



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 260 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JACOB OKOTH OTIENO CLAIMANT

-Versus-

EASTERN PRODUCE KENYA LIMITED RESPONDENT

J U D G E M E N T

In the Memorandum of Claim filed by the Claimant herein, he alleges that his employment was terminated by the Respondent unilaterally and without regard to applicable labour laws. He seeks orders of either reinstatement or payment or terminal dues as follows:-

- i) 2 months wages in lieu of notice.
- ii) Salaries and wages expected from December 2012 to December 2033 as per CBA appendix B page 29.
- iii) Transport and annual leave benefits from December 2013 to December 2033 as CBA clause 9.
- iv) Paternity leave benefit - CBA clause 11.
- v) Medical expenses from December 2012 to July 2013.
- vi) Gratuity - CBA clause 36 page 25.
- vii) Loans and interests accrued.
- viii) Overtime unpaid by 27th November, 2012 - CBA clause 6.
- ix) Dispute expenses since November 2012.
- x) Expected salary increment by the year 2033.

He further prays for costs and any other relief the court may deem fit to grant.

The Respondent filed a Replying Memorandum denying the allegations in the Memorandum of claim. The Respondent avers that it had a right to dismiss the Claimant for committing various offences from the year 2005 for which the Claimant had been warned severally and that he was dismissed following the

ultimate offence of 25th November, 2011. The Respondent further avers in the Reply that the Claimant fundamentally breached his obligations under his contract with the Respondent, that the claimant was notified of the complaint against him, was duly heard in accordance with rules of natural justice, given an opportunity to appeal against his dismissal and that the dismissal was upheld at several forums.

At the hearing of the case the Claimant testified on his behalf while the Respondent called JOYCE CHEBII the Divisional Manager of the Respondent who is also the officer who signed the Claimant's letter of dismissal.

The Claimant presented his case in person while the Respondent was represented by Mr. Bett instructed by MSSRS KIBICHIY & CO. ADVOCATES. After the hearing parties filed and exchanged written submissions.

Claimant's Case

He was employed by the Respondent as a casual worker on 8th April, 1999. He started working on regular terms on 9th April, 1999 and was confirmed on 1st July, 1999. He was issued with an appointment letter on 1st November, 2002 after working for 4 years.

The Claimant was elected as a shop steward in 2000 and as Senior Shop Steward in 2001. He retained his position of Senior Shop Steward up to the date of dismissal on 11th December, 2012.

On 25th November, 2012 which was a Sunday, there was a workers meeting in the play ground of the Respondent with the agenda of election of Interim Women Representative. The vacancy arose following resignation from employment by the former elected Women's representative. The meeting was called by the Claimant and other shop stewards and was attended by Joseph Maritim, a security leader. While the Claimant was addressing the meeting which was to be held between 9 and 11am, he noticed the presence of Mr. Maritim and invited him to address the workers. After greeting the meeting Mr. Maritim raised the issue of permission to hold the meeting which had not been sought. The Claimant replied that no permission had been sought as the meeting was to discuss a matter of interest to workers and no management input or action was necessary as the agenda did not concern the management. Mr. Maritim insisted that the Claimant should either produce a letter authorising the meeting or the meeting should be called-off. The Claimant discussed the meeting with 2 other shop stewards who were present and they agreed to postpone the meeting. The workers dispersed peacefully. The Claimant and the other shop stewards thereafter wrote a letter to the Respondent seeking permission to hold a workers meeting and delivered the letter on Monday the 26th November, 2012.

On Tuesday the 27th November, 2012 the Claimant was called to the office by the Manager Mr. Katuru Mukethe and informed that he was on suspension pending investigation into issues relating to the workers meeting held on Sunday the 25th November, 2012. Mr. Kaburu instructed RW2 Ms. Joyce Chebii to issue the letter of suspension to the Claimant. In the letter of suspension the Claimant was given a list of employees whom he was instructed not to get in contact with during the suspension.

On 29th November, 2012 the Claimant was called to the office and served with a show cause letter which he was required to respond to within 24 hours. He responded the same day. On 1st December 2012 he was called to the office and asked to elaborate what he had stated in his letter of 29th November, 2012. He prepared a statement. On 4th December, 2012 he was called to the office to attend a disciplinary hearing scheduled for 10.00 am on the same day. He called a shop steward who accompanied him to the meeting. It was the Claimant's evidence that the witnesses who testified against him at the disciplinary hearing gave false evidence as some of them were not at the Sunday Workers Meeting. He also testified that he was not allowed to question the witnesses.

On 13th December, 2012 he was called to the office where he was handed a letter of summary dismissal dated 11th December, 2016 by Joyce Chebii. The Claimant appealed against the dismissal on 15th

December, 2012. He was called on 21st December, 2012 and notified of the hearing date of the appeal on 28th December, 2012 at 10 am. The appeal upheld the decision to dismiss him.

The Claimant thereafter reported the issue to the Union Branch Office at Nandi Hills. A meeting was held between the Union and the Respondent which upheld his dismissal. The matter was reported as a dispute to the Minister of Labour who appointed the Nandi Labour Officer as Conciliator. After conciliation the Labour Officer wrote an agreement of payment to the Claimant of terminal dues in the sum of Shs.114,088.51. The Claimant rejected the Labour Officer's tabulation of his terminal dues and filed this suit in which he is seeking payment of Shs.23,510,403 made up as follows -

DETAILED VALUATED CLAIM - PARAGRAPH 5 OF THE PLANT

<p>i. Two months' Notice-CBA Clause 29</p> <p>2 x 10,052 Kshs.</p> <p>=Kshs.20,104</p>	<p>ii. Salaries and wages-CBA Appendix B page 29 from Dec 2012 - Dec. 2033</p> <p>21 years x 12 months x Kshs.10,052</p> <p>=Kshs.2,533,104</p>
<p>iii. Transport and Annual Leave Benefit from year 2013 - 2033 - CBA clause 9</p> <p>21 years x 4 1/2 people x 550/= x 2 way</p> <p>=103,950 + 21 years x 10,052/- (annual leave =211050</p> <p>=Kshs.315,000</p>	<p>iv. Paternity leave benefit CBA Clause 11</p> <p>14 days x 386.61</p> <p>=Kshs.5,412.54</p>
<p>v. Medical expense CBA clause 15</p> <p>December 2012 - December 2033</p> <p>21 years x 13628</p> <p>=Kshs.286,188</p>	<p>vi. Gratuity - CBA clause 36 page 25</p> <p>From year 1999-2033 = 33 years</p> <p>33 x 386.61 x 21 days</p> <p>=Kshs.276,039.54</p>
<p>vii. Loans and interest accrued Fasiselca Sacco by May 2016</p> <p>=Kshs.300,000</p>	<p>viii. Overtime unpaid by Nov 2012</p> <p>CBA clause 6.10 (1m)</p> <p>101 hours x 73/-</p>

	=Kshs.7,373
ix. Dispute Expenses: since Nov. 2012 =Kshs.98,040	x. NSSF contribution -Dec 2012-Dec 2033 200 x 12 months x 21 years =Kshs.50,400
xi. House Allowance CBA clause 20 Kshs.1500 x 12 months x 21 years =Kshs.378,000	xii. Subsistence allowance - CBA clause 18 1,200Ksh x 25 days x 12 months x 21 yrs =Kshs.7,560,000
xiii. Defamation/Damaged Reputation APP D. Last paragraph(4/12/2012) =Kshs.2,000,000	Expected salary increment between 2013 - 2033 =70% 70% of 13829661.08 = Kshs.9,680,762
TOTAL CLAIM = KSHS.23,510,423.08	

Respondents Case

Ms. Joyce Chebii, RW1 testified that she learnt about the workers meeting of Sunday 25th November, 2012 from the Security Manager who called her at around 11 am asking if she was aware of the union meeting that was taking place at that time. She then called the Estate Manager who directed that the meeting should be stopped because there was no permission to hold the meeting. She stated that it was a company rule that no meeting can be held within its premises without permission in writing and that this was important because chaos may arise during such meetings and security should be informed.

After investigations the Claimant was suspended on grounds that he convened an illegal meeting. Ms Chebii testified that the agenda of the meeting which was elections, was a matter to be presided over by the Union Branch Secretary.

The Claimant was later issued with a show cause letter on 3rd December, 2012. He was summoned to a disciplinary hearing on 4th December, 2012. The letter summoning the claimant to the disciplinary hearing was served on him at 8 am and the hearing was held at 9.30 am. RW1 did not attend the disciplinary hearing. The disciplinary committee found the claimant guilty of disobeying a law which was within his scope to obey and recommended his dismissal. The Claimant was informed of his right of appeal. The claimant appealed but the appeal was not successful as the Claimant did not state why the meeting was held without permission.

After the appeal the Claimant's dismissal was reduced to normal termination with terminal dues as provided in the collective bargaining agreement (CBA). The letter of termination was dated 11th December, 2012.

Findings and Determination

The issues for determination are whether there was valid reason for termination of the Claimant's employment, if the disciplinary process was fair and finally, if the claimant is entitled to the remedies sought.

Section 43 of the Employment Act provides for validity of reason for termination as follows:-

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the present case the claimant has alleged that there was no valid reason for termination of his employment.

The Claimants letter of suspension states the grounds for termination as follows:-

1. *Holding illegal workers meeting with an intention to hate workers.*
2. *Inciting workers against a fellow worker.*
3. *Interfering with Kaboswa Division Workers Union Affairs.*

The grounds in the show cause letter are as follows:-

1. *Holding workers meeting within Company premises without permission of the Estate Management on 25th November, 2012 with intention of inciting workers.*
2. *Interfering with Kaboswa Division workers union affairs.*
3. *Such misconduct as stated above is regarded an offence that will constitute justifiable and lawful grounds to terminate your services.*
4. *Should you or your representative fail to submit any reasonable explanation for your misconduct within 24 hours, the company will have no alternative, but to contemplate the summary termination for your services.*

At the disciplinary hearing, the grounds for disciplinary action against the claimant were stated as follow:-

- a) *Holding an illegal workers meeting with an intention to incite workers.*
- b) *Inciting workers against a fellow worker.*
- c) *Interfering with Kaboswa Division workers union affairs.*

The summary dismissal letter gave the grounds for dismissal as follows:-

1. *Disregarding the usual rule of law of obtaining a permit for holding a public meeting within the Company premises.*
2. *For unlawfully wanting to remove another Division union representative unconstitutionally without due process of the presence of the Branch Secretary or a representative from the office.*

It is clear from the foregoing that the grounds in the letter of dismissal were not consistent with those in the show cause letter, letter of suspension and the charges against the claimant during the disciplinary hearing.

In the minutes of the disciplinary hearing, the last paragraph states as follows:-

"The rule that was breached by the accused is captured in the disciplinary code i.e. behaving in an insulting manner to the employer clause 30(d), and knowingly fails or refuses to obey a lawful command which it was within his scope of his duty to obey clause 30(e), - as a workers' leader. Jacob Okoth and Francis Mwalichi are workers leaders who cannot claim not to have known that permission must be sought before holding a workers meeting particularly election of workers representatives without permission from the Branch Secretary's office and or Estate Management. This fact is not denied by any of them and is also confirmed by all the witnesses.

Their claim that they had permission cannot be proved hence they are guilty of holding a unauthorized meeting.

It was insulting and unlawful for Jacob Okoth and Francis Mwalichi, having been senior members of the union to disregard the usual rule of law (obtaining a permit) for a Public meeting and even if the permit had been sought from the Estate, it was still unlawful to remove the other Estate union representative unconstitutionally without the due process of the presence of the Branch Secretary or a representative from that office.

The two are dangerous to the Estate stability of peaceful co-existence and they should be dismissed with a consideration to their years of service."

From the foregoing it is clear that the grounds for dismissal of the Claimant were not those stated in his letter of suspension, show cause letter or letter of dismissal. The Claimant did not behave in an insulting manner, he did not fail to obey any lawful command. The Respondent did not produce any regulations or policy requiring the claimant or any other person to seek permission before holding a workers meeting outside of working hours. Section 56 of the Labour Relations Act provides that Union Officials and authorised representatives must be granted reasonable access for purposes of holding meetings outside of working hours. The section provides as follows:-

56. Trade union access to employer's premises

(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—

- (a) recruiting members for the trade union;*
- (b) holding meetings with members of the trade union and other employees outside of working hours;*
- (c) representing members of the trade unions in dealings with the employer; and*
- (d) conducting ballots in accordance with the constitution of the trade union.*

(2) An employer may—

- (a) impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and*
- (b) require officials or trade union representatives requesting access to provide proof of their identity and credentials.*

(3) Any dispute concerning the granting of access, or the conditions upon which access is to be granted, may be referred to the Industrial Court under a certificate of urgency.

The other reason for termination being incitement of workers was also not proved either during the hearing in court or the disciplinary hearing of the claimant. Parties were agreed that the workers dispersed peacefully after the meeting was called off by the claimant.

I therefore find that there was no valid reason for dismissal of the claimant.

Disciplinary Hearing

Section 41 of the Employment Act provides for fair hearing as follows:-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The letter inviting the claimant for disciplinary hearing is dated 3rd December, 2012 and was served on the claimant on 4th December, 2012 just before the hearing. The Respondent lined up several witnesses and did not issue witness statements to the claimant before the hearing in spite of his request for the statements.

The Respondent did not give the claimant adequate opportunity to prepare for his case or to call relevant witnesses to the hearing. In the case of **Alphonse Machanga Mwachanye v Operation 680 Limited**[2013]eKLR Radido J. summarised the requirements of section 41 of the Employment Act as follows -

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c) That the employer has heard and considered any explanations by the employee or their representative;*
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

The claimant was therefore not subjected to a fair hearing as he was never given an opportunity to prepare for the hearing. He was ambushed by witnesses whom he has stated in his evidence appeared to have been coached on what to say and some of whom he stated were not at the meeting of Sunday 25th November, 2012.

The dismissal of the Claimant was therefore both substantively and procedurally unfair.

Remedies

The Claimant sought a plethora of remedies. His remedies are based on earnings up to 2033 which is presumably the date of his retirement. Such remedies based on future earnings are not recognised by the

Employment Act and were referred to by Ojuang J. in the case of **Menginya Salim Murgani v Kenya Revenue Authority [2008] eKLR** as follows-

After considering the two scenarios, I have come to the conclusion that it would be injudicious to found an award of damages upon sanguine assessments of prospects; and therefore, the alternative scenario is held to be inapplicable.

I will not delve into all the remedies claimed in the Claimant's "**detailed valued claim**" but will only consider those that are payable.

The Claimant is entitled to notice of 2 months, salary up to date of termination, pro rata leave, gratuity and one way travelling expenses. He is also entitled to certificate of service. All these were offered by the Respondent in the various letters as well as in meetings with the Union and at conciliation. The Labour Officer calculated the terminal dues as follows -

1. 2 months wages in lieu of notice	Kshs. 17,950.40
2. Prorata Leave 7 months ... 14 days x 345.20	Kshs. 4,956.00
3. 5 days worked in December 2012 @ 345.20	Kshs. 1,726.00
4. Bus fare (2 adults & 2 children)@505/-	Kshs. 2,272.50
5. Gratuity & 21 days per year of service x 13 years @ 345.20	<u>Kshs. 94,239.60</u>
Total	Kshs.121,144.50
Less deduction totalling	<u>Kshs. 7,055.99</u>
Net to pay	Kshs.114,088.51
	=====

The tabulation was approved by both the claimant and his union representatives who attended the conciliation meeting.

The Claimant is not entitled to medical expenses, loans and interest, house allowance, wages, NSSF contribution, Subsistence allowance and expected salary from 2013 to 2033 as prayed.

The Claimant did not adduce any evidence on paternity leave and overtime claimed and the same are dismissed. The claimant did not prove defamation and is not entitled to damages for defamation as prayed.

The Claimant having been unfairly dismissed for participation in trade union activities which is a constitutional right, is entitled to compensation which I award him at the maximum rate of 12 months gross salary in the sum of shs.102,016.10 based on his last gross salary of shs.8,501.34/-.

Conclusion

In conclusion therefore I award the claimant a total of Shs.216,104.60. The Respondent shall also issue to the Claimant a certificate of service.

The claimant prayed for costs but personally prosecuted his claim. Taking into account the fact that the claim was filed by counsel who left before conclusion of the case and taking into account the expenses incidental to filing and service of suits, I award the claimant a sum of shs.50,000 as reasonable expenses for this case.

Dated, Signed and Delivered this 6th day of October, 2016

MAUREEN ONYANGO

JUDGE