



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 126 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

JAMES FINLAYS KENYA LIMITED.....RESPONDENT

JUDGEMENT

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

“Unlawful, illegal, wrongful and unfair dismissal of Peter Nyandoro”

The respondent in a Defence to Memorandum of claim dated 25th May, 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 30th October, 2002 as a general worker and deployed at Kapkoros Estate. Later, he was transferred to Marinyn Estate.

It is the claimant’s further case that on 9th February, 2014 he and a friend walked to an entertainment joint at Savannah Estate within Marinyn and ordered for drinks. As they enjoyed their drinks, a colleague named Munyendo walked to where they were seated and took the grievant’s drink which he started partaking to it. He was later to return the bottle after taking several sips. On enquiry as to why he was interfering with his comfort, Munyendo took and continued drinking of the grievant’s drink. He (grievant) rose to retrieve the bottle from Munyendo leading to a breakage of the same and deep cuts on the grievant’s right hand and injuries on Munyendo’s forehead. The grievant then sought treatment in the respondent’s health facility where first aid was admitted and he was requested to report on the following day for stitching.

The claimant’s other case is that on reporting to the dispensary the following day, he was informed that he was required in the Estate Manager’s office to record a statement on the event of the previous day to which he obliged. The statement was taken by the security officer.

The claimant's further case is that the matter was reported to Kericho Police Station where he and Munyendo were forced to explain the eventualities of 9th instant to a police officer at the crime office. They were advised to resolve the matter *inter partes* and report on progress. The grievant, like Mr. Munyendo earlier, was also issued with a P3 form.

The claimant states that on 21st February, 2015 he was called to the manager's office and on arrival was issued with a show cause letter requiring that he shows cause as why he should not be dismissed from employment for assaulting and injuring a fellow employee. He explained his predicament on not being able to draw a response due to his injured hand.

On 24th instant as he headed for the dispensary, the grievant was called to the manager's office where he found him with the Assistant Manager, Human Resource Manager and a shop steward called Sambu. Here, he was informed that a decision had been on the matter and this would be communicated in a letter he was to collect that afternoon. This was a letter of termination received in the afternoon as notified.

The claimant's case is that he later requested for a meeting *inter partes* with a view to resolving the issues but the respondent refused to revise her decision of termination. Further, attempts at conciliation amounted to nil.

It is her penultimate case that the grievant was not afforded a fair hearing and further that Mr. Munyendo was the author of his own misfortune earned through deliberate misconduct on his part. Further, the termination was intended to frustrate his involvement in union activities and intimidate labour relations at the work place to the detriment of the employees. This was *in toto* malicious and uncalled for.

He prays as follows;

1. *A declaration that the Respondent's action of termination the grievant herein is unlawful and/or illegal and/or wrongful and/or unfair.*
2. *Gratuity pay for the period in which he was in employment as provided under the Collective Agreement.*
3. *Compensation equivalent to twelve (12) month's salary*
4. *Pay in lieu of Notice as provided under the Collective Agreement.*
5. *Leave due but not taken*
6. *Leave travelling allowance*
7. *Costs of this cause*
8. *Interest on (2) to (7) herein above.*

The respondent's case is a denial of the claim. It is her case that the grievant assaulted Conrad Munyendo at the work place knowing well this was unlawful and would lead to summary dismissal. This is attested by the statements of Mr. Munyendo and other key witnesses of the incident.

It is the respondent's other case that the grievant was accorded a fair hearing and further heard on appeal at the intervention of the union representatives but he disagreed with the decision of summary dismissal by the respondent.

4.8 The Respondent accorded the grievant a hearing twice contrary to the Claimant's assertions in paragraph 22 of the Claim, a fact that is attested by the Union itself at paragraph 16 and 18 of the claim: annexed hereto and marked 'JFK 7' (a), (b), (c), are copies the Defendant's memorandum and Copies of attendance Sheets in both meetings.

4.9 *The Respondent avers that it gave the grievant a fair hearing and followed due process in the hearing as required by law and the Collective Bargaining Agreement but upon establishing that the grievant was in serious breach of its Code of Conduct and the Collective Bargaining Agreement, the Respondent was constrained to summarily dismiss the grievant. Annexed hereto and marked 'JFK 8 (a), (b) is a copy of The Collective Bargaining Agreement and copy of the grievant's Dismissal letter.*

5.3 *There is uncontroverted evidence that the grievant assaulted Mr. Conrad Munyendo as is attested by all the witness statements and such assault, having occurred within the company premises and to litigation by an employee for injuries inflicted upon the victim by a fellow employee within company premises.*

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 at paragraphs 14 and 15 of her written submissions dated 22nd February, 2017 cites the following as grounds for the grievant's termination of employment.

- a) *You assaulted another employee by hitting him with a bottle and injuring him at Savannah Village, Mariny Estate on 9th February 2014.*
- b) *In your response to the show cause letter you admitted that you did assault the employee but the reason you gave to justify your action were not convincing.*
- c) *You also admitted that you committed the offence during the disciplinary meeting on 25th February 2014 which was attended by your witness (Shopsteward)*
- d) *Your request for leniency has been taken into account however....,*

15. *Your Lordship there is absolutely no evidence at all that the grievant assaulted the employee and hit him with a bottle as alleged in the letter neither is there evidence that the grievant admitted to the assault nor is there evidence that the grievant admitted to either the offence and that he asked for leniency during the meeting of 25th February 2014 and we hold the Respondent to strict proof thereof.*

This is denied.

The claimant further seeks to rely on the authority of **Kipkebe Limited v. Peterson Ondieki Tai (2016) eKLR** where the court in upholding section 107 and 108 of the Evidence Act on burden of proof observed as follows:

'It is trite Law in evidence that he who asserts must prove this case. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.'

107 *'Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'*

108 *'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'*

She further relied on Section 45 (1) of the Employment Act, 2007 thus;

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 respondents in turn posit a case of lawful termination of employment of the claimant. It is her submission that the claimant has not discharged her burden of proof of unlawful termination as required of section 47 (5) of the employment act as follows;

...For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer...

It is her further submission that the conduct of the grievant amounted to gross misconduct as set out in section 44 (1) and 44 (4) (d) and (g) as follows;

44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(d) an employee uses abusive or insulting language, or behave in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The parties hold diametrically opposed positions on this. The issue therefore should be: what is the more probable of the two versions of evidence adduced by the parties. A test of the principle of balance of probabilities comes into play.

It is not in dispute that the issues occasioning the termination arose in a public recreation place – a bar, a place where people entertain themselves on drinks, including toxic ones. Ordinarily, sobriety would not be the order of the day but one would always be expected and entertained to imbue sanity and order in the circumstances.

The grievant comes out with convincing version of the events leading to this skirmish but this is

confronted by the respondent. He adduces evidence from witnesses statements that pursue her version of events and contradicts that of the grievant. In the circumstance, who has the better artillery to overpower the other in the circumstances? It is obviously the respondent who by her position commands the loyalty of those present and witnessing the eventualities at Savannah Village between the grievant and Munyendo. It is unlikely that anybody would come out in support of the grievant without considering their long term interest as employees.

Rika, J. has variously come out to appreciate and address situations where employees are paraded in the sun – between a rock and a hard place. They are not able to sustain their cases due to the hostile environment they face as a result of their place at the bargaining table. They are the weaker party. Nobody would openly come to their side without injuring their relationship with the employer.

I would tilt the balance of probabilities in favour of the claimant. The respondent does not address the eventualities at the police station or the results thereof even with the grievant's able narration of the same. It is his testimony that the matter was reported to the police and they recorded a statement and were issued with form P3. The attending police officer however advised them to resolve the issue on their own bearing in mind that this was a consequence of a drunken frenzy. I am therefore inclined to find a case of unlawful termination of employment and hold as such. And this answers 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 with costs to the claimant.

I am however unable to compute any further relief due to the fact that at no point in the entire suit does the claimant plead his emoluments per month or at all. This disables a court to compute and tabulate relief in the event of a successful finding in favour of a claimant. I choose to leave it as such.

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.