



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 1 OF 2017**

***(Before D. K. N. Marete)***

**JOAKIM NYAANGA RAGOI.....CLAIMANT**

**VERSUS**

**TRANSMARA SUGAR COMPANY LTD.....RESPONDENT**

**JUDGEMENT**

This matter is originated by way of a Statement of Claim dated 14th December, 2016. The issue in dispute is herein cited as;

*“Unlawful Termination of Employment”*

The respondent in a Respondent’s Statement of Response dated 21st March, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times he was an employee of the respondent in the position of Motor Vehicle Driver pursuant to a letter of contract/appointment dated 15th September, 2012. It is his assertion that he worked with dedication and diligence thereby earning a renewal of contract on 15th January, 2012 and 30th January, 2015.

The claimant’s further case is that despite his zealous, unwavering and devoted commitment at work, he was treated to unfavourable working conditions as follows;

- a) *Denying him his rights to annual leave.*
- b) *Denying him overtime.*
- c) *Denying him off days.*
- d) *Denying him house allowance and,*
- e) *Denying him public holidays.*

The claimant’s other case is that on 23rd December, 2015 he was suspended from duty and subsequently terminated from employment on 11th January, 2016. This was unfair and unlawful. It was as occasioned by criminal proceedings in Kilgoris Criminal Case No. 1695 of 2015 arising out of a complain by the

respondent or its agents. He was ultimately discharged due to the respondent's failure to attend court.

He claims as follows;

- a) House allowance for the entire period of service being  
 $15/100 \times \text{Kshs. } 15,640 \times 12 \text{ months} \times 2 \text{ years} \dots \text{Kshs. } 56,304$
  - b) Payment in lieu of untaken/unpaid leave for the entire period  
of service being  $15,640 \times 3 \text{ years} \dots \text{Kshs. } 46,920$
  - c) Payment for untaken/unpaid public holidays for the entire period  
of employment being employment being  $11/30 \text{ days} \times \text{Kshs. } 15,640$   
 $\times 3 \text{ years} \times 2 \text{ (double daily rate)} \dots \text{Kshs. } 46,920$ .
  - d) Payment for off days untaken for the entire  
period of service being  $4/30 \text{ days} \times 12 \text{ months}$   
 $\times 3 \text{ years} \times \text{Kshs. } 15,640 \times 2 \text{ (double daily rate)} \dots \text{Kshs. } 150,140$
  - e) Overtime for 2 extra hours worked daily being  $(\text{Kshs. } 15,640/30 \text{ days} \times 1/8)$   
hourly rate  $\text{Kshs. } 65 \times 2 \text{ hours} \times 30 \text{ days} \times 12 \text{ months} \times 3 \text{ years} \times 1.5$  (being 1.5  
rate overtime for normal working days)  $\dots \text{Kshs. } 210,600$
  - f) Service/gratuity calculated at 1 days salary for every completed year of  
service being  $15/30 \times \text{Kshs. } 15,640 \times 3 \text{ years} \dots \text{Kshs. } 23,460$
  - g) 12 months gross salary for compensation of unlawful termination from  
employment being  $\text{Kshs. } 15,640 \times 12 \text{ months} \dots \text{Kshs. } 187,680$
- Total Claim**  $\dots \text{Kshs. } 709,512$

In the penultimate he prays as follows;

- a)  $\text{Kshs. } 709,512$ .
- b) Certificate of service.
- c) Costs of this claim and Interest at the court rates.

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

It is her further case that the claimant's termination was on grounds of misconduct as is reflected in the suspension letter. She further denies receipt of a demand notice from the claimant and avers that this was served with the pleadings in this suit.

The matter came to court variously until the 3rd, November, 2017 when the matter was heard *inter partes*.

At trial, the parties' witnesses testified in reiteration of their respective cases. The claimant testified in adoption of his witness statements dated 14th December, 2016 and prayed that this be adopted as his evidence. It was his evidence that on the date of the disciplinary proceedings he attended and pledged that he be allowed to do the court matter first. The results of the disciplinary proceedings were that he did not participate. He did not speak. He also adopted his list of documents also dated 14th instant as evidence in support of his case.

On cross-examination, the claimant admitted having been paid his terminal benefits at Kshs. 12,000.00. He also admitted that payment for overtime required the authority of the applicant employees supervisor which authority he has not furnished. He, however, later denied payment of his entire terminal dues.

The claimant on further cross-examination testified that he was found with a cable on a motor bike. He did not know whose it was. He was arrested and arraigned to Kilgoris Law Courts to answer criminal charges consequential to this incident.

The claimant's penultimate case and evidence is that he was issued with a suspension letter and also invited to disciplinary proceedings but was not warned of having a representative during the hearing. Here, he told the panel that his position was that disciplinary proceedings should await court proceedings. He therefore did not make any further representations or participate in these proceedings.

The claimant denies being invited to disciplinary proceedings at re-examination. He also reiterated that he was not told to go with a witness or other representative at the disciplinary proceedings.

The respondent produced two witnesses. DW 1, Catherine Wakhungu Weromba testified she was incharge of attendance in the respondent's firm. She further testified in adoption of a witness statement dated 2nd November, 2017 in the respondent's list of documents of the same date. At page 51 of the list of documents, she testified that one cannot accumulate overtime for three years. Moreover, this required the approval of the supervisor.

It was her further testimony and evidence that the claimant was paid his terminal dues and compensated for the balance of 26 leave days not taken. On cross-examination, she testified that there was no overtime policy before 12th August, 2016. Then, workers would be allowed rest in lieu of overtime. This would be a day off for time done.

DW 2, Victor Magomosek and DW 3, Michael Lemiso Chimuke and DW 4, Kisio Wilson Marambi also testified in reiteration of the case of the respondent.

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 parties submit opposing positions on this.

The claimant in his written submissions dated 11th November, 2017 seeks to rely on the authority of **Patrick Kariuki vs Del Monte (K) Ltd (2012) eKLR** where the court observed as follows;

*"The memo of suspension dated 9.00.2009 had the effect of the Respondent electing to have the allegations against the Claimant investigated by the state through the criminal case number 1134 of 2009 in which the Claimant was one of the accused persons. By making the election, the Respondent was thereby precluded from internally concluding the Claimant's disciplinary case and the Claimant had a legitimate expectation that the Respondent would determine his fate taking into*

account the outcome of the proceedings in the criminal case. The criminal case found that the Claimant was innocent as charged and the judgement was delivered on 24th February, 2011 long after the Respondent had dismissed the Claimant with effect from 12.11.2009 and by the letter dated 12.11.2009. The court finds that on 12.11.2009 the Respondent did not have the benefit of the state's investigation report or findings as was to be determined in the criminal case so that the test for gross misconduct as founded on the pending investigations was not capable of being proved by the Respondent at the time of the termination.

He also sought to rely on the authority of **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2014) eKLR** where the court observed thus;

*“... when the respondent cracked the whip of termination, the same was fraught with irregularity so crucial, that of failure to involve the union as the claimant was unionized or have him accompanied by a fellow employee of the grievant choice was not done. Despite his bad record, the right to have the union present or a fellow employee at the hearing is a sacrosanct right he should have been made to enjoy. I find this to be an unfair labour practice.”*

Further, he employed the authority of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR** where it was observed as follows;

*“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of valid reason for the termination while procedural fairness address the procedure adopted by the employer in effecting the termination.”*

The respondent in rebuttal to the claimant's submissions and case submitted the irrelevance and inapplicability of the authorities cited by the claimant in support of his case. It is his submission that the respondent in terminating the employment of the claimant fully complied with the requirements of sections 44 (4) (g), 41 (1) and (2) of the Employment Act, 2007. These are as follows;

*44(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:-*

*(a)...*

*(b)...*

*(c)...*

*(d)...*

*(e)...*

*(f)...*

*(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.”*

*41. (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.*

Here, the respondent formulates and rests a case of lawful termination of employment by way of summary dismissal in which the claimant was taken through disciplinary process as required by the law above cited. The claimant on his own volition chose not to defend himself and submitted that these proceedings await the decision of the criminal enquiry. This cannot be termed as denial of a hearing.

The respondent further sought to rely on the authority of **Thomas Sila Nzivo – vs – Bamburi Cement Limited (2014) eKLR**, in further distinguishing her case. In the instant case, the court observed as follows;

*“...Disciplinary proceedings at the employment place are not an exact fit of other proceedings. The employer invariably is the complainant and has the responsibility to investigate, hear the employee and make a decision. There are employment places with limited number of personnel, to enable different and independent managers undertake different roles in the disciplinary process. Employers are only required to meet the minimum statutory procedure on fairness as prescribed under Section 41 and 45 of the Employment Act 2007...”*

Overall, this matter tilts in favour of the respondent’s case. The respondent’s has established a resounding case and evidence in her favour. On the contrary, the claimant has not in any way proven a case of unlawful termination of employment as is required of him by section 47 (5) of the Employment Act, 2007 as follows;

*47 (5) of the Employment Act which states that;-*

*“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”*

I therefore find a case of lawful termination of the employment of the claimant by the respondent and hold as such. This answers the 1st issue for determination.

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

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

Delivered, dated and signed this 11th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Orange instructed by Ongori Auta & Company Advocates for the claimant.
2. Mr. Ongegu instructed by Ongegu & Associates for the respondent.