



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 13 OF 2015

(Before D. K. N. Marete)

JAMES MAKOKHA OMUKULE.....CLAIMANT

VERSUS

JAMES FINLAY (K) LTD.....RESPONDENT

JUDGMENT

This matter was brought to court vide a Memorandum of Claim dated 22nd September, 2015. There is no disclosure of an issue in dispute on the face of the claim.

The respondent vide a respondent statement of defence dated 2nd June, 2015 denies the claim and prays that the same be dismissed with costs.

It is the claimant's case that at all material times to this cause, he was an employee of the respondent. He worked from the year 2000 to the year 17th June, 2014 when his employment was unlawfully terminated with a refusal of payment of his dues. The termination was unlawful for the following reasons;

- a) *The Claimant trade union was not informed of the intention to declare the Claimant redundant.*
- b) *No leave pay was given.*
- c) *No two month's salary in lieu of notice was paid.*
- d) *The required severance pay was not paid.*

It is the claimant's further case that he was grossly underpaid in relation to the Regulation of Wages (General) (Amendment) order in force, worked overtime, rest days and public holidays without pay.

He prays as follows;

- a) *2 months pay in lieu notice Basic + House Allowance*

9.024 + 1,353 x2 months

Kshs.20,754

b) Service Gratuity 22 days x Years worked x Basic + House Allowance/26

22x15 years x 9,024/30 *Kshs.99,264*

c) Leave due-26 days x Years worked x Basic + House allowance/26

26 x 15 Years x 10,377/26 days *Kshs,155,655*

d) Compensation for unfair termination

10,377 x 12 months *Kshs.124,524*

TOTAL CLAIM ***Kshs.400,197***

In the penultimate he prays for;

a) A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law.

b) Payment of the sums of money claimed under paragraph 9 above.

c) Costs and interests.

d) Any other relieve the Honourable Court may deem fit to grant.

The respondent's case is that the claimant is a former seasonal employee in the plucking section and was employed on 23rd July, 1999. At the time of dismissal he earned Kshs.9024 and a house allowance of Kshs. 1353.

The claimant's further case is that on 11th June, 2014 the employees of Marinyin Estate were informed that there would be a change of their duties and were allotted tasks by the respondent's management intended with the employment contracts which provided for alteration of duties.

On the following day 153 employees were allocated shear plucking tasks. 41 of these pursued their tasks while the others refused to perform their duties as allocated. The respondent's management held a meeting with the defiant employees with a view to listening to their grievances and they were instructed to report to work and perform their allocated tasks. That afternoon, these employees were called for another meeting with their shop stewards. The respondent thereafter issued a notice to the employees to report to work the following day and this was read out to them and also posted to the notice boards. Other notices were issued to the estate shop stewards, the union branch secretaries for Bomet and Kericho Counties and the Deputy Secretary General of the claimant union requesting them to advise the affected employees to report to work by 7.30am on 13th June, 2014.

They did not report to work as notified and requested and a second notice was issued with a third and final notice urging them to report to work by 1.30pm and also warning them of disciplinary consequences on failure to do so. Later in the day, the Bomet Branch Secretary addressed some of the affected workers and urged them to report to work which they heeded with an exception of seven who included the claimant.

The respondent's further case is that she prepared and served individual notice to show cause letters to these employees and in turn got their responses on 14th June, 2014. On 16th and 17th June, a disciplinary meeting was held with the seven workers, their witnesses and shop stewards. After the hearing, five of these were dismissed while two were retained in employment. The claimant, being one of the affected workers appealed through a letter dated 17th June, 2014 and on 20th instant, a meeting between the claimant's union and the respondent did not come to a compromise and therefore these employees were asked to vacate their residential premises.

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 cause?

The 1st issue for determination is whether the employment of the claimant was wrongful, unfair and unlawful. The parties hold diametrically opposite versions on this. The claimant in his written submissions dated 9th February, 2016 reiterates his claim. It is his submission that the parties to the employment contract had not agreed on the issue of shear plucking and therefore this dispute.

Again, the claimant submits that he was not given a warning as stipulated by law bearing in mind that he had served the respondent for a long period of time. He was also not given an opportunity to defend himself before a properly constituted disciplinary committee and disciplinary proceedings have not been filed by court therefore casting a shadow on its sincerity.

It is the claimant's further submission that the workers have not been trained on shear plucking or an agreement on the same entered on the Collective Bargaining Agreement.

The respondent on the other hand submits a case of procedural and substantive fairness in the process of dismissal in that the claimant was led through a disciplinary process which found him culpable and therefore his dismissal. Again, the reasons for dismissal were valid and fair. I agree.

The claimant was dismissed for defiance of lawful instructions on the performance of his duties. The respondent recites an elaborate case of cajoling the claimant and his colleague workers to end the deadlock and return to work even through the union representatives but they refused. I therefore find a case of lawful termination of the employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

On a finding of a case of lawful termination of employment, the claimant becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim. And this answers all the issues for determination.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rugut instructed by Chepkwony & Company Advocates for the Claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the Respondent.