



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.86 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

KISII BOTTLERS LTD.....RESPONDENT

JUDGMENT

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

"Unprocedural/unjustified, unfair and unlawful dismissal of Mr. Thomas Osano Magangi."

The respondent in a Statement of Response dated 25th May, 2016 denies 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 with the relevant CBA being for 1st November, 2014 to 30th October, 2016.

It is the claimant's further case that the grievant in the instant case was employed on 1st March, 2003 as a Mirror Inspector. This was confirmed on 7th November, 2003.

The claimant's further case is that on 9th October, 2015, the respondent issued the grievant with a show cause letter on allegations of failure to report to work on 5th October, 2015. The grievant responded to this on the same day but was again issued with a suspension letter on the following allegations;

a. Failure to report on duty for more than two days.

b. Failure to collect the company sick sheet to present to the attendants as per the company requirement. Exhibit 7.

The grievant on 10th October, 2015 made a response to the suspension letter despite its finality. It did not require or call for explanation.

Again, on 15th October, 2015 the grievant was issued with a letter inviting him for a disciplinary meeting/hearing on 16th October, 2015 at 9.00hours. On 10th November, 2015, he wrote a letter seeking the respondent's reconsideration of his case as this was exactly 30 days from the date of suspension. On 18th November, 2015 he was issued with a dismissal letter on the following grounds;

i. You were absent from duty for two days without permission. Efforts made by the supervisor to understand what was happening with you were fruitless.

ii. After being served with a show cause letter by your supervisor, you decided to walk into Production Managers office and confronted him with bitter words declaring that you will not respond to the show cause letter – and yet the issue about your show cause had not been brought to his attention. Exhibit 11.

The claimant would later report the matter to the minister who appointed a conciliator but efforts at reconciliation were frustrated by the respondent. The conciliator issued a referral certificate on 7th March, 2016.

The claimant's other case is that the show cause letter was written on 5th October, 2015 the day he went to hospital and also the day his shift resumed work. The grievant's suspension on the same day he received the show cause letter and also replied to the same is suspect. Further, the respondent's action of convening a disciplinary meeting on 16th October, 2015 and dismissal on 18th November, 2015 which is beyond the stipulated suspension period in the

Collective Bargaining Agreement was not in good faith and was a violation of the same.

He further pleads and presents his case as follows;

4.03. The show cause confirmed that he sent medical treatment documents on 5th October 2015 which confirmed he was provided with sick off. The only issue in contention by the Respondent was his failure to obtain company sick sheet prior to going to Hospital which we do submit he acted first to save his life.

4.04. It is the Claimants case that the grievant acted within the provisions of Section 30 of Employment Act 2007 and clause 12 of the parties Collective Bargaining Agreement. The respondents action contravened the spirit of the parties collective bargaining agreement hence untenable.

4.05. The claimant further submits to the Hon. Court that the Respondent violated the provisions of the Collective Bargaining Agreement when they kept the grievance on suspension for a period exceeding 30 days. Refer to clause 29 of the CBA.

4.06. The issue which led to the grievants suspension as contained in Exhibit 7 did not include issues in paragraph (b) of the dismissal letter. The grievant only came to know of it at the time he was served with the dismissal letter and therefore irregular.

4.07. The Respondents action to suspend the grievant when they were aware he was sick in contrary to the constitution of Kenya at they Bill of Rights and further abuse the ILO conventions on the right to life.

4.08. The Respondent further erred in law when they acted/terminated without valid reason for the action so taken.

He prays as follows;

1. That claimant humbly pray to the Hon. Court to declare the Respondents action unjustified and unlawful.

2. That the Hon. Court do direct the Respondent to reinstate the grievant unconditionally without loss of benefits and seniority.

3. That the Respondent to pay costs of the suit to the Claimant.

The respondent in his statement of response cites the following as denied facts;

4.0 Denied facts

4.1. *The allegation that there was no evidence to prove that the grievant was drunk as alleged.*

4.2 *That it was a precondition (as implied) for the grievant should have been given the investigation report by the Staff Advisory Committee prior to termination of his services.*

It is her further case that the termination of the grievant's services was procedural, lawful and fair and done in accordance with the grievant's contract of employment. It is her further case that outstanding proceedings before the Staff Advisory Committee. She was entitled to terminate the grievant's services by way of payment in lieu of notice. This was also done within the confines of the Collective Bargaining Agreement *inter partes* and also that he was not obliged to disclose the report/finding of the Staff Advisory Committee before effecting termination.

It is the respondent's further case that the grievant has no lawful claim as he was fairly and fully compensated interests of his terms of service and the CBA. Again, he grossly misconducted himself by angrily confronting the respondents then Production Manager, uttering threats to visit harm upon him and swearing not to respond to the show cause letter served upon him.

In the penultimate the respondent further pleads as follows;

6.0. Points of law

6.1 *The respondent shall at the hearing hereof contend that this honourable court lack territorial jurisdiction to hear and determine the claim herein.*

6.2 *The claim herein is misconceived and does not lie in so far as general damages have been sought.*

The matter came to court variously until the 6th December, 2016 when it was heard *inter partes*.

At the hearing CW1 Thomas Osoro Magangi duly affirmed testified in reiteration of his claim. He denied banging the table before Mr. Moongi – the Production Manager.

On cross examination, the witness testified that the procedure for reporting to work only applied when one was at work. He also testified that he should never have been absent without informing the employer. It was his further testimony that he had sent Josephine to inform Mr. Oluoch his supervisor of his sickness and also that the issue of banging door was even raised at the Staff Advisory Committee.

On re-examination, CW1 testified of a recollection of passing a sick sheet to the respondent. He also acknowledged a claim of kshs. 1.2 million being damages. He closed by testifying that the issue of banging tables was not raised in his show cause letter.

In defence, DW1 – Daniel Okoth Oluoch testified in reiteration of the defence. It was his testimony and evidence that the claimant was supposed to be at work on 5th October, 2015 but did not turn up. He did not report his absence and neither did he receive a sick sheet from Josephine. This was produced much later. He was served with a show cause letter to which he was unwilling to respond to. He did not

explain his absence until return.

On cross examination, DW1 testified that he made a show cause letter of the claimant's sickness. (He at this instant also gets uncooperative. This is repeated severally thereafter.)

DW2 – Mwangi Francis Muthui duly affirmed testified that he is the Production Manager of the respondent. He adopted his witness statement as filed in evidence.

DW2 testified that he knew the claimant. He further testified that on 9th October, 2015 the respondent was having a typhoid vaccination exercise for the whole day. It was his testimony that the claimant in the course of time knocked on his door to see him about the show cause letter of which he had received from his supervisor. He did not seem happy with it. I asked him to respond to the letter but he went berserk and started making unpleasant utterances before leaving. He forwarded the letter to Human Resource for action.

DW2 also testified that he attended the Staff Advisory Committee meeting where two issues were on trial: absence from duty and insubordination by the claimant. The claimant did not deny insubordination and attempted to apologise.

On cross-examination, the witness reiterated his evidence of requesting the claimant's supervisor to deal with the case of absenteeism. He further testified that the claimant was also absent on the following day, 6th October, 2015. It was his further testimony that the show cause letter is dated 5th October, 2015 and this is regular.

DW3 - John Angwenyi Basweti duly affirmed testified that in October, 2015 he was the Human Resource and Administration Manager of the respondent. He also adopted his witness statement as evidence in court.

DW3 further testified that on getting sick, an employee is supposed to pick a sick

sheet for medical check-up. This was not done by the claimant. In the event of absence from duty, a supervisor is supposed to issue a show cause letter. The events of the claimant amounted to absconding duty and is gross misconduct. In the absence of a sick sheet the medical report must be presented by the employee, his spouse or close relative. It was DW3 further evidence that the claimant sent a medical report but this was out of time. He also admitted insubordination.

On cross-examination, the witness narrated the goings on at the Staff Advisory Committee meeting in which he was secretary. It was his evidence that the medical documents produced by the claimant were from a medical practitioner. He also testified that he was familiar with the Collective Bargaining Agreement and this did not outrule other medical documents – clause 12 (b.) He however did not recall any issue of sick off in the document presented to the Staff Advisory Committee.

The witness on re-examination testified that the claimant did not present a company sick sheet though he was in a position to do this. He did not raise issues of ambush on the charge of insubordination but responded in answer to it.

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 absence from duty on 5th October, 2015 and insubordination of the claimant on 9th October, 2015. He only reported far much later and was drunk and uncoordinated.

The respondent in evidence further narrates the events leading to a show cause 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 evidence and witness statements of DW1- Daniel Oluoch, DW2 – Francis Mwangi and DW3 – John Angwenyi Basweti both dated 20th June, 2016 and 13th June, 2016 respectively.

The claimant fervently attempts to besmirch and punch holes on the case of the respondent but is not entirely 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.