



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

**AT KERICHO**

**CAUSE NO.101 OF 2015**

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

**KENYA PLANTATION &**

**AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**SOTIK HIGHLANDS TEA ESTATE LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 27th January, 2015. The issue in dispute is therein cited as;

*“Unlawful, illegal, unfair and wrongful dismissal of Japheth Mwamba & Festus Arasa Otundo.”*

The respondent in a Defence to Memorandum of Claim dated 10th April, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she is a registered trade union within the meaning of Section 2 of the Labour Relations Act, 2007 and represents workers in the agricultural and plantation sector. It is her further case that the grievants are

members of the claimant and were employed by the respondent as security guards until the time of their dismissal. Mwamba was employed on 1st October, 2004 while Arasa was employed on 3rd June, 1994.

Her further case is as follows;

*2.3 On 18/01/2013 at around 6.00pm one of the grievants, Mr. Otundo reported on duty whereby he relieved Mr. Mwamba from his duty station. Upon being relieved Mr. Mwamba left the work station for his house.*

*2.4 On the way, Mr. Mwamba met one of the Respondent's manager wife. The manager's wife requested him to assist her with a load she had to which he obliged. On his way back, Mr. Mwamba found Mr. Arasa conversing with neighbours's lad.*

*2.5 Mr. Mwamba stood to join the conversation but immediately a quarrel ensued upon which neighbours intervened and dispersed them. Throughout it all, the grievants did not*

*engage in any violence and/or fight.*

*2.6 On 18/01/2013, the grievants were summoned by the Respondent and after they gave their representations on what transpired, they were verbally warned and allowed to continue with their duties.*

*2.7 On 22/01/2013 the grievants were summoned again by the Respondent and dismissed summarily without being afforded a fair hearing. The grievants were neither issued with dismissal letters nor were they paid their terminal dues.*

*2.8 At the time of termination of their services the claimants were earning a salary of Kshs. 9,239. Appendix 2 is a copy of payslips for month of November 2012.*

*2.9 The grievant's reported the happenings to the claimant's branch*

*secretary for Sotik who immediately lodged an appeal with the Respondent. The appeal was heard on 12/02/2013 but the Respondent stood by its earlier decision to dismiss the grievant's herein.*

*2.10 The Claimant reported this dispute to the Minister for Labour seeking his assistance in resolving this dispute. The Minister appointed a conciliator to aid the parties resolve the dispute. A conciliation meeting was held but the parties disagreed. Appendix 3 is a copy of the Certificate of Disagreement.*

It is the claimant's other case that the investigation mechanism by the respondent was flawed in that the grievants did not cause any disturbance but merely quarreled. There were no disciplinary proceedings or hearing and therefore the falsity and fallibility of the termination. The grievants terminal benefits were not paid as expected of the law. She prays for;

*4.1 This Honourable court do order the Respondent to pay the grievant as follows:-*

*a) Gratuity*

*b) Six (6) months' unpaid salary.*

*c) One (1) months' pay in lieu of notice.*

*d) Annual leave travelling allowance.*

*4.2 This Honourable court do order the Respondent to pay the grievants twelve (12) months compensation for wrongful termination of services.*

*4.3 This Honourable Court do compel the Respondent to issue the grievants with certificates of service.*

*4.4 This Honourable Court do order the Respondent to pay the costs for this suit.*

*4.5 That this Honourable do order the Respondent to pay the grievant's interest on 4.1, 4.2, 4.3 and 4.4 hereinabove from the date of judgment to the date of full settlement.*

*4.6 Any other relief that this Honourable Court may deem fit and just to grant.*

The respondent's case is that both Mr. Otundo and Mr. Mwamba were on duty on 18th January, 2013 at 1800 hours as established at the hearing of their case. She however denies the allegations at paragraphs 2.4, 2.5, 2.6 and 2.7 of the claim and avers that these are manifestly false and afterthoughts fabricated in an attempt to absolve the grievants from wrongdoing on their part. It is the respondent's case that the two

grievants engaged in a fight while on duty and within the company premises. This is an act they well knew was unlawful and could lead to summary dismissal.

It is the further respondent's case that the grievants were accorded a fair hearing and further heard on appeal at the intervention of the claimant union but disagreed with the decision of dismissal. The grievants were further issued with dismissal letters but deliberately refused to collect and acknowledge the same.

*5.1 In regard to paragraph 3.1 to 3.4 of the Claim, the Respondent denies the submissions set out and avers that the provisions of the Collective Agreement are clear that continued employment is subject to an employee duly observing the Company Code of Conduct and the grievants' conduct herein was in violation of the Company's Code of Conduct and apart from denying the incident, the grievants did not prefer any apologies nor exhibit any signs of remorse.*

*5.2 Clause 25 (g) of the Collective Bargaining Agreement provides for summary dismissal where 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.*

*5.3 There is uncontroverted evidence that the grievants fought as is attested by their treatment sheets and the report from Kenneth Bii and therefore the grievant's dismissal was fair and justifiable.*

*5.4 Section 16 (2) of the Occupational Safety and Health Act prohibit fighting at the work place.*

*5.5 In respect of the claims in paragraph 4.1, 4.2, and 4.3, the Respondent avers that the claims set out therein are untenable as the grievants are wholly to blame for their predicaments. The Respondent accorded the grievants a fair hearing in full observance of Part V of the Employment Act in that they were heard in the presence of the shop stewards and witnesses and were duly informed that the action to be taken was summary dismissal.*

The matter came to court variously until the 1st February, 2016 when the parties agreed on a disposal by way of written submissions.

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 cause?

The 1st issue for determination is whether the employment of the claimant was wrongful, unfair and unlawful. The parties hold diametrically opposite versions on this. The claimant in her written submissions dated 23rd February, 2016 reiterates her claim and raises the following as issues for determination;

1. *Whether the dismissal of the grievants was fair and lawful?*
2. *Whether the grievants are entitled to payment and if so, how much?*
1. *Whether the dismissal of the grievants was fair?*
  - a. *Whether the reason for dismissal is valid?*

The respondent in defence also files written submissions dated 11th March, 2016 reiterates his defence and submits a case of procedural fairness on the part of the respondent and again reinforces a case of the validity of dismissal of the claimant. This is as follows;

*“..... there is uncontroverted evidence that the grievants fought as is attested by their treatment sheets, report from the nurse and the Union Memorandum marked as annexure ST 4(a); the grievants dismissal was therefore fair and justifiable. Section 16 (2) of the Occupational Safety and Health Act prohibits fighting at the work place. It is also evident that the Respondent accorded the grievants a fair hearing in full observance of Part V of the Employment Act in that they were heard in the presence of the Shop Steward and the Claimant’s branch secretary and were duly informed that the action was taken was summary dismissal.*

*.... You will also note that the Union representatives acknowledged that the grievants had fought and only prayed that they be forgiven for their actions when the matter went for conciliation. (See the Respondents Exhibit marked ST 4(a) and (b), annexed to the Respondent’s Defence to Memorandum of Claim; being the certificate of disagreement signed by all parties thereto).*

*The Respondent thus submits that the Claimants were dismissed in accordance with Section 44 (4) of the Employment Act, 2007 and section 25 of the Collective Bargaining Agreement which entitled an employer to summarily dismiss an employee if the employee fails, or refuses to obey a lawful and proper command which it was within his scope of his duty to obey issued to him by his employer or a person placed in authority over him by his employer and if without leave or other lawful cause the employee absents himself from the place appointed for the performance of his work. The Claimant has not denied that the grievants were aware that fighting at the workplace was not permitted.*

Further,

*“... the respondent submits that it was only during conciliation at the Kericho labour office that the claimant reviewed their position and began alleging that the grievants had not fought but had merely quarreled perhaps in a bid to unduly twist the true account of facts before approaching this honourable court for redress.”*

Again, the respondent’s case is reinforced as follows;

*“..... the respondent submits that it complied with the provisions of part VI of the Employment Act and in particular section 41 (1) of the Employment Act which provides that “ an employer, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”*

The respondent in the penultimate seeks to rely on the authority of **Benson Rollano Wemali v National Environment Management Authority (NEMA) 2015 eKLR** where the court expounded that provisions of Section 47 (5) of the Employment Act, 2007 touching on the burden of proof of unfair employment

rests on the employee as follows;

*“the respondent has adduced evidence to show that the dismissal of the claimant was founded on a valid and fair reason and it was done after giving claimant a chance to defend himself” ... and that “ the claimant did not discharge his burden under section 47 (5) of the Employment Act, 2007.”*

The respondent's case outweighs that of the claimant on the veracity of the evidence adduced. The evidence and case of the respondent overwhelms the claimant's by far. The claimant does not largely answer the respondent's case but insists on his. Inasmuch as this appears to be a case of your word against mine, it all tilts in favour of the respondent on a test of preponderance of evidence. I therefore find a case of lawful termination of the employment of the claimant and hold as such.

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.

Delivered, dated and signed this 17 day of May 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Rugut instructed by Chepkwony & Company Advocates for the claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the respondent.