



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 191 OF 2015

(Before D. K. N. Marete)

STEPHEN NYALENDA ADUOL.....CLAIMANT

VERSUS

TIMBER TREATMENT INTERNATIONAL LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 16th July, 2015. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;
- c. Whether the claimant is entitled to an award of certificate of service;
- d. Whether the claimant is entitled to an award of compensation for breach of contract and
- e. Who should pay costs of the suit;

The respondent in a Replying Memorandum dated 30th July, 2015 denies the claim and prays that the same be dismissed with costs.

This matter is consolidated with ELRC cause No.s 192/2015, 193/2015, 194/2015, 195/2015 and 198/2015 with this as the lead case.

The claimant's case is that on 1st February, 2014 he was employed by the respondent as an Assistant Forester at a salary of Kshs.45,000.00.

The claimant's further case is that he served the respondent dedicatedly, unsavory and without working until the date of his unprocedural dismissal on 18th June, 2015. This was on allegations of incidences that took place at James Teko's Farm in Murkwijit West Pokot on 11th June, 2015. The claimant deems the termination unfair, unprocedural, unlawful, malicious and calculated to form a basis to unlawfully summarily dismissing him on the following grounds;

- i. No evidence of the alleged taking of poles of the respondent by the claimant from the farm of Mr. Teko as indicated in the summary dismissal letter was availed to the claimant;
- ii. No evidence of investigation was availed to the claimant;
- iii. The claimant did not admit receipt of any kind of money from anyone as alleged in the summary dismissal letter;
- iv. The claimant was not and has never been party to the alleged team of unknown persons who took respondent's poles from Mr. Teko's farm;
- v. The summary dismissal letter alleged that the Claimant was part of the team that took respondent's poles from Mr. Teko's farm particulars of the alleged poles and the persons of the unknown team were not given;

- vi. To date no report has been made to the police by the Respondent regarding the alleged taking of poles by the claimant as is the due process of the law;
- vii. To date no criminal charges have been pressed against the Claimant by the respondent regarding the alleged theft of the respondent's poles;
- viii. Particulars of the alleged receipt of money and loss of poles as alleged in the summary dismissal letter were never availed to the Claimant;
- ix. The Claimant was never accorded a hearing nor an opportunity to call his witness in his defence;
- x. The Respondent had in the past and while in duty entrusted the Claimant with the Respondent's valuables and no allegations of theft had ever arisen;
- xi. The work station of the Claimant was in Eldoret, in Uasin Gishu county whereas the alleged taking of poles is alleged to have occurred in Murkwiji West Pokot County;
- xii. No show cause letter was availed to the claimant to answer to the allegation of receipt of money and taking of poles.
- xiii. The claimant further relies on his witness statement filed herewith.

7. THAT the Claimant avers that the termination was unfair because the Respondent did not act in accordance with justice/equity and it failed to prove that the reason for termination was valid thus violated section 45 (2) of the Employment Act 2007.

8. THAT the Claimant avers that termination was unlawful, unprocedural, unfair and/or illegal on the following grounds:-

- i. The Respondent did not give the Claimant Termination notice as provided by Section 35 (1) c & 36 of the Employment Act;
- ii. The Respondent denied the Claimant employment without following the procedure laid down in the Employment Act specifically the procedure laid out in section 15 and 41 of the Employment Act;
- iii. The Respondent terminated the Claimant's employment without proving that the reason for termination was valid as provided under section 43 and 45 of the Employment Act;
- iv. The Respondent failed to pay the Claimant his 12 months wages for loss of Employment as provided under Section 15 of the Labour Institutions Act and section 49 (c) of the Employment Act
- v. The Respondent failed and/or neglected to give the Claimant a Certificate of Service contrary to Section 51 of the Employment Act;
- vi. The Respondent failed and/or neglected to give the Claimant his leave travel allowance and service benefits;
- vii. The respondent breached the contract of employment and continues to do so to date.
- viii. The Claimant was never accorded a hearing nor an opportunity to call his witness in his defense as per section 41 and 44 of the Employment Act.

9. THAT the Claimant avers that the conduct of the Respondent is demeaning, punitive, contravenes constitutional safeguard on workers right to earn a living and the same should not be encouraged in a civilized nation.

He prays as follows;

- a. the claim be allowed in entirety with costs be borne by the respondent;
- b. Any other and further relief as the honorable court deems fit and just to grant.

c. *CLAIMS:-*

1. A Declaration that the summary dismissal of claimant from employment by the respondent was malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;
2. Compensation for breach of contract;

3. A maximum compensation of 12 months as per Section 49 (c) of the Employment Act and Section 15 of the Labour Institutions Act.;

4. A Certificate of Service as per Section 51 of the Employment Act;

5. Costs and interest of this Suit from the date of filing until its full determination

BROKE DOWN AS FOLLOWS;

1. Days worked – 1st – 18th June, 2015 = $\frac{450,000}{30} \times 18$ days Kshs.27,000.00/-

30

2. House allowance for June, 2015 = 15000 – 5000 Kshs.1000/=

3(a) Annual leave for 2014 balance 905 days = $\frac{45000}{30} \times 9.5$ Kshs.14250.00/=

(b) Annual leave pro-rate = 6 months

$2.16666667 \times 6 \times 1500$ Kshs.19500.00/-

4. Leave travelling allowance Kshs.2000.00/-

5. One month notice Kshs.45000.00/-

6. Service for the completed year Kshs.45000.00/-

7. 12 months compensation for wrongful termination

$45000 + 15000 = 60,000 \times 12$ Kshs.720,000.00/-

8. Loss of earnings from breach of contracts

from 19th June 2015 to 1st February, 2017

June 2015 salary balance + 45000 – 27000. Kshs.18,000.00/

July 2015 to February 2017 = 20 months

$45,000 + 10000 = 55000 \times 20$ Kshs.1,100,00/-

TOTAL CLAIMS

Kshs.2,000,750/=

The Respondent's case is a denial of the claim. This is particularized as follows;

- He was not employed as an Assistant Forester at a salary of 45,000.00
- Dedicated, unsavory and a blemish free stint of service is denied.
- He was dismissed as a consequence of incidences at Teko's Farm on 11th June, 2015 as claimed.
- Particulars of unlawfulness
- Contractual terms of employment with a contract ending on 01.02.2017
- Violation of the claimant's basic rights at Article 41 and 77 of the Constitution.
- Violation of S.87, 15, 35, 41, 44, 45, 47, 49 and 51 of the Employment Act, 2007.
- Prayers sought.

It is the respondents penultimate case that the claimant has no reasonable cause of action and that the claim is an abuse of the process of court and should be dismissed with costs.

The matter came to court variously until the 3rd February, 2017 when it opened for hearing.

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 employment of the claimant by the respondent was wrongful, unfair and unlawful. At the hearing, the claimant testified in reiteration of his case for unlawful termination of employment.

It was his testimony that he worked for the respondent from 1st January, 2014 to 25th June, 2015. He was designated Assistant Forester with a salary of Kshs.60,000.00 all inclusive.

CW1 – Stephen Nyalenda Aduol, the claimant further testified that he was terminated from employment of an incident occurring in West Pokot. This was on allegation of stolen poles on the farm of James Teko. At the time of the loss he was not in West Pokot but in the office. He further testified that he was asked whether he knew the team members who participated in this but answered in the negative. He thereafter made a statement under duress and handed it to the Human Resource. He was locked up and was under pressure when so doing.

The claimant's further testimony is that he was neither heard nor issued with a show cause letter. He was not given any write up on the matter to respond to.

On 19th June, 2015 he was asked to report to Eldoret Police Station for a statement. On 25th June, 2015 he was issued with a letter of termination. His further testimony was that poles become the property of the respondent on delivery and receipt by the respondent at Eldoret. In the instant case no company property was stolen and further Mr. Teko had not complained on this. He did not receive a show cause letter but only a letter of termination.

When the matter resumed for hearing on 26th July, 2017 the respondent testified that he did not steal any electricity poles. He was arrested at Eldoret on 25th June, 2015 and incarcerated at West Pokot Police Station – Kapenguria where he was held in custody for a whole weekend. The claimant *in toto* denies any knowledge of the eventualities at Mr. Teko's Farm or having received any money from any quarters on account of the stolen poles. He also denied having received any investigation report on the theft of posts.

The claimant further testified that he has not received a certificate of service and neither has he secured alternative employment.

On cross-examination the claimant testified that he unemployed and job seeking with occasional lapses into manual labour. The claimant further testified that he recognized his contract of employment in which he earned Kshs.45,000 besides gratuity, leave and house allowance per month. He was housed by the respondent and therefore not entitled to house allowance. The claims made are captured in the contract of employment which is symbolic of the legal engagement *inter partes*.

The claimant further testified that he was the head of the team that went to Kapenguria and had taken it there. He ascertained that there were trees to be felled and returned to the office. He left the team in the hands of Wanjala George -a driver and equal to the task.

CW1 further testified that he knew the other claimant on this subject. They were however not on the same trip but had travelled together on the first day. He did not know that there was a problem at Kapenguria until 15th. He denied receiving a show cause letter. He however admitted having seen it for the first time with his advocate. He did not attend any meeting at all and neither did he admit liability for theft.

CW2 – Peter Musosia Manga duly affirmed testified that he was the branch secretary for Kupripupa. This union had a Recognition Agreement and Collective Bargaining Agreement (CBA) with the respondent – see annexure 4 of the claim. He further testified that he knew the claimant who was an employee of the respondent and a member of the union.

His further testimony was that the Collective Bargaining Agreement was effective from 1st August, 2012 and lasted two years to August, 2014. This encompassed the period of termination.

His other testimony is that he was not invited for any disciplinary hearing and neither was the union consulted. The termination process violated the CBA at clauses 16, 17 and 19. These were on warning procedure, suspension and termination of employment respectively. The CBA provides for terminal benefits under clause 18 and 20. These are notice period, gratuity and wages. No wages were paid. Other non payments were;

- Wages for 1st – 15th June.....Kshs.27,000.00
- House allowance for this periodKshs.10,000.00
- Balance for days worked in 2014.....Kshs.14,250.00
- Prorata leave for 2016 (6 months).....Kshs.19,500.00
- Leave travelling allowance.....Kshs.2,000.00
- Pay in lieu of notice.....Kshs.45,000.00
- One year completed serviceKshs.45,000.00
- 12 months compensation.....Kshs.720,000.00
- Certificate of service to all employees.

The claimant in his written submissions dated 7th May, 2018 supports his case for unlawful termination of employment by relying on Section 45 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. 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.

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

(a) the termination is for one of the reasons specified in section 46; or

(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.

He further relies on section 41 and 43 of the Employment Act thus;

41(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 in 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 provisions 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, chose by the employee within subsection (1) make.

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.

The claimant further seeks to rely on the authority of **Walter Ogal Onuro 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 satisfaction and procedural fairness. Substantive justification has to do with the establishment of a valid reason for termination while procedural fairness addresses procedure.”

Again, in the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative.

(d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The claimant further raises and submits the following issues that remain unanswered by the respondent’s case and evidence;

a. How many poles were stolen?

b. What were the sizes of the poles allegedly stolen?

c. What means was used to ferry the poles?

- d. If at all tractors and lorries were used, what is their registration numbers?
- e. Where are the stolen poles?
- f. The summary dismissal letter alludes to unknown person. Where is the investigation report to ascertain the names and whereabouts of this person?
- g. Why were the claimants arrested, detained for several days and later released without being charged for the alleged theft of respondent's poles?
- h. From whom did the claimant's receive money from?
- i. Whose poles were stolen?
- j. If at all the respondent had poles from Teko's farm, where is the evidence of ownership?
- k. Why did the respondent fail to record statements in support of this case from Mr. Teko?
- l. Why is Teko silent? No complaint of stolen poles from Mr. Teko the owner of the farm.
- m. Where are the eye witnesses?

The respondent in her brief written submissions dated 21st May, 2018 discounts a case for unlawful termination of the employment of the claimant. This is as follows;

In his testimony, the claimant admitted that he was dismissed from employment as a result of what took place in Mr. Teko's farm, Kapenguria where poles which had been bought by his employer were stolen by his group and sold. He was the head of the team at that time and bore more responsibility. He admitted to have written a statement to the Human Resource Manager for which he did not disclose the content. When his attention was drawn to his letter dated 17th June, 2015, which is his own clear admission of wrong-doing, he denied. Having failed to produce his own statement to the HR, it implies that if he did, it would have been detrimental to his claim. S. 44 of the Employment Act No. 11 of 2007 (Revised 2017), says that an employer has a right to dismiss an employee summarily.

S.44(g) provides a good ground for summary dismissal where;

“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 employers' property”

The threshold here is that of 'mere suspicion'. He was in charge of the team that were to fell poles bought by the respondent on Teko's farm. He breached the trust bestowed on him. The respondent was served with show cause letter on 16/6/2015 and was heard on 17th June, 2015 whereby he admitted to have received proceeds of the poles. He was summarily dismissed on 18/6/2015. So it is not true that he was not served with the necessary notices or heard.

The respondent in a respondent list of documents dated 7th December 2015 enlists the following documents in support of lawful termination of employment. These are;

1. Contract of employment
2. Show cause letter
3. Summary dismissal
4. Statements recorded on 15th June, 2015
5. Reply to Notice to show cause.

The statement recorded on 15th June, 2015 implicates the claimant and his team in the theft and sale of the poles now complained of and leading to his summary dismissal.

The respondent further annexes letters of apology for the theft by Evans Wafula Wamalwa, George Wanjala, Hosea Kangogo, David Manyonge, Ronald Ngala, Andrew Wanyonyi and Abisai Mengesa. These are in response to show cause letters by the claimant's team members and clearly implicating the claimant and Mr. Teko's farm manager as masterminds of the theft of poles.

The case, testimony and evidence of the claimant is unrealistic and does not add up. His denial of receipt of show cause letter seems a mere denial. This is deduced from his team mates answers on show cause letters which is not rebutted in evidence. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for consideration is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination he is not entitled 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 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Kipkeni instructed by Kipkeni & Company Advocates for the respondent.