



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 135 OF 2016

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

MOGOBICH TEA ESTATE LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide an Amended Memorandum of Claim amended on 24th May, 2017. The issue in dispute is there in cited as;

“Victimisation and wrongful, unlawful and unfair dismissal of Isaac Birgen”

The respondent in defence retains her Memorandum of Reply dated 9th December, 2016 in which she denies the claim and prays that it 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.

The claimant’s further case is that the respondent employed the grievant on 26th July, 1999 as a general worker. This was on permanent basis and terms. It is her case that on 29th March, 2012 the grievant was deployed to perform other duties and not plucking in terms of an agreement between the management and the claimants Branch Secretary as they awaited a report from the directors meeting.

The claimant’s other case is that in 2013, he was appointed acting supervisor for a period of 3 months but in December 2014, he was returned to plucking for a period of one (1) month of which the union intervened. On 30th December, 2015, the grievant and his colleague Stephen Korir were advised by the management not to report to the usual working station at M5 for Kando job but instead join other employees at M3. This is brought out as follows;

11. The employees started shouting terming the act as an intimidation to the disable and they threatened not to continue working if the issue is not addressed.

12. The assistant manager of the Respondent, Mr. Felix came to the field at around 8.30 am and called people out of the field. He told them that Mr. Korir was going back to his kando job, while

the grievant Mr. Isaac Birgen will remain in plucking.

13. The grievant and the other employees resumed their work as usual at around 9.00 am.

14. At around 12.00 noon, after plucking 5.5 Kilograms of tea leaves, the grievant fell sick and was allowed to go to the dispensary for medication by his supervisor Mr. William Martim. Appendix 5 is a copy of the December payslip.

15. The grievant went to the dispensary on 31/12/2015 and was allowed a paid sick off for four (4) days, that is, from 31/12/2015 to 04/01/2016.

16. On 04/01/2016, the grievant was referred to Kapsabet County Hospital for further treatment. Appendix 6 is a copy of the medical sheet.

17. On 05/01/2016, after he reported to work, the grievant was given a show cause letter stating that the grievant tried to disrupt plucking operations in field M3 and engaged in a heated argument with the Estate management in front of the workers. Appendix 7 is a copy of the show cause notice dated 05/01/2016.

18. The grievant on 08/01/2016 showed cause as required and explained that he was not involved in the disruption of the plucking and that the employees were complaining about Mr. Korir and not him. Appendix 8 is a copy of the response to the show cause notice dated 08/01/2016.

19. The Respondent on 09/01/2016 called the shop stewards to attend a disciplinary hearing on the issue. During the hearing no agreement was reached and the Respondent therefore terminated the services of the grievant by handing him a termination letter immediately after the hearing. Appendix 9 is a copy of the letter of termination dated 09/01/2016.

20. The shop steward Mr. Stephen Korir wrote a letter on 13/01/2016 addressing it to the Respondent complaining about the unfair termination of the grievant. Appendix 10 is a copy of the letter dated 13/01/2016.

21. On 09/02/2016, the branch secretary held a meeting with the Respondent at Mogobich office where they tried to solve the issue but they did not come up with an agreement and as a result the dispute was referred to conciliation.

22. ON 20/05/2016, the Claimant and the Respondent attended a conciliation meeting chaired by Mr. Chemursoi, the conciliator. The dispute was not resolved and the conciliator issued a certificate of unresolved dispute for either party to take any further necessary action. Appendix 11 is a copy of the certificate of unresolved dispute dated 22/06/2016.

23. At the time of his dismissal, the grievant was earning a gross monthly pay of Kshs.7,266.74. Appendix 12 is a copy of the grievant payslip for January 2016.

24. The Respondent craved every slight opportunity to victimize the employee's representatives, especially the grievant herein without any justification at all. It is noteworthy that it terminated the grievant services on grounds of gross misconduct, the grievant is accused of having disrupted plucking duties and used abusive language against the estate management. Had the grievant disrupted the plucking he would not have been allowed to work, for that could have amounted to incitement, but instead he plucked up to 12.00 noon when he fell sick and was allowed to proceed to the dispensary for treatment and even allowed paid offs for the four days.

25. The Respondent had targeted the grievant herein for dismissal and was craving for every opportunity to dismiss him. The use of abusive language would have amounted to summary dismissal in accordance with the Employment Act 2007 Laws of Kenya Sec 44 (a), (d), (e) and (g) and also Clause 25 (a) of the Collective Agreement, but instead not even a warning letter was

issued to the grievant.

26. Even though there was a disciplinary hearing held by the Respondent for the grievant, the hearing was not fair since the management seemed like it had already made up its mind to terminate the services of the grievant. The grievant was issued with the termination letter immediately after the hearing. This shows that the letter had already been drafted and was onto to be served to the grievant. Therefore it appears to have been a well-orchestrated plan to get rid of the grievant due to his active articulation of the welfare employees.

27. The Respondent's actions amount to unfair labour practices against express provisions of the Law.

He prays as follows;

1. A declaration that the dismissal of the grievant is wrongful, unfair, unlawful and that it amounts to victimization;
2. (i) An order compelling the grievant to reinstate the grievant without loss of benefits;
(ii) An order directing the Respondent to pay the grievant for the entire time he has been out of employment.
3. An order (should prayer (2) hereinafter fail) directing the Respondent to pay the grievant:-
 - i. Twelve (12) months' compensation Kshs.87,200.88
4. Certificate of Service
5. Costs of the cause
6. Interest on (2), (3) and (4) hereinabove.

The respondent admits the basic particulars of the claim but adds that the claimant only held the position of Acting Supervisor.

It is her other case that when the claimant and Stephen Korir, a shop steward were allocated duties with other employees under the supervision of William Maritim, the supervisor who asked them to wait the others but instead the claimant asked the other employees not to work as Stephen Korir had been told to pluck tea leaves thereby occasioning a commotion. This continued until the farm managers Mr. Felix Tanui and Ronald Tanni instilled calm by talking to the workers. All this time, the two shop stewards (grievant and Stephen Korir) were quarreling and arguing with the managers.

The respondent also recites a case of issue of a show cause letter to the claimant requesting that he shows cause as to why he should not be disciplined for tearing up a resignation letter which was company property, disrupting farm operations and being absent from work without permission on 4th January, 2016. A response to this was received on 8th January, 2016 whereby the claimant was heard with his witnesses of choice but the respondent terminated his services for gross misconduct in a letter dated 9th January, 2016. This disciplinary meeting was conducted in the presence of a shop steward, a representative of the union on behalf of the claimant and the claimant in person. All charges were presented to him.

The matter came to court variously until 16th November, 2017 when it was heard *inter partes*. At the hearing the claimant sought to rely on his witness statements, list of documents and the Amended Memorandum of Claim. He also sought to produce in evidence an Memorandum of Understanding *inter partes* made on 19th March, 2012 – Appendix 3 of the Memorandum of Claim in which he was excluded from plucking.

On cross-examination the claimant testified that the letter of termination stated that he reported for plucking and was also absent. He denies causing disturbance at the work place. He further testified that he was issued with a show cause letter on 7th January, 2016 and was also invited for a meeting at the sub branch on 4th January, 2016 but in all he had a sick off for 4 days with effect from 31st December 2015 to 4th January, 2016.

DW 1 – Daniel Keter for the defence testified in reiteration of his witness statement which he also adopted as evidence produced in court. It is his case that the claimant got to his office on 5th January, 2016 at 1600 hours and destroyed a resignation letter by Josephine Okore. He was not on duty that day and had come from home. The matter was reported to the manager on the following day. This (tearing of resignation letter) happened in the presence of Ainea Siyai, a retiree who had come to his office to pursue his benefits.

DW 2 – Ainea Siyai also testified and adopted his witness statement as evidence before court. DW 3 – William Maritim also testified in support of the respondent's case. He adopted his witness statement.

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 written submission dated 23rd November, 2017 recites a case of unlawful termination of employment. In this he seeks to rely on the authority of section 43 (1) and 45 (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 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 (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 claimant in his written submission set out to contradict the evidence and case of the respondent as follows;

- On 5th January, 2016, the grievant was requested to attend shop steward meeting by the branch secretary. He indeed attended the meeting with information, permission and authority of the management before he left for the meeting.
- The claimant's position is that the grievant went to the office on 22nd December, 2015 and was requested by the office clerk to return the resignation letter to Jemimah Okero. The respondent witnesses Daniel Keter and Ainea Siyai's witness statements stated that the grievant tore the letter on 5th January, 2016 the same day he is alleged to have been absent from work without permission. This bears a question of veracity of evidence as it is contradictory.

There is no clarity on the happenings of the letter of resignation as the recipient, Jemimah Okero, was not called to testify at the disciplinary hearing.

- The witness statement of Daniel Keter and Ainea Siyai state that the grievant tore the letter on 5th January, 2016 whereas the letter of summary dismissal puts this at 30th December, 2015. Another contradiction.
- There was a breach of the Memorandum of Understanding dated 19th March, 2012 exempting the grievant from plucking duties. This could have caused the fracas but the respondent denies this and unduly lays blame on the grievant.
- The absence from duty on 5th January, 2016 is explained by the grievant. He took permission. The respondent does not in evidence support the claim of absence without permission. This is not established by its witnesses statements filed in court. Moreover, the grievant's payslip for January, 2016 indicates that he was paid for 8 days. This is testimony that he worked through and through.

The claimant on the above grounds therefore forments a case of unlawful termination of employment which is supported by contradictory and confusing evidence of the defence as outlined in the submissions as above.

The respondent on the other hand draws her written submissions in opposition to the claim. She supports a fairness of dismissal on the grounds that the reason of dismissal offered in support of termination is valid. Two, the grievant was taken through a disciplinary proceedings culminating in a case of summary dismissal.

The respondent in substantiation and support of her case seeks to rely on the authority of **Benson Owino Odongo vs Menengati Oil Refeneries Ltd [2015] eKLR** where the court observed as follows;

".....the respondent after having failed to locate the Claimant on phone and through his workmates should have held a disciplinary meeting on 14th April 201 when the Claimant resurfaced. The Respondent did not hold a hearing and the court therefore finds that it acted unfairly in declaring the claimant dismissed."

She further relies on the authority of **Banking, Insurance & Finance Union (Kenya) vs. Barclays Bank of Kenya [2014] eKLR**. Here, the court observed thus;

"therefore even in a case of sickness, an affected employee has a duty that is mandatory to bring to the attention of the employer as soon as is reasonable practicable of any absence due to sickness or illness. Where the absence is caused by sickness or illness such an employee is required to produce a certificate as to the medical condition from a qualified medical practitioner."

Again, the respondent relied on the authority of **Daniel Raiti Ogeto vs College Management Board Acting for Elgon View College Board [2014]** where Ongaya, J. observed as follows;

"there was no doubt that the claimant was given a lengthy hearing about the dismissal and the reason for the dismissal at the meeting of 15/5/2013 between the claimant and the respondent's chairman resulting in the upholding the dismissal. The court find that the lengthy hearing and discussion served to cure any procedural defects that would have occurred if it termination had taken place without a hearing"

Overall, and on an assessment of the respective cases of the parties, this matter tilts in favour of the claimant. The claimant's case overwhelms that of the respondent. What with contradictory evidence by the respondent which does not add up and is easily controverted by the claimant's submissions.

The claimant clearly elicits a case of unlawful termination of employment through an elaborate tabulation of evidence as follows;

- That there is no evidence that he tore or did not deliver the issue based letter to Jemimah Okero.
- That he was absent from duty on 5th January, 2016, but with permission.
- That he was paid for 8 days in January, 2016.
- That there is no concrete evidence on the causative of the fracas at the work place on 30th December, 2015.
- That there was disregard of the memorandum of understanding of 19th March, 2012 on his assignment of duties.

I therefore 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 the claimant is entitled to the relief sought. He is. Having succeeded on a case for unlawful termination of employment he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

- i. A declaration be and is hereby issued that the dismissal of the grievant by the respondent was wrongful, unfair and unlawful.
- ii. The grievant be and is hereby reinstated to employment without loss of emoluments, benefits and promotion with effect from 12th December, 2017 at 800 hours.
- iii. Six (6) months salary as compensation from unlawful termination of employment $Kshs.7,266.74 \times 6 = 43,600.44$.
- iv The cost of the claim shall be borne by the respondent.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Omwaka for the claimant union.
2. Miss Wachira instructed by Wachira Wanjiru & Company Advocates for the respondent.