro v. CMC Motors Group Ltd [2013] eKLR** which authority superimposed that of **Walter Ogal Anuro v. Teachers Service Commission [2013] eKLR** in restating a case of substantive justification and procedural fairness in cases of termination of employment.

The respondent in her written submissions posited as follows;

1.2 The Respondent Company filed an Amended Memorandum of Defence dated 30th May 2014 in which it states that the Claimant's contract was terminated on the basis of his sending an abusive text message to the Respondent's deputy general manager and further the fact the Claimant poorly performed his duties leading to the electrocution and death of one of the Respondent's employees. The Claimant had also abused his power as an Assistant Manager to recommend the dismissal of employees and the deduction of loans owed to his spouse from employees salaries. The termination process followed by the Respondent was fair as the Claimant was given several opportunities to give representations both in writing and in disciplinary hearings. It is the Respondent's case that the termination of the Claimant's contract was justified and carried out in accordance with the provisions of law.

The respondent further submits a case of lawful termination of employment and buttresses this by relying on section 45 (1) of the Employment Act, 2007 which provides 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-

i. that the reason for the termination is valid;

ii. that the reason for the termination is a fair reason- related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and

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

It is her case and submission that the reasons for terminating the claimant's employment were valid and fair. The disciplinary and termination process pursued was also fair and in accordance with the provisions of the Employment Act, 2007.

The respondent further sought to rely on section 43 of the Employment Act, 2007 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

It is her submission that the employment of the claimant was terminated due to reasons genuinely believed to exist by the respondent.

The termination of the employment of the claimant by the respondent also observed the requirements of sections 41 and 43 of the Employment Act, 2007 as this are well enunciated in the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the court observed as follows;

“... 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.”

The respondent also sought to rely on section 44 (4) (d) of the Employment Act, 2007 which provides 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:-

c. ...

d. an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;

This is illustrated as follows;

3.2.1.9 The Respondent humbly submits that the Claimant's text message to his superior, Mr Silas was abusive and that the Claimant used insulting language. The Claimant did not deny sending the text message to the Mr Silas during the disciplinary hearing. Further, his justification and excuses for sending the message were also baseless and unreasonable. The Respondent in the circumstances submits that the termination of the Claimant's contract on the basis that he sent the abusive message to Mr Silas was valid.

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.”

A relook at the submissions of the claimant brings out an appropriate case of a statement on the requirements for lawful termination of employment. However, this must be distinguished in order to come out clean in the circumstances of this case. Here, we are treated to a situation where termination of employment

arose in compliance with the dictates of the Employment Act, 2007. The claimant has not established a case of unlawful termination in his evidence. Not in the least. His submissions and authorities are therefore not applicable to the circumstances of his case.

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 claimant was taken through appropriate disciplinary process out of which he was found culpable of the offences charged. The entirety of the respondent's evidence brings out a case of compliance with section 41, 43, 44 and 45 of the Employment Act, 2007. The claimant was served with a show cause letter indicating the reasons for which the respondent contemplated termination. He was taken through disciplinary proceedings in which he was not able to exonerate himself from the accusations leveled against him. The claimant's case is disabled in a rebuttal of the solid case of the respondent. 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. Mr. Obosso holding brief for Mr. Ombui instructed by E.M. Juma, Ombui & Company Advocates for the claimant.
2. Mr. Koech holding brief for Mrs. Kimani instructed by Kaplan & Stratton Advocates for the respondent.