



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 146 OF 2016**

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

**JUSTUS MATARA KEMUMA.....CLAIMANT**

**VERSUS**

**TRANSMARA SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter came to court vide an Amended Memorandum of Claim dated 24th November, 2016. The issue in dispute is there in cited as;

*Unlawful dismissal*

The respondent in an Amended Statement of Response dated 9th December, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times herein he was an employee of the respondent with effect from the year 2009. At the time of dismissal he had served for 8 years, clean and neat.

The claimant's other case is that on 3rd September, 2016, he was dismissed from employment without justification and on the strength of externalities and unreasonable considerations. He deems such dismissal as unconstitutional, illegal, arbitrary, unlawful and anchored on considerations immaterial or impairment to his employment contract. This was also a violation of his rights under Article 25 (c) and 47 (1) of the constitution and he claims exemplary damages.

It is his other case that at the time of dismissal he was aged 47 and earned a gross salary of Kshs.45,000.00 and therefore with 13½ years of service and career imperiled by his dismissal, his entitled to allowances thereto.

He prays as follows;

1. For a declaration that the claimant's dismissal is illegal, unconstitutional, discriminative, null and void *ab nitio*.
2. Special damages.
3. General damages

3.A Exemplary damages for arbitrary, unlawful and or illegal summary dismissal.

4. An order for reinstatement.

5. Costs of this suit.

The respondent's case is a denial of the claim. It is her case that the claimant's dismissal was above board and in accordance with the Employment Act, 2007. This was informed of charges made against him in which he was afforded a fair hearing and after participating with his workmates, he was found culpable.

It is the respondent's case that the claim is frivolous, vexatious and a waste of time as the claimant was involved in selling the company's property - to wit, sand to third parties which misconduct was tried within the confines of law and procedure attendant to workplace disciplinary proceedings.

This matter came to court variously until the 6th November, 2017 when it was heard *inter partes*.

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 submissions submits a violation of section 43 of the Employment Act, 2007 in that the respondent failed to prove the reason for terminating the employment of the claimant. It is his case that both the internal mechanism and the evidence adduced in this court fall short of evidence in support of dismissal. Again, the claimant was not given a fair chance of being heard on the decision reached was at variance with the evidence. This would not support the harsh, arbitrary and draconian decision of summary dismissal meted out on the claimant.

The respondent in furtherance of their case submits a case of gross misconduct as provided under section 44 (4) (g) of the Employment Act, 2007 as follows;

*(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:-*

*(d) ...*

*(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.*

In answer to a case of substantive and procedural fairness the respondent again submits compliance with section 41 (1) and (2) as follows;

*41 (1) Subject to section 42(1), an employer shall before termination the employment on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands the reason from which the employer 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) of (4) hear and consider any representations which the employee may on grounds of misconduct or poor

.....

She seeks to buttress this on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where Mbaru, J. held as follows;

*“Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.*

The parties rely on the same authorities in support of their respective cases. The claimant particularly gets out of his way to rubbish the evidence of the respondent heaping culpability on his part. It is her submission that no clear cut evidence was adduced to implicate the claimant in the sand saga and further that crucial witnesses comprising of Moses Okiro, Tom Juma, Robert Mokire, Victor Otieno Akumu or even Towett, all of them drivers were not invited to testify during the disciplinary committee proceedings and also in court. So far so good.

This is clearly a case of your word against mine. We must therefore employ acceptable principles of evaluation of evidence in a determination of the issues in

dispute. Here, I seek to involve the principle of balance of probability and answer the following question: of the two versions of evidence, which is the more probable?

I answer this in favour of the respondent. This is the more probable of the two scenarios. Besides this, the respondent adduces evidence clearly bringing out a case of misconduct and culpability on the part of the grievant. It would be fallacious to make an award in his favour and therefore let him benefit from his mischief. This would be untenable and an abuse to intelligence. I therefore find a case of lawful termination of employment 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 4th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Miss. Obosso holding brief for Nyabega instructed by Mose Nyabega & Company Advocates for the claimant.
2. Mr. Ongegu instructed by Ongegu & Advocates for the respondent.