



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 27 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JANE KERUBO ONDIEKICLAIMANT

-Versus-

KAPCHORUA TEA COMPANY LIMITED.....RESPONDENT

JUDGMENT

The main facts of this case are not contested. The Claimant JANE KERUBO ONDIEKI, hereinafter referred to as **Kerubo**, a female adult, was employed as a Tea Estate General Worker on 1st April 2002 by the Respondent, a tea growing and processing company operating in Nandi Hills. Her terms of employment were regulated by the Collective Bargaining Agreement (CBA) signed between the Kenya Tea Growers Association and Kenya Plantation and Agricultural Workers Union. Kerubo was housed at the Respondent's residential estate. Her employment was terminated by letter dated 14th June 2012. The reason for termination of her employment as given in the letter of termination is that there was an incident in which an employee by the name Joshua Otieno was seriously injured by another employee, Zablon Nambisia on suspicion that Joshua had intimate relationship with Kerubo. Joshua was admitted in hospital for 4 days while Zablon was arrested and charged with the offence. The union and employees expressed concern that Kerubo's continued stay at the estate was undesirable.

The letter of termination stated that the Respondent had exercised its discretion to terminate her employment. The letter states that she would be paid wages earned, prorata leave, one way bus fare and gratuity.

Kerubo was unhappy about the termination of her employment and filed the present suit in which she states that the termination of her employment was unfair. She prays for the following remedies:

- a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, she 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 filed a Statement of Response to the Claim denying that the termination of Kerubo's employment was unfair and avers that there was valid reason for the termination which was supported by the union. The Respondent avers that Kerubo was of immoral behaviour which was a bad example to

children in the estate and other workers. The Respondent further avers that her continued stay at the estate was a risk to herself and others and that public policy demanded that she be separated from other employees. The Respondent further averred that Kerubo had fundamentally breached her obligations arising under her contract of service as provided under section 44(3) of the Employment Act.

At the hearing of the Claim, Kerubo who was represented by Mr. Rugut instructed by Chepkwony & Company Advocates gave a brief testimony in which she stated that she just found that she had been terminated without notice. Under cross examination she stated that her husband's name was Peter Ondieki and that she worked with both Joshua and Zablon. She stated that she did not know if Zablon threatened to kill Joshua over a relationship with her. She further stated that she was not aware if Zablon injured Joshua with a panga or that Joshua was hospitalised.

Kerubo further stated that she was aware that there was a welfare Committee which resolved welfare issues at the estate but was not aware if there was a meeting between the welfare committee elders, the union and the supervisor at which it was agreed that she was a bad influence in the estate. She stated she left work in May 2012 and was not aware that Joshua resigned on 2nd June 2012 and Zablon on 10th June 2012.

She stated that her letter of termination is dated 14th June 2012 and stated the reasons for termination. She stated that when she was terminated she reported to the union but the union was not interested. She denied that she was paid any terminal dues and specifically denied receiving Kshs.32,095 on 25th June 2012. She stated that she was not given notice upon termination. She stated that her salary was Kshs.8013 as at 2012.

The Respondent was represented by Mr. Robert Muthaga instructed by the Federation of Kenya Employers. The Respondent's witness Shem Kibet, a supervisor in Kapchorua testified that Kerubo's salary was paid according to the quantity of tea picked but when on leave she was paid the basic wage negotiated in the CBA between the Union and Kenya Tea Growers Association which was Kshs.8013 at the time Kerubo's employment was terminated. He testified that Kerubo's salary was paid through Kenya Commercial Bank (KCB) as indicated in her pay slips at Respondent's Appendix 5.

Kibet testified that what caused the termination of Kerubo's employment was a complaint by the union that following the fight between Joshua and Zablon it became untenable for Kerubo to live in the estate. He testified that a meeting was held between shop stewards, management and supervisor which resolved that Kerubo's service be terminated. He testified that there was an earlier incident where a mother invited a man into her house and sent her son to a neighbour. The son came back and entered the house through the window and slashed the man leading to his hospitalisation for one month and the man now uses crutches due to the injuries he suffered. He stated that this was the reason why Kerubo's behaviour could not be tolerated in the estate.

Kibet testified that Kerubo was paid Kshs.75,937 as gratuity based on her basic pay, less Kshs.31,930 owed to Fair Trade which was recovered and Kshs.11,912 owed to the SACCO. The balance of Kshs.32,095 was paid into Kerubo's account at KCB.

Kibet testified that Kerubo was terminated in public interest as her behaviour was not good for the children of the employees and the neighbours.

Under cross examination Kibet stated that Kerubo was present at the meeting which decided that her employment be terminated but did not sign the attendance list. He stated that Kerubo was shown the tabulation of her terminal benefits but did not sign. He testified that Kerubo was a member of the Cooperative and Fair Trade where she owed money that was deducted from her terminal benefits.

He stated that he was aware Kerubo is married. He stated that the issue of immorality is not contained in the pleadings and further that the letters of resignation by Joshua and Zablon do not refer to immorality. He stated that there is no evidence that Kerubo was involved in the court case in respect of the fight between Joshua and Zablon.

In their written submissions the parties reiterated the contents of their pleadings and evidence by their witnesses.

Determination

The issues for determination are

1. Whether there was valid reason for termination of the Claimant's employment
2. Whether the Respondent complied with fair procedure, and
3. Whether the Claimant is entitled to the remedies sought

Valid Reason for Termination

Section 43 of the Employment Act provides for validity of reason for termination of employment as follows:

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the present case the reason given in Kerubo's letter of termination is that following the fight between Joshua and Zablon in which Joshua was seriously injured and was hospitalised, the union and employees expressed concern that Kerubo's continued stay at the estate was undesirable and that the Respondent had exercised its discretion to terminate her employment. The letter of termination does not state what wrong Kerubo committed. The letter further does not refer to any clause in the CBA justifying the termination.

In the Memorandum of Defence in reply to the Claim, it is averred that Kerubo's behaviour offended the law and she was liable to summary dismissal under section 44(3) which provides that-

44. Summary dismissal

*(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily **when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.** [Emphasis added]*

What conduct of the Claimant was the Respondent referring to? The letter of termination only referred to an incident where Joshua was seriously injured by Zablon on suspicion that Joshua had an intimate relationship with Kerubo. The fight was the cause of the termination and Kerubo was not involved in the same. It was between Joshua and Zablon.

The Respondent exhibited letters of resignation of Joshua and Zablon. None of the 2 letters refer to the fight. No other evidence has been submitted to prove that there was a fight and that the Claimant was in any way involved in the fight.

If two men fight over a woman, as has been alleged by the Respondent, is it the fault of the woman? Definitely not. It was not alleged that it was an offence for Kerubo to have an intimate relationship with any or either of the two men and no evidence was adduced that there was any such relationship between the Kerubo and the two men. As stated by Shem Kibet, the Claimant told the Respondent that she had a

constitutional right to associate with anybody she wished to associate with, and if indeed she said so, she was absolutely right. Unless it was prohibited by the terms of her employment, there was no reason why she could not associate with any employee of the Respondent.

For the foregoing reasons I find that there was no valid reason for termination of the Claimant's employment.

Procedural Fairness

Section 41 of the Act provides for procedural fairness as follows-

41. Notification and hearing before termination on grounds of misconduct

(1) 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 this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the 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.

In the present case it is the Respondent's position that it caved in to the demands of the estate welfare committee to terminate the employment of the Claimant. The Respondent abdicated its role as employer and allowed the welfare committee to decide the fate of its employee. The Respondent did not as much as frame charges against Kerubo and require her to respond to those charges. She was condemned unheard, contrary to the provisions of the Act.

The termination was therefore procedurally unfair.

Remedies

The Claimant prayed for notice, severance pay and compensation for unfair termination. Having not been given notice or paid in lieu thereof, I award her 2 months' salary in lieu of notice as provided in Clause 24 for employees with more than 5 years' service. This was admitted by the Respondent at paragraph 26 of the Memorandum of Defence. The Claimant is not entitled to severance pay which is only payable to employees declared redundant. Having found the termination of her employment both substantively and procedurally unfair and taking into account all circumstances of her case especially her long service and the manner in which she lost her employment, I award the Claimant maximum compensation of 12 months' salary.

Conclusion

In conclusion, I declare the termination of the Claimant's employment unfair and award her the following-

1. Pay in lieu of notice in the sum of Kshs.17,950.
2. Compensation in the sum of Kshs.107,700
3. The Respondent will pay the Claimant's costs of this suit and the decretal sum shall accrue interest at court rates from date of judgment if not paid within 30 days.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE