



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 6 OF 2015

(Before D. K. N. Marete)

EUNICE AKINYI.....CLAIMANT

VERSUS

JAMES FINLAYS (K) LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 25th August, 2014. It does not disclose an issue in dispute on its face.

The respondent in a Respondent's Statement of Response dated 2nd June, 2015 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that at all material times to the claim he was an employee of the respondent. He was in such employ of the respondent. He was in such employ from 2007 to 18th October, 2013 when his services were unlawfully terminated with no payment of terminal dues.

The claimant's further case is that the termination of employment 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.*

The claimants seeks a declaration that the termination process undertaken by the respondent was unlawful and further, he was grossly underpaid. This is as follows;

- 8. The Claimant further avers that during his employment with the respondent he was grossly underpaid having regard to the regulation of wages (general) (amendment) order, in force, worked overtime without payment, he worked on rest days without pay and worked on public holidays without due pay.*

He prays as follows;

a. 2 months pay in lie notice

Basic + house allowance

$$9,024 + 1,353.6 = 10,377.6/26$$

Kshs.20,754

b. Service gratuity

22days x yrs worked x basic + hse allow/26

$$22days \times 5 \text{ years} \times 10,377.6/26 \text{ days}$$

Kshs.43,905.23

c. Leave due – 26 days x years worked x basic + house

allowance/26

$$26 \times 5 \text{ years} \times 10,377.6/26$$

Kshs.51,888

d. Compensation for termination

Gross pay x 12 months

$$10,377.6 \times 12 \text{ months}$$

Kshs.124,531.12

The claimant prays for judgement against the respondent 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 may deem fit to grant.

The respondent's case is that on 15th and 16th October, 2013, the claimants and six other employees were/was allocated duty of harvesting tea and instructed to join Nyati B. team where he had worked previously.

Others followed but the claimant refused to pursue instructions from his superiors and when asked to give reasons for such misconduct he declined. He was on the following day requested to resume duty but declined and stayed away for three (3) days without reason.

The respondent's other case is that the management informed her of the dire consequences of this gross misconduct and despite the intervention of the shop steward she remained defiant. She was subsequently dismissed on 18th October, 2013.

The claimant's union requested for a meeting with regard to the dismissal vide a letter dated 24th October, 2013 but this ended in a stalemate. An appeal against dismissal by the union and a hearing was slated for 9th December, 2013 but the decision for dismissal was upheld.

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 termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in her written submissions does a case of lack of substantive and procedural, fairness in her termination as follows;

2. The law is clear in Section 41 (2) that “Notwithstanding any other provision of this part, an employer shall before terminating employment of an employee 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”

...the respondent summarily dismissed the claimant and the Respondent likewise has not demonstrated to this Honourable court the following to justify dismissal;

i. No invitation was issued to the Claimant to show cause

ii. The Trade Union was not informed of summarily dismissal so as to give representation before dismissal

iii. The claimant was not personally notified of transfer and given opportunity to explain himself before justifying transfer and later summarily dismissed.

He therefore justifies the claim and seeks prayers as sought.

The respondent in her written submissions dated 18th April, 2017 reiterate her case of lawful termination of employment. It is her submission that the claimant and her colleagues were asked to report to their respective places of work but declined to obey the instructions as presented. They even refused to heed the advice of their union representative/shop steward. The procedural aspects of disciplinary proceedings like show cause letter, hearing and appeal were undertaken and in all the decision to dismiss the claimant and her colleagues was upheld. This is therefore a lawful termination/dismissal arising out of gross misconduct by the claimant.

This is a matter of my case against yours by the parties. I say this because the parties hold diametrically opposed positions on the versions of their respective cases. It must therefore be decided on the doctrine of balance of probabilities and or preponderance of evidence.

In my estimation, this case tilts in favour of the respondent. There is evidence of refusal by the claimant to heed instructions to perform her duties, ostensibly in protest against shear plucking of tea. This has been and remains a contentious issue in the industry. I therefore find a case of lawful termination of the employment of the claimant on a test of balance of probabilities and preponderance of evidence.

I am therefore inclined to dismiss this claim with orders that each party bears their own costs of the claim.

The 2nd issue for determination is whether the claimant is entitled to relief sought. She is not. Having lost on a case of unlawful termination of employment is not entitled to the relief sought.

I noted during the hearing of this cause and cause No. 4 and 10 of 2015, issues of consolidation and deconsolidation on 17th July, 2015 and 3rd February, 2017 respectively. This is a rare experience in litigation. I however also note the similarity in the frame and substance of the three claims and find it unnecessary and of no value to treat these differently. Doing a separate judgement in the respective three matters would not add value or make a difference to these proceedings.

I am therefore persuaded and *suo moto* invoke the power and discretion of this court to reconsolidate and apply this judgement to cause No. 4 and 10 of 2015.

Delivered, dated and signed this 16th day of May 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rugut Instructed Chepkwony & Company Advocates for the Claimants.
2. Mr. Masese Instructed Federation of Kenya Employers for the Respondent.