



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 695 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th October 2016)

VIOLET SHIVACHI.....CLAIMANT

VERSUS

SELECTA KENYA – GMBH & CO KG LIMITED.....RESPONDENT

JUDGEMNT

1. The Claimant filed her suit through the firm Gakoi Maina & Company advocates seeking damages for unlawful and unfair summary dismissal with failure to pay terminal benefits and accrued dues.
2. They state that the Claimant was employed by the Respondent on or about 7th December, 2002, as a general worker and at the time of her dismissal she was earning a salary of Shs. 8,993.40 per month.
3. She states that on 28.12.2012 the Respondent suspended her for allegedly being involved in a strike that had taken place on 24.12.2012 in the Respondent's premises, allegations which were never proved nor was she given a chance to defend herself despite sending the Respondent a letter denying the same.
4. The Claimant states that the termination was devoid of procedures of the Employment Act, untimely, unlawful and unjustified. She claims that her statutory benefits of Shs. 168,473.47 were never paid and she prays for the Court to allow her claim as drawn.
5. The Respondent filed a Memorandum of response on 12 February, 2016, wherein they admit the employment relationship but state that on 24.12.2012, without any justified reason, and without following the law, the Claimant incited her co-workers at the Respondent's farm located in Juja to go on an illegal strike. On the same day, the workers downed their tools and refused to work for a few hours upon the Claimant's incitement.
6. They state that pursuant to this on 28th December, 2012, the Claimant was put on suspension pending investigation of the circumstances surrounding the illegal strike. On 9th January, 2013, the Claimant was issued with a show cause letter which they state that she rudely refused to accept or sign.
7. The Respondent further states that on 12th January, 2013, the Kenya Plantation & Agricultural Workers Union, through its Thika Branch Secretary, called for a meeting between the Respondent and the Union to discuss the events of 24th December, 2012. A mutual discussion was held and minuted where it was explained to the Union that the Claimant had shown gross indiscipline and insubordination to warrant dismissal which dismissal was done in accordance with law, procedure and also the Collective Bargaining Agreement (CBA).

8. It is the Respondent's contention that the Claimant having refused to answer the Notice to Show Cause, the Respondent had no option but to summarily dismiss the Claimant which it did on 10th January, 2013.
9. They state that following the dismissal, the Claimant went through administrative clearance and was paid her final dues on 15th January, 2013, receipt of which she acknowledged by signing the final dues voucher. The Respondent further contends that they issued the Claimant with a Certificate of Service dated 18th March, 2013.
10. During her employment with the Claimant, the Respondent states that they remitted to the National Social Security Fund (NSSF) contributions fully, and without fail. They pray for the claim to be dismissed with costs.
11. In evidence the Claimant stated that she was dismissed for no reason as she did not participate in any strike and she did not incite anybody. She also denied having been given any notice to show cause letter neither was she given an opportunity to defend herself.
12. The Respondent in evidence put up three witnesses who led evidence to the effect that the Claimant was dismissed after inciting workers to participate in an illegal strike. The Respondent issued a notice to show cause letter but the Claimant refused to sign for it and failed to present herself at the disciplinary hearing. Dismissal followed thereafter which they state was in accordance with the law.
13. In submissions the Claimant stated that she was dismissed without following procedure set out in section 45(2) of the Employment Act, 2007, and as such the termination was unlawful and unfair. They rely on the case of **Walter Ogal Anuro vs. Teachers Service Commission (2013) Eklr** where it was held that:
- “for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”***
14. The Claimant also submits that failure to give her an opportunity to be heard was in contravention to the law. They rely on the case of **Metah Mzee vs. SDV Transami t/a Bollorre Africa Logistics Kenya Limited (2013) eKLR** where it was held that:
- “the summary dismissal was not just and equitable because he would have expected the Respondent to confront the Claimant with details of its investigations so that he could exhaustively reply to the same.”***
15. It is the Claimant's submission that having worked for the Respondent for almost 12 years, she was entitled to severance pay as set out in Clause 24(a) of the Collective Bargaining Agreement. Further they state that notice pay is also due as provided for in Clause 18(c) of the Collective Bargaining Agreement (CBA). They pray that the Claim be allowed as drawn.
16. The Respondent submits that evidence was adduced by their witnesses **Davis Waswa, Godfrey Lijoodi** and **Stanley Mutwiri** to the effect that the Claimant was the leader of the standoff which in their view was illegal. The Claimant's actions were thus acts of misconduct. On, 28th December 2012, she was sent on suspension to enable further investigations of the circumstances surrounding the illegal strike. Also suspended were 9 of her fellow colleagues.
17. On 9th January, 2013, a meeting was called by the management in which meeting the branch secretary of the Kenya Plantation & Agricultural Workers Union (“the Union”) was called and fully participated.
18. They submit that the Claimant was issued with a show cause letter on 9th January 2013 on allegations of incitement to strike and participating in workers standoff. The Claimant rudely refused to accept or

sign the show cause letter and particularly refused to submit to the disciplinary procedure which fact they submit was categorically confirmed by DW1, DW2, **Geoffrey Lijoodi** and DW3 **Stanley Mutwiri**.

19. DW2 Geoffrey Lijoodi is the Chief Shop Steward of the union at the Respondent's farm. He confirmed in evidence that on 24th December, 2012, the claimant was the ring leader of an illegal strike at the respondent's farm stating that **Violet drew a line on the ground and told workers not to cross it**.

20. The Respondent also submits that from the evidence on record, the Respondent complied with the procedural fairness requirements set out in Section 41 by issuing a show cause letter to the claimant. As confirmed by DW1, DW2 and DW3, the Respondent had all the intentions of taking the claimant through a fair procedure. She blatantly refused to submit to the fair procedure.

21. They also rely on the case of Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR this Court held that:

“for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination”.

22. All the three witnesses of the Respondent confirmed that the procedure adopted in dismissing the claimant adhered to the test in the above cited case and as such it was fair and lawful.

23. The Respondent also submit that the events leading to the summary dismissal of the claimant were summed up very aptly by all the Respondent's witnesses as participating in an illegal strike which they hold as a fundamental breach of the contract of employment.

24. They rely on **Section 78** of the **Labour Relations Act, 2007**: which provides that:

1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if:

(a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;

(b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;

(c) the parties have agreed to refer the trade dispute to the Industrial Court or to arbitration;

(d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Industrial Court;

(e) the trade dispute was not referred for conciliation in terms of:

(i) this Act; or

(ii) a collective agreement providing for conciliation;

(f) the employer and employees are engaged in an essential service;

(g) the strike or lock-out is not in furtherance of a trade dispute; or

(h) the strike or lock-out constitutes a sympathetic strike or lock-out.

2) For the purposes of this section:-

(a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee's employer:-

i. is not a party to the dispute; or

ii. is not represented by an employer's organisation that is a party to that dispute; or

(b) an employer engages in a sympathetic lock-out if the employer locks out an employee in support of a trade dispute:-

i. to which the employer is not a party; or

ii. in respect of which the employer is not represented by an employer's organisation that is a party to dispute.

25. The Respondent further submit that, Section 78 (1) (b) tackles the scenario herein pertinently: -

“No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute”.

26. They state that Respondent has a valid bargaining agreement with the Kenya Plantation and Agricultural Workers' Union. Clause 15 of the CBA provides for a grievance handling procedure. The claimant decided to ignore this procedure thereby exposing herself into illegalities that not even the CBA could protect her”.

27. They therefore urge the Court to find that the Claimant breached not only 78 of the Labour Relations act but also the CBA in that she engaged in unfair labour practice, to wit, engaging in unprotected strike.

28. On the prayers sought, the Respondent submit that service pay is not payable for the reason that the Claimant is a duly registered member of the NSSF and remittances were duly paid. They rely on the case of **James Musembi Mweu vs Bueki Enterprises Limited Nairobi cause No. 2000 of 2011** where the learned Justice declined to grant gratuity on account of the fact the Claimant was a member of NSSF.

29. They pray for the claim to be dismissed with costs.

30. Having considered all the evidence and submissions on 28th December 2012, the Claimant was suspended from work for being involved in a strike on 24th December 2012. The suspension was for 14 days and she was to report back to work on 10th January 2013 (appendix 2 – Respondent's documents).

31. It appears the Claimant responded to this letter as per her Appendix 4 denying involvement in the strike.

32. From Respondents Appendix 3, she was served with a show cause letter to explain why disciplinary action could not be taken against her. The show cause is dated 9th January 2013 and it is indicated that she refused to sign it and indicated she wanted to go away.

33. The Respondents have however not indicated where they served the letter upon Claimant as at this time she was already on suspension and was expected to report back on 10.1.2013.

34. It seems there was also a meeting on 9.01.2013 between the Respondents and Union where the Union officials are said to have conceded that the Claimant be terminated as per Clause 18B of CBA. The Claimant didn't attend this meeting.

35. From the above analysis it is clear that the Respondents acted against the Claimant without any formal

hearing being accorded to her because the time they are alleging they served her with a show cause letter, she was on suspension and during the meeting which is the purported disciplinary hearing on 9.1.2013, she was still on suspension and she didn't attend the meeting. The reasons for the dismissal as advanced by the Respondents are denied by the Claimant.

36. The Respondents witness indicated that the Claimant refused to attend a disciplinary hearing but there is no indication that she was invited to one.

37. Under Section 43 of Employment Act – the employer is expected to have valid reasons before terminating the services of an employee. The employer is also expected to follow due process as advanced under Section 41 of Employment Act.

38. The Respondents have not demonstrated that they had valid reasons nor followed due process.

39. They have insisted that she was summarily dismissed for participating in an illegal strike and was demised under Section 44(4) of Employment Act 2007. Section 44(4) of Employment Act states as follows:

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

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

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) 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 fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

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

40. It is not stated that the Claimant committed any of the offences listed.

41. It is this Court's finding that the Respondent's dismissal of the Claimant was unfair and unjustified and I find it so in terms of Section 45 (2) of Employment Act which states as follows:

(2) “...A termination of employment by an employer is

unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

42. In terms of remedies, the Claimant was a member of NSSF and so she is not entitled to service pay. However in terms of the CBA, she was entitled to 60 days' notice before termination (Clause 18 of CBA) and she was not given notice. She is therefore entitled to:

1. 2 months salary as notice being $2 \times 10,733 = 21,466/=$.

2. 12 months salary for unlawful dismissal

= $12 \times 10,733 = 128,796/=$.

TOTAL = 150,262/=

3. Plus costs and interest.

Read in open Court this 25th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musa Juma for Respondent – Present

No appearance for Claimant