



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 324 OF 2014

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION..... CLAIMANT

v

DEL MONTE KENYA LTD.....RESPONDENT

JUDGMENT

1. Dickson Njoroge Ndungu (1st Grievant) and Kasama Mutinda (2nd Grievant) were dismissed by Del Monte Kenya Ltd (Respondent) on 8 March 2012 and the reason given was that they had been found with 5 litres of a chemical stolen from the Respondent.
2. The Grievants complained to their union, the Kenya Plantation & Agricultural Workers Union (Union) which in turn reported a trade dispute to the Cabinet Secretary for Labour. A Conciliator was appointed but on 12 March 2014, she returned a verdict of unresolved dispute.
3. Consequently, the Union moved to Court on 24 July 2014 alleging *wrongful, unlawful and unfair dismissal* of the Grievants. The Respondent filed a Response on 17 October 2014, and the Cause was heard on 14 May 2015 and 4 November 2015.
4. The Court has considered the pleadings, evidence and submissions by the Respondent and identified the issues for determination as, *whether the dismissals of the Grievants were unfair and appropriate remedies.*

Whether dismissals were unfair

Procedural fairness

5. Section 41 of the Employment Act, 2007 provides for the basic right to a hearing before termination of employment on the grounds of *misconduct, poor performance or physical incapacity*. The Grievants herein were dismissed because of theft, a misconduct.
6. The essentials of the statutory right to a hearing are that the employee is informed of the allegations to confront and that he is afforded an opportunity to make representations. The employee has a right to be accompanied by a fellow employee or union representative.
7. The 1st Grievant was issued with a show cause/suspension letter dated 24 February 2012. The letter outlined the allegations against him as being caught with 5 litres of dursban chemical, believed to have been stolen from the Respondent.

8. The show cause letter requested the 1st Grievant to make written representations within 24 hours and he did tender written explanations on the same day.
9. Still on the same day, the 1st Grievant was invited to attend a disciplinary hearing on 28 February 2012 at 10.00am. The invitation letter advised the Grievant that he was entitled to have another employee/shop floor union representative present during the hearing.
10. The hearing was held and minutes of the proceedings were annexed to the Response. On 8 March 2012, the Grievant was dismissed.
11. The 1st Grievant was informed of the charges against him, he was requested to make written explanations which he did. Thereafter he was invited to attend a face to face hearing which he attended and present were union representatives.
12. The Court is satisfied that the Respondent complied with the statutory requirements of procedural fairness in respect of the 1st Grievant.
13. The 2nd Grievant testified that he was not heard before the decision to terminate his employment was taken. He only recorded a statement as part of the investigations to establish the facts.
14. According to the Respondent's Industrial Relations Officer, the 2nd Grievant was a casual employee/on a daily contract and he never went back to work after the alleged theft.
15. On the employment status, the 2nd Grievant stated and his testimony was not challenged that he was employed by the Respondent in 2009 and was paid fortnightly.
16. This Grievant therefore cannot have been a casual employee whose contract lapsed at the end of the day. In any case, by operation of the law, he could not have been a casual employee for over 3 years.
17. The Court therefore finds that he was at the minimum on term employment of 2 weeks duration which were continuously extended and was entitled to the protection against unprocedurally unfair termination of employment afforded an employee by section 41 of the Employment Act, 2007.
18. In addition, because no hearing was held to afford him an opportunity to be heard, the Court finds that the Respondent terminated the 2nd Grievant's employment for misconduct/theft without complying with the peremptory requirements of section 41 of the Act.
19. The termination of employment was procedurally unfair.

Substantive fairness

20. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer is under a duty to prove the reasons for dismissing an employee, and that the reasons are valid and fair.
21. The Grievants were dismissed on allegations of theft. They were found with 5 litres of a chemical suspected of having been stolen from the Respondent. They were arrested and charged by the Police. Nothing much came out of the criminal proceedings as the charges were withdrawn.
22. The 1st Grievant admitted that they were found with a jerry can which he had given to the 2nd Grievant to use for carrying paraffin. He could not understand how the paraffin turned into a chemical.
23. The 2nd Grievant on his part contended that the jerry can had water they had used for rinsing to enable him buy paraffin when they were caught by Respondent's guards.
24. Two of the Respondent's witnesses, a security officer and an employee in the spray department identified the liquid in the jerry can as a chemical used to spray.
25. The Grievants attempted to controvert the testimony of the Respondent's witnesses that the liquid was a chemical. It was suggested that the witnesses had no qualifications in identification of chemicals.
26. The attempt by the Grievants cannot succeed in a case of this nature. Identification of chemicals in circumstances as obtaining here does not require any specialist skills.
27. Many are the times in the ordinary happenstance that a chemical, paraffin or the such, are used in households or farms without the need for laboratory testing/identification after purchase.
28. In my view, the Grievants were caught red handed but had to find an explanation, any explanation to explain themselves away from the impending consequences of having been found red handed. They had no plausible explanations and the Court finds as much, with the conclusion that the Respondent had and has proved valid and fair reasons for the dismissals.

Appropriate remedies/Orders

29.The Grievants pleaded several heads of relief. The Court will briefly examine them as some are contractual/ statutory entitlements not dependent on manner of separation.

Gratuity/House allowance/Leave/Leave travelling allowance

30.There was no attempt to quantify these heads of relief. No evidence on remuneration/ (contractual basis) at the material times to assist in determining the same were tendered.

31.The Court declines to make any award under these heads.

Compensation/Pay in lieu of notice

32.The termination of the employment of the 1st Grievant was both procedurally and substantively fair. He is not entitled to an award of pay in lieu of notice or compensation.

33.For the 2nd Grievant, it is only the process which was not fair.

34.Compensation is discretionary. The Court is of the view this is not a fit case to award the 2nd Grievant compensation or pay in lieu of notice.

Damages

35.It is not clear what the Grievants meant by damages as opposed to compensation of upto 12 months wages.

Household goods

36.No evidence was led on account of these.

Conclusion and Orders

37.The upshot of the foregoing is that the Union's claims on behalf of the Grievants are dismissed.

38.Because of ongoing relationship/social partnership between the Union and Respondent, each party to bear its own costs.

Delivered, dated and signed in Nakuru on this 29th day of January 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muli, Legal Officer, Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon