



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 916 OF 2016

GEORGE MAEBA MAGETO.....CLAIMANT

VS

UNILEVER TEA (K) LIMITED.....1ST RESPONDENT

HILLARY LOMBARD.....2ND RESPONDENT

JUDGMENT

Introduction

1. George Maeba Mageto, the Claimant in this case was an employee of Unilever Tea (K) Limited, the 1st Respondent herein. He brought this claim after being summarily dismissed on 5th September 2016. The 2nd Respondent is sued in her capacity as an independent investigator into allegations leveled against the Claimant, which eventually led to his dismissal.

2. The Claimant’s claim is contained in a Memorandum of Claim dated 30th November 2016 and amended on 31st October 2017. The 1st Respondent’s defence is contained in a Memorandum of Reply dated 22nd March 2017 and amended on 16th October 2017. The 2nd Respondent filed a Memorandum of Reply on 24th March 2017.

3. When the matter came up for hearing, the Claimant testified on his own behalf and thereafter called his wife, Marion Wangoi Maeba. The 1st Respondent called its Assistant Human Resource Business Partner, Zakaria Kirui. The 2nd Respondent did not testify.

The Claimant’s Case

4. The Claimant was employed by the 1st Respondent in the position of Weighing Clerk. He worked until 5th September 2016 when he was summarily dismissed on allegations of defilement.

5. The Claimant states that the said allegations were fabricated to force him out of employment. He maintains that the dismissal was unlawful and unfair. He now seeks the following:

- a) Salary for days worked.....Kshs. 3,000
- b) 2 months’ salary in lieu of notice.....36,000
- c) Unpaid leave allowance for 1 year.....18,000
- d) Gratuity (564x18x22 daysx20).....248,239
- e) 12 months’ salary in compensation.....216,000
- f) Damages for defamation
- g) Letter of service

The Respondents’ Case

6. In its Memorandum of Reply as amended on 16th October 2017, the 1st Respondent admits that the Claimant was its employee. The 1st Respondent states that the Claimant was summarily dismissed on the ground of violation of the Code of Business Principles. The 1st Respondent further states that the Claimant was given an opportunity to respond to the allegations made against him.

7. The 1st Respondent avers that the Claimant's disciplinary hearing and subsequent summary dismissal were preceded by thorough investigations into the allegations leveled against him and an investigation report tabled before the 1st Respondent by the 2nd Respondent. The Claimant was issued with a show cause letter informing him of the allegations that had been levelled against him and inviting him to submit a written explanation as to why disciplinary action should not be taken against him.

8. The Claimant responded to the notice to show cause by letter dated 12th August 2016. The 1st Respondent, being dissatisfied with the Claimant's response, wrote to the Claimant on 15th August 2016, inviting him to a disciplinary hearing on 17th August 2016. The Claimant was given an opportunity to have a fellow employee present at the disciplinary hearing and the Unit Shop Stewards, Isaiah Owuor and Kamau Tai were present at the said hearing.

9. The Claimant was given a complete explanation of the reasons for his summary dismissal in the letter of dismissal dated 5th September 2016. He appealed against the dismissal on 5th September 2016 and by its letter dated 28th October 2016, the 1st Respondent upheld the decision of the Disciplinary Committee and the sanction imposed. The 1st Respondent avers that the Claimant was paid all his accrued dues. He was also issued with a certificate of service.

10. In her Memorandum of Reply dated 22nd March 2017 and filed in court on 24th March 2017, the 2nd Respondent states that she has been improperly joined in these proceedings. She adds that anything done by her in respect of the Claimant's employment and subsequent dismissal by the 1st Respondent was done in her capacity as an independent contractor to the 1st Respondent for which she cannot be held liable.

11. The 2nd Respondent maintains that since there is no pleading of an employment relationship between herself and the Claimant, this Court has no jurisdiction to hear and determine this cause as against her.

Findings and Determination

12. There are three (3) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the 2nd Respondent has been properly joined in these proceedings;
- c) Whether the Claimant is entitled to the remedies sought.

The Dismissal

13. The Claimant was dismissed by letter dated 5th September 2016 stating as follows:

"Dear George,

RE: SUMMARY DISMISSAL

On 11th August 2016 you were issued with a letter that requested you show-cause why disciplinary action should not be taken against you for breach of the following Code of Business Principles.

1. Standard of Conduct: "We conduct our operations with honesty, integrity and openness and with respect to the human rights and interests of our employees."

2. The Code Policy: Respect, Dignity and fair Treatment.

3. Obeying the Law: Unilever "employees are required to comply with the laws and regulations of the countries in which we operate."

*You were asked to submit a written explanation detailing why disciplinary action should not be taken against you for the aforesaid offences. You were further asked to attend a disciplinary hearing that was set for **Wednesday, 17th August 2016 at 9.00 am** at Chemosit club Kapgwen Estate at which time your written explanation and the allegations levelled against you would be discussed. You were advised that you were entitled to bring an employee or a shop floor representative with you in accordance with Section 41 of the Employment Act 2007.*

*Based on the evidence presented by all parties to the Code Committee in the disciplinary hearing held on **17th August 2016**, the Code Committee has concluded that the Code of Business Principles provisions have been breached by you – George Maemba Mageto. This breach constitutes gross misconduct and Unilever has taken the decision to **summarily dismiss** you from employment*

with effect from 5th September 2016, on account of gross misconduct as envisaged by Section 44(4) of the Employment Act 2007 and [Clause 24(g) of the current Collective Bargaining Agreement].

Upon normal clearance, your terminal dues, if any, will be paid as follows:

1. Wages earned up to last working day.
2. Pro-rata leave earned but not utilised
3. Any overtime worked but not paid
4. One Way Bus Fare

You will be issued with a certificate of service. Please note that the above payments are subject to statutory deductions and any monies that you may owe the company.

Yours faithfully

UNILEVER TEA KENYA LIMITED

(Signed)

Stanley Cheruiyot

Estate Manager, Kapgwen Estate

14. The dismissal letter accuses the Claimant of gross misconduct in the nature of breach of the Respondent's Code of Business Principles. The letter itself carries no particulars. However, from further evidence adduced before the Court, it emerges that the Claimant was faced with allegations of defilement of a minor aged two and half years.

15. Section 43 of the Employment Act, 2007 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 the 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.

16. It is now firmly settled that the burden placed on an employer by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate employment. In **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR**, the Court of Appeal affirmed this position by citing with approval the following excerpt from the **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642**:

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably taken another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

17. It has also been established that there is no necessary nexus between internal disciplinary proceedings against an employee and criminal proceedings against the same employee. This was the holding by the Court of Appeal in **Kenya Power and Lighting Company Limited v Aggrey Lukorio Wasike [2017] eKLR**. The law on this issue is that the outcome of a criminal case has no definite bearing on the outcome of disciplinary proceedings because the two processes are distinct and separate with diverse rules of engagement and standards of proof.

18. Regarding the standard of proof and the burden placed on the employer by Section 43 of the Employment Act, I take the view that the reason an employee may be acquitted in a criminal trial and still be found guilty at the work place is that administrative charges are not to be defined as if they were criminal charges. For example, an employee may be acquitted of theft or fraud only to be found guilty of negligence or ineptitude leading to termination of employment.

19. The case before me now is somewhat unique in that the Claimant was accused of a definite criminal offence and a very serious one at that. In the final submissions filed on behalf of the Claimant on 19th June 2018, reference was made to Section 8(1) & (2) of the Sexual Offences Act which provides as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

20. The question is whether, having chosen to pursue a charge of defilement against the Claimant, the 1st Respondent could claim the comfort of a lesser burden of proof other than proof beyond reasonable doubt. I think not. The offence of defilement is extremely serious which in the case of the Claimant could attract life sentence. In fact, the Respondent had no capacity to compromise on the sanction against the Claimant. In other words, the Respondent could not substitute a life sentence with summary dismissal. This is more so because the would be complainant was a third party.

21. The 1st Respondent put up an impressive effort, complete with an independent investigator, to nail the Claimant. The Court was however unable to understand why the 1st Respondent chose not to report the matter to the police or at the very least seek the intervention of state agencies clothed with investigative capabilities. Having failed to do so, the 1st Respondent cannot now say that they were not required to prove the charge of defilement beyond reasonable doubt.

22. Taking the circumstances of this case in their fullness, I have arrived at the conclusion that the 1st Respondent acted irresponsibly and unreasonably. Applying the *range of reasonable responses test*, the Court finds and holds that this is a proper case in which the decision of the employer must be interfered with.

23. The ultimate finding is that the Claimant's dismissal was substantively and procedurally unfair and he is entitled to compensation.

Remedies

24. Further to the foregoing findings, I award the Claimant twelve (12) months' salary in compensation for unfair termination of employment. In making this award, I have taken into account the Claimant's long service, spanning over a period of twenty (20) years as well as the Respondent's conduct in the dismissal transaction.

25. I further award the Claimant two (2) months' salary in lieu of notice as provided in the applicable Collective Bargaining Agreement (CBA). I also allow the claim for gratuity as per the CBA. The claims for days worked and leave pay are admitted and are payable.

26. No basis was laid for the claim for damages for defamation which therefore fails and is dismissed.

The 2nd Respondent's Joinder

27. Regarding the question as to whether the 2nd Respondent has been properly sued, the only thing to say is that there are no specific prayers sought against her. The claim as against the 2nd Respondent is therefore unsupported and must therefore fail.

Final Orders

28. In the end, I enter judgment in favour of the Claimant and against the 1st Respondent in the following terms:

- a) 12 months' salary in compensation.....Kshs. 216,000
- b) 2 months' salary in lieu of notice.....36,000
- c) Gratuity for 20 years as per CBA (18,000/30X18X20).....216,000
- d) Salary for 5 days in September 2016 (18,000/30x5).....3,000
- e) Prorata leave for 2016 (18,000/30x1.75x8).....8,400

Total.....479,400

29. This amount will attract interest at court rates from the date of judgment until payment in full.

30. Since the Claimant's case only succeeded in part, I direct that each party will bear their own costs.

31. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Gichana for the Claimant

Miss Onyango for the Respondents