REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.12 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

SOTIK TEA HIGHLANDS ESTATE.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 22nd July, 2014. The issue in dispute is therein cited as;

"Unfair, unlawful and illegal summary dismissal of Dennis Siro"

The Respondent in a Memorandum of Defence dated 13th October, 2014 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that he was employed by the Respondent on 20th September, 2002 as a general worker but not issued with a letter of appointment. His further case is that on 22nd July, 2013, he informed the Respondent of the possibility of attending a training by the KRA the following day. He was instructed to report on duty and work as he awaited instructions on the training. He indeed reported to work on 23rd July, 2013 and worked throughout as he did not get instructions on the training.

On 24th July, 2013, he was summoned to report to the office for disciplinary proceedings for disobedience of lawful instructions and he explained the situation. On the following day the Respondent convened a meeting with shop stewards of the Claimant union for a discussion on the dismissal of the grievant but this ended in a stalemate.

The Claimant's further case is that on 26th July, 2013 he was issued with a letter of summary dismissal. He referred the matter to the union who sought the intervention of the Minister with the appointment of a concilliator but concilliation also failed. It is his case that this dismissal was draconian, unfair, unlawful, illegal, in bad taste and meant to punish the grievant for actively participating in union matters and voicing the rights of his fellow workers.

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. If prayer 1 above fails, an order directing the Respondent to do the following:-

a. Pay the grievant gratuity for the years He 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 respondent when the grievant was thrown out or payment in lieu;

h. Pay the grievant damages for unlawful, illegal and unfair dismissal;

i. Pay the grievant the costs of the cause;

j. Interest on (a), (b), (c), (d), (e), (f) and (g) above.

The Respondent's case is that attendance of the KRA training was not dependent on communication from her end. The Claimant had been informed of the training and further instructed to report to work for light duties before the training. He had replied to this rudely.

The Respondent denies that a disciplinary hearing was held on 24th July, 2013 but admits that the grievant was summoned and informed of a disciplinary hearing on 25th July, 2013 with a rider that he submits a written report explaining the events of 22nd and 23rd July, 2013. This fell on deaf ears. The disciplinary meeting took place with a request for the write up. He was given an opportunity to explain his actions but maintained an unapologetic stance and was therefore ultimately summarily dismissed.

This matter came to court variously until the 21st June, 2016 when it was heard. At the hearing, the Claimant duly sworn testified in reiteration of his case. He also adopted his witness statement dated 19th March, 2015 and filed on 30th March, 2015.

CW2, Joseph Mageto duly sworn also testified on behalf of the Claimant. He produced and adopted his witness statement dated 25th May, 2015 as evidence in court.

The Respondent through DW1, Hulda Moraa also testified in reiteration of their case. She adopted her witness statement dated 22nd November, 2014 and produced the same in evidence. It was her evidence

that she organised the disciplinary proceedings where the grievant brought in two shop stewards with the others being invited by herself. It is her testimony that the Claimant was heard and a decision of dismissal made. The grievant appealed against the decision but this was again dismissed. This was also the same story by DW2 and DW3 – Doreen Kituku and Peter Ndegwa Achado who also testified on behalf of the Respondent.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully.

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 unlawfully. The Claimant in his written submissions again reiterates his case of unlawful termination of employment. He further sought to rely on S 41(1) and (2) of the Employment Act, 2007 as follows;

> *Section 41 (1) of the Employment Act provides as follows:-*
>
> > *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 the explanation.*
>
> *Section 41(2) Employment Act provides as follows;-*
>
> > *Notwithstanding any other provision of this Part, an employer shall before terminating the employment of an employee or summarily dismissing and employee under section 44(30 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 Claimant also seeks to rely on the authorities of **Peter Apolo Ochieng v. Amedo Centre Kenya Limited (2016) eKLR** at paragraph 39 where Honourable Lady Justice M. Mbaru stated as follows:-

> *The provisions with regard to fair procedures leading to a termination under section 41 of the Employment Act are mandatory. Where no followed, a termination becomes procedurally unfair. Without written proceedings setting out how the Claimant was heard at the meeting held on 13th August, 2009 and there being no representative to accompany the Claimant, the resulting termination became unfair. That was the best forum for the respondent to submit all the evidence now submitted in court in defence for the claimant to address. The claimant should have been notified before the hearing date and he should have been given sufficient time to prepare his defence and advised by the employer to bring another employee/representative of his choice. (emphasis ours)*

She also sought to rely on the authority of **Margaret Auma Ingwe v. Kenya Power and Lighting Company Limited (2015) eKLR** 35-36 and 38 Honourable Lady Linnet Ndolo stated as follows;

> *Following a notice to show cause issued to the Claimant on 18th May 2012 and her response dated 21st May 2012, the Claimant was invited to a disciplinary hearing on 5th*

> *June 2012. The invitation letter which was dated 31st May 2012 was not served on the Claimant until 4th June 2012. The Respondent's third witness, Elizabeth Kalei who is the Chief Human Resources and Administration Officer told the court that He did not know why the invitation letter was served late and the Court was left wondering whose responsibility it was to ensure that the Claimant was served in good time. The Court was even more perturbed by Kalei's assertion that it was good human resource practice to notify and employee of an impending disciplinary hearing the day before.*
>
> *On her part, the Claimant testified that her representatives and witnesses were not allowed to participate in the disciplinary hearing because He had submitted their names past the deadline set in the in the invitation letter. The dictates of Section 41 of the Employment Act are not empty procedures. They are intended to avail employees facing disciplinary action an opportunity to prepare and present their defence before disciplinary action is taken against them.*
>
> *In handing the claimant's case, the respondent failed to avail her adequate time to prepare her defence and for this reason, the court finds the dismissal unfair for want of due process. (emphasis ours)*

This is also the position in the case **of Rebecca Ann Maina & 2 Others v. Jomo Kenyatta University of Agriculture & Technology (2014) eKLR** at paragraph 34 where Lady Justice Linnet Ndolo stated as follows:-

> *"I agree with Counsel for the Respondent that internal disciplinary proceedings are non judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.*

The Claimant further submits that the reason for dismissal is invalid and unfair in contravention of S 43(1) which provides as follows;

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

The act of dismissal was taken due to the grievants trade union activity and in contravention of Article 1 of the Convention No.135 – Workers Representatives Convention, 1971 of the International Labour Organisation (ratified by Kenya on 09.04.1979 provided as follows:-

> *Workers representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status as workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreement or other jointly agreed arrangements.*

The Respondent's submissions came in to reinforce her case and controvert that of the Claimant. I agree with the submissions of the Respondent that in the circumstances of this case, the matter has to be decided on a balance of probabilities. This is because the evidence is one of your word against mine and therefore would go either way. It would therefore be the onus of the court to determine which of the parties cases is the more probable and realistic than the other. She puts it thus;

> *We rely on this Honourable Court's decision in Bernard Shisiali Muhatia v Speedex Logistics Ltd (2013) wherein your Lordship stated thus;*

> *"This matter has to be decided on a balance of probabilities. That is, who of the two parties is most likely telling the truth in the circumstances? Which of the two cases is most probable?"*

Again, the circumstances and evidence adduced by the parties tilts in favour of the Claimant. This is because in the first place, the Respondent does not come out clear in a demonstration of a clear cut pursuit of the elements of substantive and procedural fairness in her disciplinary proceedings as provided by S. 41 and 42 of the Employment Act, 2007. There is again no demonstration of notice or adequate and proper notice of the disciplinary proceedings leading to dismissal or even appeal. There is no evidence of the right to a hearing or even proper representation of the grievant by persons (shop stewards) of his choice. The Claimant's case remains uncontroverted by the defence. This, coupled with the principle of balance of probabilities tilts the matter towards a case of the Claimant. It renders the Respondent's case sloppy and I therefore find that the termination of the employment of the Claimant was wrongful, unfair and unlawful.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. On a finding of unlawful termination of his employment the Claimant becomes entitled to the relief sought.

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

1. That the grievant, one, Dennis Siro, be and is hereby reinstated to his employment and reports to work on 15th November, 2016 at 800 hours.

2. That the Respondent be and is hereby ordered to return all the grievants household/personal effects realised during removal from living quarters on termination of employment.

3. That each party bears its own costs of this claim.

Delivered, dated and signed this **14th day of November 2016.**

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Muli instructed by Kenya Plantation & Agricultural Workers Union for the Claimant.

2. Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent.