



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.16 OF 2014

(Before D. K. N. Marete)

PETER KIPROP KEMEI.....CLAIMANT

VERSUS

NANDI TEA ESTATES LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 22nd January, 2014. The issue in dispute is therein cited as;

“Wrongful/unfair/summary dismissal/and unlawful termination of the claimant Peter Kiprop Kemei being aggrieved by such wrongful, unfair and unlawful dismissal filed the claim herein.”

The respondent in a Respondent's Response to Statement of Claim dated 13th February, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this claim, he was an employee of the respondent as Clerk Grade I. He earned a salary of Kshs. 17,868.40.

It is the claimant's further case that it was a term of his contract of employment that the claimant would serve on permanent and pensionable terms alongside other allowances and benefits. He further contends that the respondent lodged a complaint with the police over some missing 279 bags of fertilizer at the respondent's premises and thereby the claimant was subsequently charged in Kapsabet Principal Magistrate's Court Cr. Case No. 2325 of 2011 for the offence of stealing by servant. On 8th July, 2013, and on full trial, he was acquitted of the charges under Section 215 of the Criminal Procedure Code.

The claimant further claims that on 20th July, 2011 his services were terminated. This termination was tainted with illegality, breach of terms and conditions of employment and null and void as follows;

- a. The termination was contrary to the rules of natural justice generally.*
- b. The claimant was not afforded sufficient opportunity to defend himself.*
- c. The decision to terminate the Claimant was arbitrary.*
- d. The termination was contrary to the Employment Act 2007 and the Constitution.*

The claimant in the penultimate avers and submits that the termination was unfair, unlawful and unjustifiable and without cause and without offending the claimant a hearing. It was outside the scope of equity and justice and contrary to the Employment Act as he was not awarded terminal benefits despite twenty two (22) years of service. He prays as follows;

a. Gratuity for the twenty two years (22) having worked with the Respondent.

b. The claimant was aged fifty years (50) at the time of termination earning a gross salary of Kshs. 17,864.40 and would have worked upto sixty years (60). The claimant claims earnings for the remaining ten years (10) at the rate of Kshs. 17,868.40 per month.

In the penultimate he prays as hereunder;

a. The claimant be reinstated to his former employment without any loss of benefits and or seniority.

b. A declaration that the Claimant's employment services with the Respondent were wrongly terminated, unlawfully summarily dismissed and or unfairly.

c. Termination benefits and gratuity for the twenty two years (22) the claimant worked.

d. Earnings for ten years (10) the claimant would have worked at the rate of Kshs. 17,868.40 per month.

e. Service pay.

f. Three months salary in lieu of notice of termination of employment.

g. Costs of this claim and interest.

h. Any other or further relief that this Honourable Court may deem fit and just to grant.

The respondent denies evidence of a contract of service of employment *inter partes* and that the claimant was a suspect in the criminal case and therefore responsibility for his arrest did not fall on herself.

It is the respondent's further case that the claimant absconded duty after his arrest and detention at the police station and he was amenable to acts of gross misconduct for failing to report on duty as required by the CBA then in force. As a consequence of this, summary dismissal was effected onto the claimant.

She further avers and submits;

a. THAT, the claimant requested in writing to be paid full gratuity.

b. THAT, the claimant acknowledged receipt of all his gratuity payments.

c. THAT, the claimant confirm that he has no further claim against the Respondent NANDI TEA ESTATES LIMITED.

d. THAT, this claim is therefore misplaced.

e. The claimant is NOT a beneficiary of Collective Bargaining Agreement (CBA) 2012/2013.

The issues for determination in the circumstances therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this cause?

The 1st issue for determination is whether indeed the determination of the employment of the claimant was wrongful, unfair and unlawful. This is the claimant's case but the respondent disputes the same. The claimant grounds his case on an arrest, charge and acquittal on a theft of 279 bags of fertilizer belonging to the respondent on a charge of theft by servant. The respondent submits that this occasioned absence from duty which was contrary to clause 25 (f) and (g) of the subsisting CBA between herself and Kenya Plantation & Agricultural Workers Union (KPAWU) and therefore the summary dismissal of the claimant. This provides as follows;

(f) If, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within 14 days either released on bail or on bond or otherwise lawfully set at liberty.

(g) If, an employee commits, or on reasonable and sufficient grounds is suspected of having committed, any criminal offence against or to the substantial detriment of his Employer of his Employer's property.

The claimant, in a Reply to Response to the Statement of Claim makes the following submissions;

3. THE Claimant wholly denies the contents of paragraph 8 of response specifically that upon arrest and prosecution the Respondent was mandated by law to summarily dismiss the Claimant from employment in accordance with the Collective Bargaining Agreement and Employment Act No.11 of 2007. The Respondent is put to strict proof thereof.

5. THE Claimant denies the contents of paragraph 10 of the response specifically that:-

a. The Claimant requested in writing to be paid full gratuity.

b. The Claimant acknowledged receipt of all his gratuity payments and that the claimant confirmed that he has no further claim against the Respondent.

c. The claim is misplaced.

d. The Claimant is not a beneficiary of the Collective Bargaining Agreement on 2012/2013.

The respondent enlists and annexes various documents in her further respondent's list of documents as follows;

1. Claimant's statement dated 23rd December 2013 acknowledging receipt of full

2. payment of Kshs.253,980/= gratuity.

3. Copy of letter of application to be paid gratuity dated 5th December 2013.

4. Gratuity payment notification of lump sum payment dated 11th December 2013.

5. Letter of payment of prorated leave days and bus fare dated 1st August 2011.

6. Copy of cheque no. 003395 for Kshs.253,980/= in favour of PETER KIPROP KEMEI.

7. Cheques for payment of leave days and bus fare.

These demonstrate payment of terminal dues to the claimant.

At the hearing of the matter on 2nd December, 2015 the claimant testified in reiteration of his case. The parties were later to abandon this approach in favour of a determination of way of written submissions. These submissions further served a reiteration of the respective cases and positions of the parties.

It is clear from the evidence and submissions of the respondent that the claimant was dismissed for failure to report to work – absenteeism and absconding duty. This was as a consequence of incarceration during the proceedings in his criminal case. The respondent deems this adequate and lawful in the circumstances. However, this raises a fundamental question of law. It raises issues of contest between the law on termination of employment and the essence of the employment contract.

The fundamentalities of an employment contract/contract of employment are frontal and take preference in an employment relationship. This however must now be contrasted with the principles of substantive and procedural justice in the process of termination. The provisions of the Bill of Rights in the Constitution of Kenya, 2010 and sections 41, 44 and 45 of the Employment Act, 2007 must at all times be tempered with the employment contract and other sensibilities so as not to occasion absurdity in a determination of parties rights in an employment relationship or case for termination. And this is the position here.

It is also an acknowledged principle of civil law that the outcome of criminal proceedings are not conclusive or binding in a determination of rights under employment or contract law. What does this cause and its circumstances portend for a determination in employment relationships?

I am inclined to find a case of lawful termination of employment in the circumstances of this case. This is because the respondent brings out a serious case of breach of duty and trust besides laying down a case of absenteeism occasioned by the consequences of such breach. The CBA – the basis of the contract of employment at clause 25 clearly provides for summary dismissal in the circumstances. The conduct of the claimant as expressed in the claim indicates caution in the approach of the matter against the respondent. All these in the end call for a cautious interplay between the law on substantive and procedural justice and employment contract as aforesaid. This conclusion ousts absurdity and brings out a case of justice.

On the above finding of the 1st issue for determination, the 2nd issue dissipates into nothingness. The claimant would not be entitled to the relief sought having lost on a case of unlawful termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. This clears all the issues for determination.

Dated, delivered and signed this 23rd day of May 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rotich instructed by Mwinamo Lugonzo & Company Advocates for the claimant.

2. Mr. Koech holding brief for Kitur instructed by S.K.Kitur & Company Advocates for the respondent.