



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 14 OF 2016

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 14th November, 2014. The issue in dispute is therein cited as;

“Unlawful, illegal and/or unfair dismissal of Leah Oranga.”

The respondent in a Reply to Memorandum of Claim dated 18th December, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the parties herein have a standing CBA that guides the parties terms and conditions of employment.

It is the claimant's further case that on 31st May, 2013 the grievant fell down while carrying out his duties at the respondent's premises and injured her hip. She received treatment for the injury at the respondent's dispensary on 1st June, 2014 and 2nd June, 2014.

The following rendition of events leading to the issues in dispute tells her story;

7.04/06/2013 the grievant was allocated light duties which entailed weeding the flower garden around the divisional office but was unable to perform them owing to her condition. At around 10.00am the grievant fell down and was rushed to the medical facility she had been attended to the previous day.

8. On 05/06/2013 the clinical officer at the respondent's estate dispensary referred her to Nandi Hills Hospital for further management. At this facility, the grievant was treated and a one week off duty recommended for her. When she went back to the respondent's premises, the respondent ignored the recommendation for off duty and allocated her light duties yet again.

9. On 13/06/2013 the grievant went back to Nandi Hills Hospital for X-ray where she was given an appointment for the 20/06/2013 for X-ray purposes. On the scheduled date, the grievant went back

to the hospital where x-ray was conducted. She was advised that she required a belt for the hips. When she went back to the respondent's premises, the respondent declined to provide her with the belt recommended for her.

10. Further, on 20/06/2013 the respondent coerced the grievant to surrender the X-ray film obtained at Nandi Hills Hospital. On 27/06/2013 she went back to the hospital for check up for 08/07/2013 and advised to bring with her the x-ray film prepared by Dr. Akumu. Appendix 3 is copies of her treatment records.

11. On 08/07/2013 she went back to the hospital and was given medication and again advised to procure the hip belt. She went back to the respondent's premises where she informed the respondent about her condition and what the medical personnel at the Nandi Hills hospital had advised.

12. On 09/07/2013 the grievant was verbally informed that a disciplinary hearing against her was scheduled for the same day at 2.00pm in the Senior Managers's office. Since the grievant was ailing, and also due to the short notice she did not attend the meeting.

13. On 10/09/2013 the grievant received a letter for dismissal on account of presenting falsified medical treatment records alleged to have originated from Nandi Hills Hospital with intention of being paid sick offs. Appendix 4 is a copy of the dismissal letter.

14. On 10/07/2013 the grievant wrote a letter to the respondent appealing against the decision of the respondent to dismiss her. This letter was followed up by another letter written by the employees' representative at the respondent's premises. In the said letter, the employees' representatives sought for a meeting to discuss and/or review the decision of the respondent to dismiss the grievant. Appendix 5 is copies of the said letters.

15. On 12/07/2013 the respondent wrote to the grievant notifying her to attend an appeal meeting scheduled for 13/07/2013 at 9.00am. At the said meeting, the respondent declined to allow the employees' representatives the opportunity to ask questions and even stated that the decision to dismiss the grievant could not be changed. This prompted the employees' representatives to write another letter addressed to the respondent. Appendix 6 is copies of the said letter and minutes of the meeting and appendix 7 is a copy of the said letter.

16. On 15/07/2013 the grievant was issued with another letter indicating that the respondent had decided to maintain its earlier decision to dismiss the grievant herein summarily. At the time of her dismissal, the grievant herein was earning a minimum salary of Kshs.10,052.00 although this amount could go higher depending on the green leaf plucked. Appendix 8 is a copy of the said letter and appendix 9 is a copy of the grievants payslip for the month of July 2013.

17. Thereafter, the grievant sought to know the substance of the allegations that she forged medical records. On 22/05/2014 the grievant visited Nandi Hills County Hospital where she had been treated earlier in the months of June and July 2013 to verify the correctness of the medical records therein. At the said facility, the Medical Superintendent at the said facility confirmed that the grievant had visited the facility from 05/06/2013 for treatment and subsequently put on physiotherapy. Appendix 10 is a copy of the said letter and/or medical report.

It is the claimant's case that the termination of her employment was unlawful, illegal and unfair and grounded on falsifying medical records. It is not in dispute that the grievant sustained hip injury through a fall at her place of work but instead of the respondent providing medical support, she was dismissed.

The claimant further avers that the grievant was not informed of her charges before the disciplinary meeting and neither was she afforded adequate time to prepare for her defence.

19. The respondent did not inform the grievant of the offence for which she was to attend a

disciplinary hearing about. Further, the respondent did not afford the grievant with adequate time within which to prepare for the disciplinary hearing having informed her about the meeting about 12.00pm on 09/07/2013 whereas the meeting was to be at 2.00pm. The grievant did not have sufficient time to look for a representative of her choice with whom she could have appeared at the disciplinary hearing with.

20. At the disciplinary hearing, the respondent did not involve the shop stewards as provided under the Collective Agreement signed between the parties herein and as such the grievant was not represented. The decision to summarily dismiss the grievant is therefore bad in law, unlawful, unfair and tainted with illegality.

She prays as follows;

1. An Order directing the respondent to do the following;
 - a. To unconditionally reinstate the grievant herein;
 - b. To pay the grievant for the entire period within which she was dismissed.
 - c. To pay the grievant in respect of all the leave days due to her as the time of reinstatement;
 - d. To pay the grievant leave travelling allowances.
2. Should prayer 1 above fail, an order directing the respondent to do the following:-
 - a. Pay the grievant gratuity for the years she has served with the respondent at the rates provided for under the CBA;
 - b. Pay the grievant house allowance from the time of dismissal until the time judgment;
 - c. Pay the grievant monthly salary for a period of twelve (12) months'
 - d. Pay the grievant in lieu of leave for the period dismissed;
 - e. Pay the grievant leave travelling allowance for the period of dismissal;
 - f. Pay the grievant in lieu of notice of termination;
 - g. Pay the grievant damages for unlawful, illegal and unfair dismissal;
 - h. Pay the grievant the costs of the cause;
 - I. Interest on (a), (b), (c), (d), (e), (f) and (g) above.
 - j) Any other relief this Honourable Court deems fit to grant.

The respondent denies the factual (truthfulness) of the claim and sets out the position as follows;

4. The respondent denies the factual averments contained in paragraph 5,6,7 & 8 of the Memorandum of Claim. The correct facts are set out below;-

- a) The claimant was at work at all times during the diverse dates between 1st June and 6th June, 2013.
- b) On the 4th of June, 2013 when the claimant claims to have attended dispensary, it is clear

that she was working plucking tea to which she plucked a total of 16.5Kgs (Green leaf weight sheet EPK-1 and Attendance checklist EPK-2).

c) On 5th June, 2013 when she claims to have been referred to Nandi Hills District Hospital, she was allocated duties in the nature of slashing boundaries and ravines (Daily Work Allocation sheet EPK-3).

d) The respondent denies that the claimant got injured and particularly that on the 1st of June, 2013 the alleged injury necessitated attendance to the Estate Dispensary, said attendance to the dispensary is further vehemently denied and claimant put to strict proof.

5. The respondent denies the averment of facts carried in paragraphs 9,10,11,12, 13, 14, 15, 16 and 17 and sets the record straight as follows;

i. The claimant made a request for a sick leave on 20th June 2013 on alleged prescription of a doctor at Nandi Hills District Hospital. The medical records from the hospital were taken from the claimant to verify their authenticity. The alleged coercion to surrender the documents is a complete fabrication which is denied in toto.

ii. Paragraph 11 is denied and claimant put to strict proof.

iii. The respondent in pursuit of authentication of the medical records discovered them to be forged and/or fraudulent (letter to hospital ref EPK/KBT/L04/2013 dated 22nd June 2014 EPK-4 and letter from hospital Ref NHDH/GEN/2013 dated 1st July 2013 EPK-5)

It is the respondent's submission/averment that the claimant was informed of the decision of appeal to the effect of upholding dismissal on grounds that no new evidence had been tendered in support of the appeal. She also dismissed the proceedings of the labour officer and reiterates her case that the claimant forged documents to earn paid sick offs.

This matter came to court variously until the 7th December, 2016 when it was heard *inter partes*.

CW1, Leah Oranga duly affirmed testified in support and reiteration of her case. She sought to rely on her witness statement as filed and also enlisted her list of documents in support of her case.

Mr. Mwitwa, Counsel for the respondent also submitted a case of reliance on a witness statement dated 6th June, 2016 and the list of documents annexed to the Reply to claim dated 18th December, 2014.

On cross-examination, the claimant went out to reiterate her case of sickness during the material times of 1st June, 2013 to 7th June, 2013 and hospital attendance thereof and continued sickness between 13th June, 2013 to 26th June, 2013. She also vouched for the truthfulness of her medical records.

It is however noted that at this juncture, the claimant testified that she had not been instructed to fit a hip joint kit. This to me, was a complete departure from her case and therefore debilitating.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant by the

respondent was wrongful, unfair and unlawful. The claimant in her written submissions faults the respondent's case and submits that she was admitted at the District Hospital from 5th June, 2014 to 20th June, 2014 with a diagnosis of a lower back injury. On return to office she was directed to report to the Manager's office where she found fourteen people. The manager informed her that those were the people in charge of health and further took away her X-ray film and medical documents. She was also requested to sign some forms but declined on grounds that she did not know the contents. At this juncture, she requested the involvement of an employee representative at the firm but this was declined by the manager.

The claimant further sought to rely on the authority of **Charles Maina Munyua v. Victory Construction Limited (2013) eKLR** at page 4 where Nduma, J. stated as follows:-

“The employer is thus obliged to produce records to rebut any claims made by an employee. Where the employer fails to produce such records, an adverse presumption may be made in favour of the employee (emphasis ours).”

It is the claimant's submission that the documents presented by the respondent do not indicate the time the grievant reported to or left work. They also do not indicate the time they were prepared except for EPK2 which was signed on 6th December, 2014 and filed on 19th instant. It is her case that these documents were solely prepared for purposes of doing a rebuttal to this cause.

The claimant further urges this court to treat the respondent's evidence with a pinch of salt for lack of material disclosure as follows;

“The respondent in its minutes of the occupational health and safety committee admits that the grievant was attended on 31/05/2013 and 03/06/2013 at its dispensary. It also admits that the grievant was attended at the district hospital and even presented with an X-ray report. Why was treatment records not filed before this Honourable Court? We humbly submit that the respondent's motive is to mislead and misrepresent this Honourable Court.

Secondly, the respondent has produced a letter EPK – 4 addressed to the medical superintendent for Nandi Hills District Hospital in respect of one Leah Orangi's treatment records. The letter is alleged to have been responded through a letter, EPK – 5 on 01/07/2013 and signed for the Medical superintendent. Exhibit EPK – 5 states that Leah Orangi does not appear in the hospital's outpatient register. The correct name of the grievant is Leah Oranga and this is reflected in all the respondent's employment records. We humbly submit that the respondent sought clarity with regard to the wrong person and hence the response from the district hospital.”

The claimant further cites a violation of Section 41 (1) and (2) of the Employment Act, 2007 in that the grievant was not afforded a hearing on the issues leading to her termination. This is as follows;

“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 his explanation.

Notwithstanding any other provisions of this part, an employer shall, before terminating the employment 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.”

She further sought to rely on the authority of **Patrick Abuya v. Institute of Certified Public Accountants of Kenya (ICPAK) & Another (2015) eKLR** at paragraphs 78 and 79 where Honourable Justice Stephen Radido held as follows;

“Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood.

In my view, the respondents action of writing an invitation letter on 3rd March, 2014 inviting the claimant to hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill and motivated and was not in consonance with the statutory requirements of procedural fairness. (emphasis ours)

It was equally not in accord with justice and equity as envisaged by section 45 (4) (b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.

Again in, **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others 2014 eKLR** at paragraph 20 Lady Justice Monica Mbaru stated as follows;

“It is not for the claimant to call for representation. The employer, the respondent herein had the duty to inform the claimant of the allegations against him as remind him of his fundamental right to have at the hearing a person of his choice, his Union

or fellow employee. Whether the claimant was aware of his right or not, the duty vested upon the employer to reiterate these rights and dully accord them to an employee being subjected to disciplinary proceeding such as the claimant faced. Where an employee chooses not to have such representation or the presence of a fellow employee of his choice, then this must be carefully recorded as when raised at any hearing proceedings. In the absence of such confirmation that the claimant was represented by his Union or a fellow employee of his choice present, then the respondent made a fundamental omission in the disciplinary process that does not meet the tenants of section 41 of the Employment Act, thus negating the proceedings and any decisions therefrom. Section 41 of the Employment Act is stated in mandatory terms as;

The respondent in her written submissions recites a case of lawful termination of employment. She relies on the authority of **Mc Kinley Vs. BC Tel, (2001) 2 S.C.R 161, 2001 SCC 38** where the issue of determination was whether an employee’s dishonesty, in and of itself, necessarily gives rise to just cause for summary dismissal the court stated that;

“Whether an employee is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. Just cause for dismissal exists where the dishonesty violates the essential condition of the employment contract, breaches the faith inherent to work relationship or is fundamentally or directly inconsistent. The employee’s obligation to his or her employer.”

An analysis of the respective cases in the parties as presented hereinabove tilts this matter in favour of the claimant. This is because on a test of preponderance of evidence, the claimant’s case comes out neater. The claimant propels a case of unlawful termination of employment and demonstrates this in evidence. She controverts the respondent’s data and evidence on her injury and sickness and the documentation thereof as being dubious and suspect. The respondent does not address any of this.

The respondent in her written submissions brings out a case of dishonesty and mischief on the part of the claimant. This she submits is adequate ground for dismissal. I agree. However, the respondent does not establish in evidence or at all. The case of dishonesty remains a mere allegation. In any event, it is contradicted by the submissions of the claimant. I therefore find a case of unlawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having established a case of unlawful termination of employment she becomes entitled to the relief sought. I am therefore inclined to allow the claim and order relief as follows;

1. Reinstatement of the grievant to her former position in office.
2. The grievant be and is hereby ordered to resume work on 1st February, 2017 at 800 hours.
3. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 31st day of January 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Muli for the Claimant Union.
2. Mr. Mwita holding brief for Kibichiy instructed by Kibichiy & Company Advocates for the Respondent.