



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 85 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS....CLAIMANT

VERSUS

KISII BOTTLERS LIMITED.....RESPONDENT

JUDGMENT

The matter was originated by way of a Statement of Claim dated 7th April, 2016. The issue in dispute is herein cited as;

"Unprocedural/unjustified and unlawful termination of Obed Gesagwa Orora."

The respondent in a Statement of Response dated 25th August, 2016 opposes the claim and prays that the same be dismissed with costs.

The claimant's case is that the parties to the dispute have valid recognition and Collective Bargaining Agreements *inter partes* and the relevant CBA is for the period covering 1st November, 2014 to 30th October, 2016.

It is the claimant's further case that the grievant was an employee of the respondent with a confirmation on 7th November, 2003.

Her other case is that the grievant was issued with a show cause letter on 23rd September, 2015 on allegations of drunkenness. On 25th September, 2015, he was issued with a suspension letter pending investigations.

The grievant was on 1st October, 2015 issued with a letter of invitation to the Staff Advisory Committee meeting on 2nd October, 2015. It is his case that on the 14th October, 2015, he was wrongfully dismissed from service.

The grievant appealed against the decision of termination but no reasons for termination were offered at a meeting on 30th October, 2015. Efforts at reconciliation were also rebuffed by the respondent despite a reference and intervention by the conciliator.

The claimant's further case is that there was no evidence of drunkenness tabled by the respondent or even a valid reason for termination from employment. At the time of termination of employment, the

grievant was under investigation and it was only fair that the investigation report be availed to him. The termination was therefore a frustration of Section 41, 43 and 45 of the Employment Act, 2007 and the ILO Convention No.158.

He prays as follows;

4.01. The Claimant prays to the Hon. Court to declare the Respondents action unfair and unjustified and unlawful.

4.02. That the Hon. Court to direct the Respondent to reinstate the grievant unconditionally.

4.03. That costs of the suit be provided for to the Claimant.

4.04. That the Hon. Court do issue any other order it deem fit to address the cause of justice.

4.05. Whereas the Hon. Court do issue any order as prayed in 4.01 to 4.02 the Claimants prayers are as follows:

(a) Payment of salary for the duration of suspension.

(b) Maximum compensation for unfair and unlawful loss of employment.

(c) Payment of any other benefit the grievant is eligible within the provisions of the Collective Bargaining Agreement and law whichever is favoruable.

(d) Order cost of the suit to Claimant.

The respondent in her written submission denies the claim and enlists the following as issues for determination;

1. Whether there was a valid reason for termination of the respondent's services.

2. Whether there was procedural fairness in the process leading to the termination of the grievant's services; and,

3. The remedies, if any, to award the grievant.

It is her submission that the termination of the grievant's services was procedurally lawful and fair and was done pursuant to the grievant's contract of service. The respondent had an entitlement to terminate the claimant's services summarily and in any event the grievant was notified of the opinion of the Staff Advisory Committee. The grievant was also fairly and fully compensated within the terms of his conduct of employment and the Collective Bargaining Agreement and therefore has no feasible case against herself. Again, this court lacks territorial jurisdiction to hear and determine this claim.

The matter came to court variously until the 5th December, 2016 when it was heard *inter partes* with the grievant's opening testimony.

CW1 – Obed Orora duly affirmed testified in reiteration of his case and support of the claim. It was his testimony that he was not awarded an opportunity to be heard on appeal and further that he never reported to work drunk as alleged.

The witness further testified on his appearance before the Staff Advisory Committee. It is his evidence that no one testified against him at this juncture and he was not given a report of the committee. He was not taken for a drunkenness test nor was he given an opportunity to call a witness.

On cross examination, however, the grievant testified that the show cause was due to habitual

drunkenness at his workplace. He acknowledged this and appreciated that this was a ground for dismissal.

DW1- Janet Nyamongo, duly affirmed also testified in reiteration of the defence case. It was her testimony that on 20th September, 2015, the claimant was not present at start-up. He did not report even when he was sought by Mr. Odhiambo. Her further testimony was that he came later and behaved unusually and in a weird manner. He could not explain his lateness or even refusal to respond to the call to report at work. He appeared drunk and smelled of alcohol. He could not handle the machines.

DW1 further testified that the respondent lost thirty minutes of production due to the absence of the grievant at start-up. She asked him to go home. This is because this was on a Sunday morning and her supervisors/seniors were not available to manage the situation.

DW2- John Angwenyi Basweti duly affirmed also testified in support of the defence case. He in the process adopted his witness statement as filed in evidence.

DW2 further testified that he did not deter the claimant from bringing a witness to the disciplinary committee meeting and that the claimant's termination was due to misconduct. He had come to work drunk. In further evidence the witness testified that the disciplinary meeting was chaired by the production manager. The committee recommended termination and no appeal against dismissal has been received to date.

In cross-examination, the witness testified that he did not witness the drunkenness but learnt of the same through the show cause letter. He did a suspension letter on seeing the claimant's response to the show cause. He also testified that he took a record of the disciplinary proceedings but these were not part of these proceedings.

In re-examination, the witness testified that the claimant was granted an opportunity to avail a witness but declined. He said he was okay.

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 parties hold opposing positions on this. However, a scrutiny of the respective cases of the parties and the evidence in support of the same brings out a case of lawful termination of employment. This is because the respondent abundantly adduces evidence of the misconduct of the claimant on 20th September, 2016 when he failed to report to work at start-up. He only reported far much later and was drunk and uncoordinated.

The respondent in evidence further narrates the events leading to a show cause and suspension letter made to the claimant. This was followed by a termination of employment after disciplinary proceedings recommended his dismissal. These are all contained in the witness statements of DW1- Janet Nyamongo and DW2 – John Angwenyi Basweti dated 18th and 13th June, 2016 respectively.

The claimant fervently attempts to besmirch and punch holes on the case of the respondent but is not successful. This is because he seeks to rely on the legal tenets of procedural fairness but fails to demonstrate this in evidence. 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. He is not. Having lost on a case of unlawful termination of employment, the claimant would not be entitled to relief, or at all.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination

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

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Dickens Atela for the Claimant Union.
2. Mr. Nyamurongi instructed by M/s Nyamurongi & Company Advocates for the Respondent.