



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

At Kericho

CAUSE NO. 113 OF 2016

(BEFORE D. K. N. MARETE)

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

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 29th June, 2016. The issue in dispute is therein cited as;

Unlawful, wrongful and unfair dismissal of Sephen Mwanzali Musha.

The Respondent in a Respondent's Memorandum of Response dated 29th July, 2016 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* successively.

It is her further case that the grievant was employed by the respondent on 29th June, 1988 as a general worker. His duties at the time of employment entailed plucking of green tea. Between the years 1990 and 1993 the grievant was promoted to the position of acting supervisor within the respondent's tea plucking unit. In 1994 he was transferred to the security department where he acted as a supervisor between the years 1995 and 1997.

It is the claimant's further case that on 17th May, 2014 as was the practice when an employee loses a loved one, he was informed that Mr. Majani's father had passed on. He nominated Mr. Koech to accompany Mr. Majani to his rural village to confirm the information so as to facilitate payment of welfare funds. This was done and the funds appropriately paid with appropriate budgetary plans towards the burial.

The claimant's other case is that the funeral committee nominated two employees, George Maeba and Mr. Okora to represent the employees at the funeral. The committee secretary on 31st May, 2014 handed the balance of Kshs.13,400.00 to Mr. Okora which comprised of Kshs.9,400.00 for handing over to Mr. Majani and Kshs. 4,000.00 being transport for the two representatives. It was later reported and established that there was no attendance at the burial on their part.

The grievant reported this matter to the welfare officer and was later confronted by the divisional manager on the subject. He admitted knowledge of the same and also tendered an explanation upon which he was told to await further communication.

On 16th June, 2014, the grievant was informed by the welfare officer to report to the Divisional Manager's office where upon arrival he found the funeral committee, Mr. Majani, employee representatives and members of the respondent's management who included the estate manager, Mr. Sawe. Statements were taken and they were directed to leave and await further communication.

On 19th June, 2014, he was issued with a show cause letter to which he responded on 21st instant whereupon he was issued with a notice inviting him to a disciplinary hearing on 22nd June, 2014 – a Sunday. This was held on 23rd and the grievant went on his annual leave. On return, he was issued with a letter of summary dismissal dated 19th June, 2014.

The matter was reported to the claimant who appealed against the decision of dismissal but this was turned down. Attempts at conciliation also failed with the respondent failing to revise its position.

She prays as follows:

1. *A declaration that the dismissal of the grievant is unlawful, wrongful and unfair.*
2. *An order directing the Respondents to reinstate the grievant without loss of benefits, leave, promotions and other entitlements.*
- a. *An order directing the Respondent to pay the grievant monthly salary and/or wage for the entire period he was dismissed.*
3. *In the event this Honourable Court finds that prayer two (2) herein above untenable to grant, an order directing the Respondent to pay the grievant as follows:-*
 - a. *In lieu of notice of termination* - *Kshs.25,418.00*
 - b. *Gratuity* - *Kshs.301,106.96*
 - c. *Compensation* - *Kshs.152,508.00*
4. *Certificate of Service*
5. *Costs of the cause*
6. *Interest on 2(a) or (3) herein above.*
7. *Any other prayer that this Honourable Court may deem fit and just to grant.*

The respondent's case is a denial of the claim.

It is her further that on or about 14th April, 2016 he was reported that the grievant, in the company of another employee, a Mr. Samwel Omuhindi were visibly drunk at the respondent's premises contrary to company policy guidelines and work place decency. He was warned and recorded a statement on that account.

Later, it was reported by a Mr. Jomo Litari that the grievant had misappropriated money due to him (Litari) in funeral contribution. The grievant again received a warning and this matter was considered during his disciplinary proceedings. Other incidents of misconduct and misappropriation were reported of the grievant. This prompted a summon of the grievant to defend himself against gross misconduct at a disciplinary hearing. He was summarily dismissed.

The respondent avers that the dismissal of the grievant was lawful and further he was paid all his terminal dues and issued with a certificate of service. It is her further submission that the grievant is not owed a farthing and also that the remedy of reinstatement is not available to the claimant in the circumstances.

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 contends that the dismissal of the grievant was unfair and unlawful. She relies on the authority of section 43 (1) and 45 (1) of Employment Act, 2007 which burden the employer to prove that the reason or reasons for termination and in the absence of this, the termination shall be deemed as unfair.

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) of the Employment Act provides that no employer shall terminate the employment of an employee unfairly

It is her submission that this is not the case here and therefore the claim should be allowed with costs.

The respondent submits a case of lawful termination of employment. It is her submission that unlawful termination of employment is not proven by the claimant inasmuch as section 107 of the evidence act burdens her to do this as follows;

107.(1) 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.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The respondent in the penultimate summarizes his response as follows;

a. The claim for unlawful termination is also unfounded as no evidence was led in support of the same.

b. The claim for gratuity does not apply as the Claimant was summarily dismissed for gross misconduct and as such is not entitled to such compensation.

c. The claim in lieu of notice of termination does not apply either as the Claimant having been summarily terminated as anticipated under Section 44 (4) of the Employment Act was not entitled to any notice.

d. On the certificate of service, the Respondent is willing to issue the same it is the Claimant that has failed to avail himself to collect the same.

I agree with the respondent's case. The claimant has not demonstrated a concrete case of unlawful termination of employment. On a preponderance of evidence, the respondent's case is richer than the claimants. This is because despite the overwhelming evidence of misconduct, through drunkenness, misappropriation of welfare funds and short circuiting of intended beneficiaries of the fund, the claimant has not rebutted this in evidence. There is therefore no evidence of foul play in the dismissal of the claimant. I therefore find a case of lawful termination of employment of the claimant by the respondent and hold as such.

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

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

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.Karanja instructed by Murimi , Ndumia, Mbago & Muchela Advocates for the respondent