



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 18 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

SOTIK TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide a Memorandum of Claim dated 26th August, 2014. The issue in dispute is there in cited as;

“Unlawful, illegal and unfair termination of Martha Nyaboke Bosire”

The Respondent in a Reply to Memorandum of claim dated 10th November, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that as a union in this sector, she has a valid Recognition Agreement with the respondent. They have also negotiated several such agreements in their course of business.

It is her further case that the respondent employed the grievant on 4th October, 2004 at Moniera Estate as a general worker but did not issue her with a contract of employment/letter of appointment. She was assigned duties of teaching at the Respondents kindergarten. She would, however, attend the respondent’s office for purposes of updating records therein on request.

The claimants other case is that on or about the year 2011, a Mr. David Osebe called on the respondent’s office with a view of getting funds for having lost his wife. The respondent’s officials retrieved Mr. Osebe’s records and realized that there was an addition and or alteration. The grievant was summoned and the forgery forced on her leading to a verbal summary dismissal. She then earned a salary of Kshs.8,013.00.

The unions other case is that an appeal against this dismissal was declined by the respondent at a meeting held on 2nd August, 2011. The respondent therefore launched a complaint with the police whereas the grievant was charged in PMCC 228/2012 but she was on trial acquitted for lack of evidence. It is her further case that the grievant was not awarded a defence and that the acts of the respondent were malicious, unfounded and conjecture which could not be substantiated.

It is her case that despite the acquittal, the respondent has declined a reinstatement and payment dues in

accordance with the law.

She prays as follows;

1. An order compelling the Respondent to reinstate the grievant herein in position she served before she was dismissed or any equivalent position.

2. In the alternative an order compelling the Respondent to pay the grievant the following:-

a) Twelve (12) months pay for loss of employment

b) Gratuity calculated as per the CBA

c) Payment in respect of leave days

d) Two months pay in lieu of notice

e) Days worked and not paid

f) One way transport for leave for both her and her family

g) Overtime worked and not paid

3. Damages for wrongful, illegal and unfair dismissal

4. Costs of this suit

5. Interests on (2) (3) and (4) herein above

The Respondents case is a denial of the claim.

It is her other case that upon proper investigations, there was sufficient evidence linking the acts of forgery to the grievant and therefore the summary dismissal on grounds of gross misconduct.

She further avers that in consideration of the seriousness of the offence committed and the likely prejudice that could have been suffered by her actions, an appeal against dismissal was justifiably declined.

She denies malice and states that she has initiated steps towards an appeal against dismissal of the criminal proceedings.

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 submissions dated 8th March, 2017 reinforces a case of unlawful termination of employment. It is her case that the dismissal from employment flouted the provisions of section 43 (1), 45 (1) and (2) of the Employment Act, 2007 as follows;

43 (1) 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.

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.

c.

It is the claimant's case and submission that she was summarily dismissed on unsubstantiated allegations of forgery which were shoddily investigated. The respondent denies this and submits a case of proper investigations and a finding of culpability on the part of the claimant.

The claimant in her pleadings denied any relationship to David Osebe, or at all. Again, the history card No. 568 was never in her custody but that of the record clerks of the respondents thus the remoteness of her effecting the alleged forgery. Again, the owner of the history card, one, David Osebe, testified in PMCC No. 238 of 2012 (Criminal Case) denying any relationship with the claimant and thereby scuttling the respondents explanation at the appeal hearing on 2nd of August, 2011. She was also acquitted for lack of evidence and this settles the issue of culpability of the claimant. There was no sufficient proof of forgery or that the forgery, if at all, was committed by the claimant. This dilutes the respondent's case of heaping the forgery on the claimant. There was therefore no valid reason for the dismissal of the claimant.

The claimant further submits that she was not, in the process of summary dismissal accorded a fair hearing. It is her express case that she was summarily verbally dismissed on discovery of the forgery and pegging it on her good self. No procedural aspects of a fair hearing were awarded to her in the circumstances. She puts it thus;

Firstly, the grievant was not given any show cause notice by the Respondent to allow her explain what happened, or defend the allegations against her. Secondly, the grievant was not given any notice inviting her to a disciplinary action or informing her of her right to a representative of her choice. Thirdly, the grievant did not attend any disciplinary hearing before she was dismissed by the Respondent from Section 41 of the Employment Act grants an employee the right to be represented by a shop floor union representative or a fellow employee. The Respondent has not filed the minutes of the meeting to show whether such representative was present during the disciplinary hearing, if at all one was held. The grievant did not call for representation for the simple reason that she was not informed about this right. This alone is sufficient ground for this Honourable Court to declare the dismissal unfair for failure to comply with the law.

She sought to rely on the authority of **Fredrick Saundu Amolo v. Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR** at paragraph 20 where Mbaru, J. observed as follows;

It is not for the Claimant to call for representation. The employer, the respondent herein had the duty to inform the claimant of the allegations against him as a reminder of his fundamental right to have at the hearing a person of his choice, his Union or a fellow employee. Whether the claimant was aware of his right or not, the duty vested upon the employer to reiterate these rights and dully accord them to the employee being subjected to a disciplinary proceedings such as the claimant faced. Where an employee chooses not to have such representation or the presence of a fellow employee of his choice, then this must carefully be recorded as when raised at any hearing before the industrial court, the court is a matter of justice, caused to refer to such proceedings. In the absence of such confirmation that the claimant was represented by his Union or a fellow employee of his choice present, the respondent made a fundamental omissions in the disciplinary process that does not meet the tenets of Section 41 of the Employment Act, thus negating the proceedings

and any decisions there from. Section 41 of the Employment Act is stated in mandatory terms....;

The respondent raises and submits a case against the claimant. It is her submission that the grievant's termination of employment was fair and justifiable for gross misconduct. It is her case that the forgery on Mr. Osebe's history card was traced to the grievant and she did not give a satisfactory reasons for such action. She was therefore dismissed on reasonable suspicion.

The respondent also submits a case of the claimant's access to a fair hearing through disciplinary hearings as displayed in the letter of dismissal dated 25th July, 2011. This letter is not exhibited whatsoever. The respondent also displays witness statements in favour of her case but this would be expected.

This is a display of a case of lawful termination. The claimant case comes out as a demonstration of a botched up termination with undue regard to substantive and procedural fairness. No effective disciplinary process was employed at the origins of dismissal. Further, the reason for termination is not justifiable in that this is not substantial to the satisfaction of the law as set out. The respondent has failed to establish a concrete case for lawful termination of employment and if find 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.

The relief of reinstatement sought in the claim may not be appropriate in the circumstances. This is because of the time lapse between the cause of action and this determination. The cause of action arose in 2011. No specific date is indicated by the claimant but the respondent exhibits a letter of summary dismissal dated 23rd July, 2011. The claim was filed on 3rd September, 2014 and has done its rounds in our corridors for three (3) plus years. It is now six years past the cause of action. This kind of lapses delimits the court's application of the remedy of reinstatement, more so taking into cognizance the office of the claimant.

It is the onus of claimants to file their claims timeously and also employ diligence prosecution of the same. The law is clear on the timelines and even circumstances for issue of the remedy of reinstatement. It is also trite law that delay defeats equity. Many are a situation that litigants stumble their own interests through undue delay in filing and prosecution of their respective cases. Beware.

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.8,013.00

ii. 12 months salary as compensation for unfair termination of

Employment.....Kshs.96,156.00

Total.....Kshs.104,169.00

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 instructed by for the claimant.

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