



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.10 OF 2014**

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

**KENYA PLANTATION AND AGRICULTURAL**

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

**VERSUS**

**UNILEVER TEA KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The matter is brought to court by way of a Memorandum of Claim dated 22nd July 2014. The issue in dispute is therein cited as;

*“unlawful, illegal and/or unfair termination of Simon Sang.”*

The respondent in a Respondent's Memorandum of Defence dated 30th September, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is the parties have a subsisting recognition agreement and have also concluded several Collective Bargaining Agreements (CBA's) from time to time.

It is the claimant's further case that the grievant, one, Simon Sang was employed by the respondent on or about February, 2002 as a seasonal employee in the withering section at a basic wage of Kshs.6,000.00 per month. He worked for six (6) months and proceeded on leave. On resumption, he was employed as a permanent employee.

He was, however, not issued with a letter of contract of employment.

The claimant's further case is that on 28th September, 2013, the grievant was issued with a show cause letter. This is as follows;

*On 28th September, 2013 the respondent wrote to the grievant herein requiring him to show cause why disciplinary action should not be taken against him for failing to adhere to company procedure of recoding employee overtime, colluding with Mercy to have her work hours and take as equivalent time off without management's knowledge, misusing authority and refusing to give Mercy overtime that she rightfully earned and for touching Mercy without her consent....*

He was on 5th October, 2013 dismissed on grounds of gross misconduct pursuant to Section 44 (4) (c) and (e) and clause 24 of the CBA.

The claimant avers that the reasons for the grievant's dismissal are unclear and do not stipulate the reason for the draconian action taken by the respondent. The claimant is led to infer that this inaction was due to accusations of sexual harassment leveled against the grievant and which are denied *in toto*.

The claimant avers that on or about February, 2013, an employee and colleague, one, Mercy Jerotich approached the claimant in respect to five hours, purportedly worked as over time. The grievant denied knowledge of this and pledged to enquire the same from Kosgei, a colleague at work. The grievant consulted Mr. Onditi on this but he denied knowledge of the same.

*“The grievant herein implored Mercy to be patient as he enquired from one Kosgey about the purported overtime. In the meantime, the grievant consulted Mr. Onditi about the purported overtime and Mr. Onditi indicated that he was also not aware of the overtime but also promised to enquire from Mr. Kosgei about the issue”.*

He prays as follows;

1. *An order directing the Respondent to do the following;*
  - a. *To unconditionally reinstate the grievant herein;*
  - b. *To pay the grievant for the entire period within which he was dismissed;*
  - c. *To pay the grievant in respect of all the leave days due to her as the time of reinstatement;*
  - d. *To pay the grievant leave travelling allowance;*
  - e. *Directing and/or compelling the Respondent to produce the grievant’s household goods that were withheld by the Respondent when the grievant was thrown out or compensation thereof.*
2. *Should prayer 1 above fail, an order directing the Respondent to do the following:-*
  - a. *Pay the grievant gratuity for the years she has served with the Respondent at the rates provided for in the CBA;*
  - b. *Pay the grievant house allowance from the time of dismissal until judgment;*
  - c. *Pay the grievant monthly salary for a period of twelve (12) months.*
  - d. *Pay the grievant in lieu of leave for the period dismissed.*
  - e. *Pay the grievant leave travelling allowance for the period of dismissal.*
  - f. *Pay the grievant an equivalent of two months’ salary in lieu of notice of termination;*
  - g. *To produce all the household goods that were withheld by the*
  - h. *Respondent when the grievant was thrown out or payment in lieu.*
  - i. *Pay the grievant damages for unlawful, illegal and unfair dismissal.*
  - j. *Pay the grievant the costs of the cause;*
  - k. *Interest on (a), (b), (c), (d), (e), (f) and (g) above.*

- *Any other relief this Honourable Court deems fit to grant.*

The respondent in response agrees that the grievant was her employee and that there was a subsisting CBA *inter parties*. She however, in the Respondent Memorandum of Defence submits that clause 24 & 30 of the CBA provide for summary dismissal as follows;

4. *Clause 24 of the agreement provides for 'summary dismissal' for matters that amount to gross misconduct and states the following grounds:*

*“(c) If an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature was his duty, under his contract, to have performed carefully and properly.*

*(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 or his employer's property.”*

5. *Further, Clause 30 of the agreement states;*

*“An employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity”*

It is the respondent's further case that she received a report on the grievant that as a team leader he;

- Failed to adhere to company procedure of recording another employee's overtime under his team.*
- Colluded with the other employee to have the other employees work hours and take as equivalent time off without the knowledge of the management.*
- Misused his authority and refused to credit the other employees overtime rightfully earned with a view to having his sexual demands on the other employee met.*
- Sexually harassing the other employee by touching her without her consent.*

After due and fair disciplinary process, the grievant was unable to mitigate his case and was summarily dismissed from employment on grounds of gross misconduct and paid the following dues;

- Wages earned up to the last working day;*
- Pro-rata leave earned but not utilised;*
- Overtime worked but not paid;*
- One way bus fare*

The claimant appealed and a meeting was held on 23rd October, 2013 but this appeal was dismissed and the earlier decision of dismissal upheld.

The matter was thereafter referred to the Minister and a conciliator appointed but this again ended in a stalemate. This is as follows;

*The respondent denies that the dismissal of the employee was wrongful, unlawful or unfair as alleged or at all. The Respondent avers that;*

- The employee was invited to a disciplinary hearing by the Respondent, along with*

*the shop stewards, to present his accounts of the gross misconduct.*

- b) The respondent held fair hearing for the employee before arriving at the decision to summarily dismiss him on account of gross misconduct;*
- c) The employee was found to have committed an act of gross misconduct; and*
- d) Extensive investigations were carried out by the Respondent and an elaborate and lawful procedure employed in coming to the conclusion of summary dismissal; and*
- e) All actions taken by the Respondent were in line with the Agreement between the parties and in particular the CBA.*

This matter came to court variously until the 8th December, 2015 when it was heard *inter parties*.

The issues for determination 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 the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. At the hearing on 8th December, 2015, CW1- Simon Sang, duly sworn, testified and reiterated his case as per his pleadings and memorandum of claim. It was his testimony that he was employed as a General Worker at an initial salary of Kshs. 3,600.00 this cumulating to Kshs. 6,000.00. He was promoted to an acting supervisor in the marking department and dismissed on grounds of dishonoring a worker's overtime. This overtime had been performed by one, Mercy Jerotich, at night when he was not on duty.

Parties to this overtime were called and recorded statements but these were not availed to him. Two meetings were held on 25th August, 2013 and 3rd September, 2013 and thereafter he was issued with a show cause letter. In these meetings were shop stewards but these were not invited by himself. The claimant further testified that he was dismissed and even on appeal, the case for dismissal was upheld.

The respondent in his written submissions disputes the veracity of DW1 Joyce Rop, who testified on behalf of the respondent. It is the claimant's submissions that her evidence amounts to hearsay as she was not a party to the sequence of events that she testified on. This is as follows;

*"It is our humble submission that the witness could not testify and be cross-examined on events she did not witness. Her evidence constituted hearsay. On the occurrence or otherwise of the alleged offences, the witness evidence was hearsay and therefore she is not a competent witness.*

*Section 62 of the Evidence Act, Chapter 80 of the laws of Kenya states as follows:-*

1. *Oral evidence must in all cases be direct evidence.*
2. *For the purposes of subsection (1) of this section, "direct evidence" means-*
  - a. *With reference to a fact which could be seen, the evidence of a witness who says he saw it;*
  - b. *With reference to a fact which could be heard, the evidence of a witness who says he heard it;*
  - c. *With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that matter,*

*In this case, the evidence of the Respondent's witness in so far as the same touched on the validity or otherwise of the offences for which the grievant was*

*dismissed was not direct. The witness conceded that she did not see the grievant touch Mercy Chepkemoi and that she was informed of these allegations."*

I agree. Inasmuch as we may not wish to subject these proceedings to the parameters of a criminal trial, this is the law of evidence. It has not changed and therefore the respondent would not be facilitated in benefitting from the wrong application of the law.

The claimant also submits on a botched up disciplinary process in which he was not awarded adequate opportunity for representation and also was represented by shop stewards at the invitation of the respondent. He seeks to rely on the

authority of **Fredrick Saundu Amolo Vs. Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR** at paragraph 20 where my sister Lady Justice Monicah Mbaru stated as follows;

*"It is not for the claimant to call for representation. The employer, the respondent herein has the duty to inform the claimant of the allegations against him as remind him of his fundamental right to have at the hearing a person of his choice, his Union or a fellow employee. Whether the claimant was aware of this right or not, the duty vested upon the employer to reiterate these rights and dully accord them to an employee being subjected to disciplinary proceeding such as the claimant faced. Where an employee chooses not to have such representation or the presence of a fellow employee of his choice, then this must be carefully recorded as when raised at any hearing before the Industrial Court, the Court is as a matter of justice, caused to refer to such proceedings. In the absence of such confirmation that the claimant was represented by his Union or a fellow employee of his choice present, then the respondent made a fundamental omission in the disciplinary process that does not meet the tenents of section 41 of the Employment Act, thus negating the proceedings and any decisions therefrom. Section 41 of the Employment Act is stated in mandatory terms ...*

The respondent submits a case of substantive fairness in dismissing the claimant in that she employed Section 44 of the Employment Act and Clause 24 of the CBA in dismissing the claimant. It is the respondent's case that the claimant failed to adhere to company procedure in recording employees' overtime and also colluded with a member of his team, one, Mercy Cherotich, to have her take work hours off by way of a local arrangement. She further relies on the authority of **Chimwaga Mwamuye Mwabonje v Nine One One Group Limited (2015) eKLR** where the court held as follows;

*"... the claimant negligently and carelessly performed his duties contrary to his contract of employment, the Court held that the summary dismissal of the claimant was justified under section 44 (4) (c) of the Employment Act."*

We need not belabour. The circumstances of this case point out to a case of wrongful, unfair and unlawful termination of employment. The testimonies of the parties and their written submissions are world apart in separation. However, pertinent issues arise at all these stages: what was the impact of tendering an outdated sexual harassment policy by the respondent? Was it due and applicable in the circumstances of this case? Was due disciplinary process substantially and procedurally pursued in accordance with the law by the respondent? I answer all these in the negative. I therefore find a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent and I hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is.

I am therefore inclined to allow the claim and order relief as follows;

- i. That the claimant be and is hereby reinstated to employment without loss of emoluments, benefits, privileges, seniority and promotions.
- ii. That the claimant be and is hereby ordered to resume/report back to work on 18th May, 2016 at 800 hours.
- iii. That the claimant be and is hereby awarded twelve (12) months' salary as compensation for unlawful termination of employment, that is Kshs.

6,000.00 x 12 = Kshs. 72,000.00.

- iv. That the cost of this claim shall be borne by the respondent.

Dated, delivered and signed this 17th day of May 2016.

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. Muli for the union.
2. Mr. Ng'eno instructed by Kaplan & Stratton for the respondent.