REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 125 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION……..….....CLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED…....…RESPONDENT

JUDGEMENT

This matter is brought to court vide an Amended Memorandum of Claim dated 11th August, 2015. The issue in dispute;

Unlawful, illegal, wrongful and unfair dismissal of Joseph Orina

The Respondent in an Amended Replying Memorandum on 22nd September, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she and the respondent have a recognition agreement under which they have negotiated her standing Collective Bargaining Agreement, (CBA) *inter partes* stipulating the terms and conditions of the respondents workers who double as members of the union.

It is her further case that the grievant was employed by the respondent on 1st November, 2002 as a tea estate worker at a salary of Kshs.8,777.00 per month He was deployed at the respondents Nandi premises. His letter of employment was however issued on 1st November, 2003. His promotion data is detailed as follows;

> *5. THAT contents of paragraph 5 of the Amended Memorandum of Claim are denied particularly that on the 5th of April 2006 the grievant was appointed to the position of Acting Grade III Clerk with effect from 1st April 2006 which position he held until 30th April 2006. Further the Respondent denies that he was also appointed to Act as Grade III Clerk between 2nd day of January 2009 and 28th February 2009 and 1st March 2009 promoted to position of Clerk Grade III. Strict proof to the contrary is invited.*

It is the claimant's other case that on 10th August, 2013 the grievant reported to work as usual and his supervisor, one, Benson Sangura instructed him to weigh tea plucked by a Mr. Charles Sifuna who had,

according to Mr Sangura, sought permission to take a relative to hospital and come back in a little while. He thereon returned at 1000 hours in the company of the Divisional Manager who demanded to know whether the grievant had weighed the tea. The grievant reported his action as carried out on the instructions of the supervisor.

On 12th August, 2013 the grievant was served with a suspension letter pegged on issues touching on the events of the early morning of 10th August, 2013 on green leaf fraud. He was later on served with a notice to attend disciplinary enquiry which was not signed or indicated on the date of such enquiry.

The claimant's further case is that on 22nd August, 2013, he attended a disciplinary hearing but his representative was denied access. He was served with a dismissal letter on 24th instant indicating that he had been dismissed on account of falsifying company records through fraudulent green leave weighing and failure to obey instructions that only direct workers would present their pick for weighing.

The claimant's final case is that his attempt at appeal was frustrated by the respondent by not only setting stumbling conditionalities for the appeal but also denying the presence and participation of his four preferred representatives. Attempts conciliation flopped and were lost on the way side.

The claimant earned Kshs.13,321.94 at the time of dismissal.

He prays as follows;

1. An order directing the Respondent to do the following;

a. To unconditionally reinstate the grievant herein;

b. To pay the grievant for the entire period within which he was dismissed;

c. To pay the grievant in respect of all the leave days due to him as the time of reinstatement;

d. To pay the grievant leave travelling allowance.

2. Should prayer 1 fail, an order directing the Respondent to do the following:-

a. Pay the grievant gratuity for the years he has served with the Respondent at the rates provided for under the CBA;

b. Pay the grievant house allowance from the time of dismissal until the time judgement;

c. Compensate the grievant monthly with an amount equivalent to twelve (12) months salary;

d. Pay the grievant in lieu of leave for the period dismissed;

e. Pay the grievant leave travelling allowance for the period of dismissal;

f. Pay the grievant in lieu of notice of termination;

g. Pay the grievant damages for unlawful, illegal and unfair dismissal;

h. Pay the grievant the costs of the cause;

i. Interest on (a), (b), (c), (d), (e), (f) and (g) above.

j. Any other relief this Honourable Court deems fit to grant.

The respondent's case is a denial of the claim. The respondent further denies the subsistence of the CBA

and indeed that of the entire claim and puts the claimant in strict proof thereof. This is as follows;

> *6. THE Respondent denies the contents of paragraph 6 of the Amended Memorandum of Claim and all the particulars on 10th August 2013 the grievant reported to work as usual at Kapsumbeiwa Estate where in the course of duty his supervisor, a Mr. Ben Sangura instructed him to weigh tea plucked by a Mr. Charles Sifuna who according to the supervisor had sought permission to a relative to hospital and report back after three (3) hours. Strict proof to the contrary is invited.*
>
> *7. THE Respondent denies the contents of paragraph 7 of the Amended Memorandum of Claim particularly that at around 10.00am Mr. Sifuna returned to work as directed by his supervisor accompanied by the Divisional Manager. Further that the said Manager came with Mr. sifuna to the weighing shed where he demanded to know whether Mr. Sifuna had weighed and that the grievant weighed Mr. Sifuna's pluck on the Respondent's supervisor's instructions. Strict proof is invited.*
>
> *8. THE Respondent further denies the contents of paragraphs 8 and 9 of the Memorandum of Claim particular particularly that he was served with a suspension letter and Notice to attend Disciplinary Equiry and that further. The Respondent will plead in the alternative and without prejudice to the foregoing that the said Notice was neither signed nor did it indicate the date of the disciplinary enquiry.*
>
> *9. THAT Respondent denies the contents of paragraph 10 and 11 of the Amended Memorandum of Claim particularly that on 22nd August 2013 the grievant attended a disciplinary hearing in the company of an employees' representative and the said representative was denied entry to the venue and further that he was forced to attend the disciplinary hearing without any representation and denied the opportunity to call witnesses in defence of his assertions.*
>
> *12. THE jurisdiction of this court is denied.*

This is indeed a curious way of offering defence in a matter like this.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submission dated 9th June, 2014 reiterates her claim. It is her submission that the termination of the employment of the grievant lacked substantive and procedural fairness in that he was not appropriately afforded an opportunity to be heard. Further, the termination was based on invalid reasons and all this *in toto* amounted to a violation of section 41 (1) and (2) together with section 45 (1) and (2) of the Employment Act, 2007 which provides as follows;

> *41 (1) Subject to section 42(1), an employer shall before termination the employment on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands the reason from which the employer 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) of (4) hear and consider any representations which the employee may on grounds of misconduct or poor performance and the person if any chosen by the employee within subsection (1) make.*

Further,

> *45 (1) No employer shall terminate the employment of an employee unfairly*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> > *a) That the reason for termination is valid;*
> >
> > *b) That the reason for the termination is a fair reason –*
> >
> > > *(i) related to the employees conduct, capacity or compatibility; or*
> > >
> > > *(ii) based on the operational requirements of the employer; and*
> >
> > *c) that the employment was terminated in accordance with fair procedure*

The claimant further seeks to rely on the authority of **Peter Apolo Ochieng V. Amedo Centre Kenya Limited (2016) eKLR** as follows;

> *The provisions with regard to fair procedures leading to a termination under section 41 of the Employment Act are mandatory. Where not followed, a termination becomes procedurally unfair, without written proceedings setting out how the Claimant was heard at the meeting held on 13th August, 2009 and there being no representative to accompany the Claimant, the resulting termination became unfair.*

Again, in the authority of **Peter Onyango Nyabongo v. Citadelle Security Limited (2015) eKLR** at paragraph 33 where Honourable Radido, J. observed as follows:-

> *The court therefore finds that the dismissal was procedurally unfair. Because of the conclusion reached, it is not necessary to examine whether the Respondent had valid and fair reasons to dismiss the Claimant.*

The claimant in the penultimate submits a case of unfair dismissal in that this lacked any justification and therefore transgressed section 43 (1) of the Employment Act, 2007 as follows;

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

The respondent in his written submission dated 1st April, 2017 submits a case of lawful termination of employment of the claimant. This is on account of dishonesty on the part of the claimant. The respondent in support of his case produced various documents relating to the subject matter including a four page disciplinary enquiry filed but altogether failed to explain the adverse issues raised by the claimant on the fairness or otherwise disciplinary process.

I find that the claimant's case overwhelms that of the respondent. It is the more probative of the two. The respondent only brings out a cursory explanation of the events leading to the issues in dispute. She does not offer any formidable rebuttle of the claimant's case. I therefore find a case of unlawful termination of employment and order as such. This resolves the 1st issue for determination.

The 2nd issue for determination is whether claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment,

she becomes entitled to a relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) month salary as payment in lieu of notice....Kshs.13,321.94

ii.12 months salary as compensation

for unfair termination of Employment…….....Kshs.159,863.28

Total …….....**Kshs.173,185.22**

iii. The cost of this claim shall be borne by the respondent

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Omwaka for the claimant union

2. Mr.Koech instructed by Bett & Company Advocates for the respondent