



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.102 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 3rd March, 2015. The issue in dispute is therein cited as;

“Unlawful, illegal, wrongful and unfair dismissal of Simon Mocho.”

The respondent vide a Memorandum of Defence dated 11th June, 2015 denies the claim and prays that the same be dismissed with costs to herself.

The claimant's case is that the parties have a subsisting Collective Bargaining Agreement stipulating the terms and conditions for the employees who are the members of the claimant union. The claimant's further case is that the grievant was employed by the respondent as a general worker in the tea plucking department and was deployed at Tagabi Estate where he worked for about one year. He was thereafter promoted as follows;

5. Subsequently and due to his good performance and discipline, the Respondent took to orienting the grievant herein to take up the position of Acting Leaf Clerk. This process took two and a half years upon which the

grievant was appointed to the position of Acting Hand Plucking Team Leader in the year 1997. The grievant held this position until the year 2002.

6. Due to his continued good performance, the grievant was appointed to the position of Team Leader Grade 1 in the year 2002. In the year 2005, he was transferred to the Welfare & Security Department Team in the position of Team Leader which position he held until his unlawful dismissal. At the time of his dismissal, the grievant was earning a basic wage of Kshs.18,575.

The claimant's further case is that the grievant was in the cause of a recruitment exercise for workers for

the respondent implicated in soliciting and taking of Kshs. 1,000.00 bribe from one, Bosire, as an inducement to secure him employment with the respondent. This is denied. The claimant further admits that he was taken through a disciplinary process culminating in his dismissal for misconduct. He however does not agree with this process which he deems a mirage meant to satisfy the requirements of disciplinary process whereas it was not. Again, the documents sustaining the claimant's dismissal were not incorporated with the CBA and therefore the fallacy of the termination of employment.

He prays as follows;

1. *A declaration that the respondent's action of dismissing the grievant herein is unlawful and/or illegal and/ or wrongful and/or unfair.*
2. *Gratuity pay for the period in which he was in employment as provided under the Collective Agreement.*
3. *Twelve (12) month's pay.*
4. *Pay in lieu of Notice as provided under the collective agreement.*
5. *Leave due but not taken.*
6. *Leave travelling allowance.*
7. *Costs of this cause.*
8. *Interest on (2) to (7) hereinabove.*

The respondent's case is that;

- i. *The Claimant's summary dismissal was genuine, warranted and justified in the circumstances.*
- ii. *The Claimant's summary dismissal was procedurally fair and in accordance with the applicable provisions of the law and the Collective Bargaining Agreement (hereinafter 'CBA').*
- iii. *The Claimant's claim is an afterthought and is false, misleading and misadvised.*
- iv. *The Claimant is not entitled to the Orders sought herein.*

She *in toto* denies that the termination was unlawful, illegal, wrongful and unfair termination as pleaded.

It is the respondent's further case that the terms and conditions of the employment of the claimant were set out in the subsisting CBA and again, he was expected to adhere to the respondent's Code of Business Principles. The respondent avers that sometimes in November, 2014 a complaint was lodged with the respondent that the grievant had taken a bribe as an inducement for the recruitment of an employee. Investigations were launched and there was established that on a balance of probabilities the grievant was culpable and in breach of the respondent's Code of Business Principle aforesaid. This amounted to gross misconduct.

The grievant was issued with a show cause letter and subjected to disciplinary proceedings in a meeting held on 15th April, 2014 and a decision for dismissal was made after a full hearing. This is as follows;

7. Subsequently, by a letter dated 25th March 2014, the Respondent called upon the grievant to show cause why disciplinary action should not be taken against him for breach of the Respondent's Code of Business Principles. The grievant responded to this letter on 27th March, 2014. See Appendix 3.

8. Upon reviewing the grievant written responses, the Respondent invited the Claimant to attend a disciplinary hearing to be held on 2nd April, 2014. The said meeting however did not take place on 2nd April 2014 as scheduled as the grievant was on sick off. See Appendix 4.

9. The Respondent avers that the disciplinary hearing was held on 15th April 2014 in the presence of the Kapgwen Estate shop stewards and a welfare assistant. The grievant was given a fair hearing and an opportunity to respond to the allegations of breach of the Respondent's Code of Business Principles. See Appendix 5.

10. Subsequently, the Respondent took time to consider and look into the grievant representations that were made at the said hearing. The Respondent came to the conclusion that the explanations given by the grievant were inadequate and unsatisfactory and that this actions amounted to gross misconduct under clause 24 (g) of the CBA and section 44 (40) of the Employment Act. A decision was therefore made to summarily dismiss the grievant. The grievant was notified of this decision in writing on 23rd May, 2014. See Appendix 6.

The claimant appealed vide a letter dated 24th May, 2014 but this was considered and dismissed at a disciplinary meeting hearing held on 28th July, 2014 involving the claimant, his shop stewards and union branch officials. The

matter would thereafter be referred to the Minister for Labour who appointed a conciliator where the parties failed to agree and come up with a Certificate of Disagreement. She therefore denies that the dismissal was unlawful, illegal, wrongful and unfair and avers that this was indeed carried out in accordance with the law and provisions of the CBA as hereunder;

- a. Extensive investigations were carried out by the Respondent and based on a balance of probabilities, it was reasonably concluded that the grievant violated the Respondent's Code of Business Principles which is an act of gross misconduct.
- b. The employee was invited to a disciplinary hearing by the Respondent, along with the shop stewards, to present his accounts of gross misconduct.
- c. The claimant was given an opportunity to respond to the allegations of misconduct made against him but he failed to sufficiently do so hence the Respondent's decision to summarily dismiss him.
- d. All actions taken by the Respondent were in line with the Agreement between the parties and in particular the Collective Bargaining Agreement.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The parties hold varied positions on this one. The claimant in her written submissions reiterates her case and forments a justification for the claim.

The respondent in his written submissions also reiterate the defence and comes out as follows;

2.3 The COPB in addressing “Business Integrity” states as follows;

“Unilever does not give, receive, whether directly or indirectly, bribes or other improper advantages for business or financial gain. No employee may offer, give or receive any gift or payment which is, or may be construed as being a bribe. Any demand for or offer of a bribe must be rejected immediately and reported to management”

(See pages 2 and 10 of the Respondent's bundle of documents)

2.4 The Court, in the case of *Joseph Wambugu Kimenchu vs Attorney General (2013) eKLR*, set out the standard of proof in internal disciplinary hearings when it held that;

“...strict rules of evidence and procedure would not apply to internal disciplinary process... in disciplinary proceedings all the management needs is some preponderance of probability that the accusations levelled might have occurred.” (Emphasis own).

2.8 The investigation report demonstrated that the grievant had indeed met with the complainant at the complainant's house. The statements revealed that the grievant received bribes. Some are highlighted below;

Daflin Chepkemoi

“During induction, we had one complaint. Shemeji alipeana pesa na hakua amepata kazi, David Bosire alipeana Kes. 1000/-

(page 5 respondent's bundle of documents)

David Bosire – (The Complainant)

“I did not succeed to get employment. “Nikaenda kwa team leader later at around 2pm nikamwambia kwamba sikufaulu nikampa 1,000 na makaratasi yangu. Akaniambia ataona vile atanisaidia. The following day akaniambia kuna nafasi inaweza patikana if some people will not pass the medical test, or the ones who did not get into the system. Alinirudishia makaratasi after 2 days, and told me that I was not successful to get a job even at the nursery.”

(Page 6, Respondent's bundle of documents)

Robert Keter

He claims he got the security job by requesting Mocho since he has a sick child. (Page 6, Respondent's bundle of documents)

This matter tilts in favour of the respondent case. On a test of preponderance of evidence and balance of probability, the respondent's case carries the day. This is because of her co-ordinated and sequestered evidence in support of the defence. The claimant miserably fails to support his case in evidence and it therefore must fail. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

With a finding of lawful termination of employment, the claimant would not be entitled to the relief sought. And this answers the 2nd issue for determination.

This being the case, I am inclined to dismiss the claim with an order that each party bears their own costs of the claim. And this clears all the issues for determination.

Delivered, dated and signed this **16th day of June 2016.**

D.K.Njagi Marete

JUDGE

Appearances

Mr Khisa for the claimant union.

Mr. Ngeno instructed by Kaplan & Stratton for the respondent.