



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 45 OF 2017

(Before D. K. N. Marete)

JOHN NGOKO ISOE.....CLAIMANT

VERSUS

NYASIONGO TEA FACTORY CO. LTD.....RESPONDENT

JUDGEMENT

This matter came to court vide a Statement of Claim dated 19th September, 2017.

The respondent in a Reply to Memorandum of claim dated 16th November, 2017 denies the claim and prays that the same be dismissed with costs.

The claimants case is that vide the respondents letter dated 12th March, 2010, he was employed as Driver Grade II by the respondent. The effective date of employment was 1st April, 2010 and he earned Kshs.15,535.00 inclusive of house and medical allowances.

The claimant's further case is that on 2nd August, 2010 he was confirmed in appointment as Driver Grade II with a salary of 19,280.00 and a house allowance of Kshs.2,330.00, in the event the respondent could not provide accommodation to him.

The claimant's other case is that on 7th December, 2010 he was promoted with effect from 12th December instant and earned Kshs.19,280.00, Kshs.2,330.00 and Kshs.500.00 per month as salary, house allowance and medical allowance respectively. This rose to a basic pay of Kshs. 33,710.00 as at January, 2016.

The respondent was again, vide a letter dated 1st November, 2013 appointed to act as Logistics Officer with effect from 1st November, 2014 to 30th April, 2014 (?) with an acting allowance of Kshs.4,500.00 per month. He was thereon assigned as a clerk to collect tea leaves at Kenyoro Tea Buying Centre – NS 050. The claimant was thereafter dismissed from employment on allegations of tampering with the weighing scale. Prior to this, he had been charged in court with the offence of cheating contrary to section 315 of the penal code in Keroka PM CR.CASE 1419 of 2015 of which he was acquitted on 4th July, 2017.

It is the claimant's case that he was irregularly and unlawfully dismissed from employment as follows;

a) Charging the claimant in court vide Keroka PM CR. 1419 of 2015 yet again proceeding to

dismiss the claimant from duty without awaiting the outcome of the criminal proceedings.

b) Failure to accord the claimant an opportunity to be heard.

c) Acting with malice and spite.

It is his other case that he has not been paid his terminal benefits, salaries and leave allowance.

He prays as follows;

a) A declaration that the summary dismissal against the claimant by the respondent was unfair, irregular and unlawful.

b) The claimant prays for full payment of suspended salaries w.e.f 13/1/2016, leave and medical allowances.

c) Costs.

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

It is her case that on 16th March, 2015 the claimant was found tampering with the respondent's weighing scale by hooking an external spring on the said weigh scale so as to deceive the company of the correct weight of the tea leaves obtained from each farmer in the field. This was with the ultimate aim of ensuring that the claimant improperly enriched himself out the inexistent kilograms that he would document. He was thereon issued with a reprimanding letter dated 16th March, 2015 which he was required to answer within 48 hours.

It is the respondent's further case that the claimant in answer denied the accusations but it was clear that farmers in his area of collection had variously complained of his weighing tactics. He had been warned of this misconduct on 11th March, 2015 but nevertheless disregarded such warning.

The respondent's other case is that due to this continuous gross misconduct, the claimant was suspended from duty with effect from 25th March, 2015 and a disciplinary committee held on 27th instant to deliberate on this matter. On 20th August, 2015 his suspension was lifted and he was allowed to resume duty albeit with warning that he would be sternly disciplined in the event of repeat complains against this conduct. This was again to be repeated at Kenyoro Tea Buying Centre - Code No. NS 050 on 14th October, 2015 and prompted a show cause letter. The claimant was to appear before a Disciplinary Committee on 25th November, 2015 where he was dismissed on failure to rebut his case of gross misconduct.

The matter came to court on 16th November, 2017 when the parties agreed on a disposal by way of written submissions.

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 his submissions dated 23rd November, 2017 submits a case of unlawful termination of employment in that the respondent summarily dismissed him on 31st January, 2016 without awaiting the outcome of the criminal proceedings in Keroka Cr. Case No.1419 of 2015 on the subject. Again, the claimant was not awarded a hearing before dismissal.

The claimant further seeks to rely on the authority of **Patrick Njuguna Kariuki vs. Delmonte (K) Ltd Cause No. 95 of 2011** the court stated that;

“By electing to charge the Claimant with a criminal case 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”.

Further,

“Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant justice agency”.

The respondent refutes this and submits a case of lawful termination. In this, she relies on section 41 (1) and (2) to implant a case of substantive and procedural justice as follows;

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.

The respondent recites the numerous occasions of misconduct for which the claimant was warned and reprimanded and ultimately leading to show cause and disciplinary proceedings in which he was found culpable and dismissed from employment.

The respondent further seeks to rely on the authority of section 44 of the Employment Act, 2007 which lays down the law on summary dismissal as follows;

44. (1) Summary dismissal shall take place when an employer terminated 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.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(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. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

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

e. an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

f. in the lawful exercise of any power of arrest given by or under anywritten law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

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 respondent further submits a case of validity for dismissal and relies on section 43 (1) of the Employment Act, 2007.

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 her submission that the claimant was dismissed for gross misconduct which misconduct had proceeded unabated despite numerous warnings to the claimant.

The respondent in answer to the issue of justification of reasons for termination further sought to rely on the authority of **Kenya plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited [2016] eKLR**, where this court observed thus;

"...The respondent in the penultimate seeks to rely on the authority of Benson Rollano Wemali v National Environment Management Authority (NEMA) 2015 eKLR where the court expounded that provisions of Section 47 (5) of the Employment Act, 2007 touching on the burden of proof of unfair employment rests on the employee as follows;

"the respondent has adduced evidence to show that the dismissal of the claimant was founded on a valid and fair reason and it was done after giving claimant a chance to defend himself" ... and that "the claimant did not discharge his burden under section 47 (5) of the Employment Act, 2007."

The respondent's case outweighs that of the claimant on the veracity of the evidence adduced. The

evidence and case of the respondent overwhelms the claimant's by far. The claimant does not largely answer the respondent's case but insists on his. In as much as this appears to be a case of your word against mine, it all tilts in favour of the respondent on a test of preponderance of evidence. I therefore find a case of lawful termination of the employment of the claimant and hold as such..."

The claimant has failed to prove a case of unfair termination of employment. This is against the respondents overwhelming evidence of massive misconduct on his part, leading to dismissal. This is outrightly a case of lawful termination of employment. The claimant's case falls by the wayside. 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. Ochang holding brief Abobo instructed by Josiah Abobo & Company Advocate for the claimant.
2. Mr. Sambu instructed by Seth & Wathigo Company for the respondent.