



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 233 OF 2015**

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

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

**VERSUS**

**EASTERN PRODUCE KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a Memorandum of Claim dated 3rd September, 2015. The issue in dispute is therein cited as;

*Unlawful, wrongful and unfair dismissal of Esther Jepolem*

The respondent in a Memorandum of Defence dated 10th November, 2015 denies the claim and prays that the same 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. This stipulates the terms and conditions of service for the employees who are members of the claimant union.

The claimant's other case is that the grievant herein, Esther Jepolem, was employed by the respondent in 1986 in the position of Office Messenger and deployed at the respondent's Chemoni estate. In 1987 she was promoted to the position of payroll clerk and deployed at respondent's Kapsikak division. In 2013, she was transferred to Kibware estate.

The claimant's other case is that on or about 11th November, 2007 she entered

into an agreement with the respondent in which she would supply tea to the respondent herein from her farm under an arrangement called outgrowing. She became outgrower No.147. On 10th June, 2011 the grievant was summoned by the respondent's Group Internal Auditor who directed her to show her the farm from which she supplied tea. She complied.

On 13th June, 2013, the grievant was issued with a suspension notice for being involved in green leaf delivery fraud at Chemoni estate. She was however not informed of the particulars of the offence. On the following day, she sought to resign from employment but the respondent declined on grounds of the ongoing investigations.

The claimant's other case is that on 15th August, 2013 she was issued with a notice to attend disciplinary enquiry slated for 19th August at 900 hours. This indicated that a Mr. Maurice Ngetich, on behalf of the company, had lodged two complaints against herself. She indeed attended the disciplinary proceedings and pleaded her case against fraudulent activity but was nevertheless issued with a letter of summary dismissal dated 5th September. This is as follows;

*11. Particularly, the grievant explained that she had not falsified records or documents and/or involved herself in any fraudulent activity. She also explained that she had not tampered with and/or in any manner altered outgrower's tea records. During that meeting no witness was presented to testify that he or she saw the grievant download the alleged outgrower weighment. No material was placed before the grievant in support of the allegations. **Appendix 6 is a copy of the minutes of the disciplinary enquiry.***

*12. The grievant's job description involved effecting payments and not weighing of tea for the outgrowers or at all. The grievant could therefore not in any way make entries regarding the weight of tea for outgrowers or at all.*

*13. On 05/09/2013 the grievant was issued with a letter summarily dismissing her for green leaf hawking and falsifying record/document. **Appendix 7 is a copy of the dismissal letter.***

Her further case is that thereon, this matter was reported to the claimant who pursued conciliation proceedings to no avail. The conciliator entered a disagreement.

She prays as follows;

*1) A declaration that the dismissal of the grievant is unlawful, wrongful and unfair in the circumstances.*

*2) (i) An order compelling the Respondent to reinstate the grievant without loss of benefits.*

*(ii) An order compelling the Respondent to pay the grievant monthly salary for the entire time she has been out of service.*

*3) If prayer (2) above fails, an order directing the Respondent to pay the grievant as follows;*

*i) Gratuity/Service as provided under the CBA;*

*ii) In lieu of notice of termination;*

*iii) Leave not taken and leave travelling allowance;*

*iv) Compensation equivalent to twelve (12) month's salary;*

*v) Damages for unlawful, wrongful and unfair termination;*

*vi) Costs of the cause.*

*4) Interest on 2 (ii) or 3 herein above at court rates*

*5) Any other relief this Honourable Court may deem fit and just to grant.*

The respondent's case is a denial of unlawful termination of employment of the claimant. It is also a recital of the undisputed facts of the case leading to disciplinary proceedings and a termination of employment communicated in her letter of 5th September, 2013. She puts it thus;

*11. The Respondent vide a letter date 13<sup>th</sup> August 2013, invited her to attend a disciplinary hearing*

to be held on 19<sup>th</sup> August 2013 having been charged with;

a. Hawking tea which she had admitted in a statement made to the Respondent's officer on 10<sup>th</sup> June 2013; and

b. Falsifying records on 9<sup>th</sup> March 2010 in that she downloaded into her account in the Outgrowers system a fraudulent weight at 20:33 hours when the last weight was at 127:23 hours. See Appendix 5:

Copy of disciplinary hearing notice dated 13/8/2013;

Copy of green leaf collection and weighments sheet dated 9/3/2010;

Copy of green leaf delivery note dated 9/3/2010; and

Copy of the Grievant's statement on green leaf delivery to Chemomi Estate dated 12/6/2013

16. The Respondent vide a letter dated 8<sup>th</sup> December 2013 responded to the Conciliator's report and while disagreeing with the report, reiterated that it acted both in procedurally and substantively fair manner which fact was proved during the conciliation process. The Respondent therefore felt that to interfere with its original decision to summarily dismiss the grievant would be detrimental to it as it would contradict its own consistency principle and more so given the gravity of the matter at hand. See Appendix 9; a copy of the Respondent's response to Conciliator's report dated 8/12/2014

This matter came to court severally until 23rd May, 2017 when it was heard with the parties testifying in reiteration of their respective cases.

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 her written submissions dated 16th October, 2017 sought to rely on the authority of section 43 (1) and 45 (1) 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 the 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) A termination of employment by an employer is unfair if the employer fails to prove –*

*a) That the reason for termination is valid;*

Further, the claimant sought to rely on the authority of **Zephania Nyambane vs Nakuru Water & Sanitation Services Company Limited (2013) eKLR** at page 9 where Ongaya, J. observed as follows;

*Thus to answer the second issue for determination, the court finds that the alleged reasons for termination were never established as they were fictitious as not established to exist at the time of termination and therefore not valid.*

The respondent on the other hand submitted that the role of a pay roll clerk, the grievant's duties, involved *inter alia*,

2.2 As a payroll clerk, the Grievant's duties involved *inter alia* the following;

- i. Issuing (electronic) scales for weighing tea to out-grower leaf clersk each day;
- ii. Upon return of the weighing scales at the close of business, transferring (electronically) the out-grower tea weight data from the weighing scales to the office computer and printing this data.

2.8 The Respondent prepared a report summarizing its findings which are summarized below;

- i. The Grievant started supplying the Respondent with tea as an out-grower in 2010, having an out-grower account no.4147. It was an express term of the out-grower agreement that she would not engage in hawking of tea. (see page 1 of the Respondent' supplementary bundle of documents)
- ii. From her narrative, this tea came from a various farms which did not belong to her. She alleged that she used to lease the farms not exceeding 0.4 acres. It was noted that the lease only begun to run from 3<sup>rd</sup> June 2012. Nothing was provided to indicate where she sourced her tea before that; (see application from at page 2 of the Respondent's supplementary bundle of documents)
- iii. The amount of tea she supplied far exceeded that which could be produced by a farm measuring 0.3 acres. (see page 2 and 3 of the Respondent's bundle of documents)
- iv. The Grievant admitted that she was buying tea leaf from other farmers, which act constitutes hawking of tea.
- v. On one particular date, 26<sup>th</sup> March 2010, the data indicated that an entire trip delivered only the Grievant's tea to the Respondent. (see page 43 of Grievant's documents)
- vi. It was reasonably believed that Grievant, in her capacity as a payroll clerk, accessed the scale after hours as higher value of tea was added to her account no 4147 in respect of the day's collection as an out-grower. (see paragraphs (g) and (h) at page 3 of the Respondents bundle of documents)

She linked this to establish a case that the grievant was always involved in the activities she was accused of meddling as these were part of her duties.

The respondent further sought to rely on the authority of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR** where the court, in outlining procedural fairness pronounced thus;

*"The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*

*Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*

*Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."*

It is her case that procedural fairness would never arise in the circumstances as the grievant was awarded ample and adequate opportunity to present her case at a disciplinary enquiry at the work place. In this, she failed to disapprove her culpability.

A scrutiny of the respective cases of the parties tilts the matter in favour of the respondent. This is because the respondent overwhelmingly proves her case as against that of the claimant. The claimant miserably fails to tender a concrete

case on the tests of a preponderance of evidence or even balance of probability. The probable case and scenario in the circumstances is that of the respondent.

The claimant also fails to satiate the legal requirements and burden of proof enunciated in section 47 (5) of the Employment Act, 2007 as follows;

*47 (5) 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.*

In the circumstances, a case of unlawful termination of employment flops in entirety. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she 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. Omwaka for the claimant union instructed by for the claimant.
2. Mr.Ngeno instructed by Kaplan & Stratton Advocates for the respondent.