



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 88 OF 2015

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

DEL MONTE (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th December, 2016)

JUDGMENT

The claimant union filed a memorandum of claim on 14.05.2015 claiming wrongful, unfair and unlawful dismissal of its member one Moses Omutanyi Mumia, the grievant. There is no dispute that the parties are in binding recognition and collective agreements at all material time. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal of the grievant herein was unlawful, illegal, unfair and wrongful.
- b) An order directing the respondent to pay the grievant compensation equivalent to 12 months' salary.
- c) Gratuity pay for each completed year of service as provided under the collective agreement.
- d) Leave due but not taken in terms of the collective agreement.
- e) In lieu of notice pay per collective agreement.
- f) Days worked.
- g) Costs of the suit.
- h) Costs of the cause.
- i) Interest on (a) to (h) above.
- j) Any other relief that the Honourable Court may deem fit and just to grant.

The response to the claim was filed on 10.06.2015 through Dola, Magani & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The grievant was employed by the respondent on 12.08.1996 as a general field worker. The grievant's

employment was terminated on 06.06.2013 at a time the grievant held the position of a Lead-man. The claimant at that time supervised 20 employees.

The grievant's job entailed receiving cut pineapple fruits from the farm supervisor, weighing the same, and issue the fruits to the respondent's customers as per orders given to the grievant by the sales supervisor.

On 24.05.2014 the grievant was on duty at the assigned shed from where he transacted with the customers and carried out his duties. A security officer arrived and took away record books the claimant was using in his duties. The security officer told the grievant that the security manager wanted the books for purposes of some verification. The books were to be returned but they were never returned to the grievant.

On 25.05.2014 the grievant reported on duty and was summoned to see the security manager. The manager asked the grievant to record a statement about alleged theft of fruits. The grievant recorded a statement but which was not filed in court. The grievant then resumed duty.

On 27.05.2014 before reporting on duty, he was summoned by his supervisor and at the shed, the finance director, the supervisor and the security manager were present and the grievant was asked to hand in the books of records. It was the grievant's evidence that at every close of the day's business he entered in a register the weight of the fruits sold, the number of the fruits, receipt numbers, invoice numbers and the customer's name. After the records were taken, the personnel officer summoned the grievant and told him that it had been reported that certain receipts had been repeated in the register that the grievant maintained. The grievant was given a suspension by the internal memo dated 22.05.2014. It was stated in the memo that between January and 16th May 2014 it had been noted that out of 108 sales transactions of fresh pineapples in the Anglo French Shed, only 22 had valid documentation. Further it was stated that in some incidents one invoice number could be used repeatedly to collect pineapples from the yard. Investigations had revealed that the number of pineapples collected from the said repeated invoices were greater than what had been paid for so that there were fraudulent transactions during the period. The grievant was therefore suspended for 7 days from 22.05.2014 to allow for investigations and to report to the human resource office on 29.05.2014.

The grievant reported on 29.05.2014 as was scheduled and was given a show-cause memo dated 29.05.2014. The memo stated that a customer one Joseph Mwangi used the same invoice 12 times and another customer Joseph Ndegwa used the same invoice 4 times to collect fresh fruits valued at Kshs. 5, 246, 000.00. The loss was said to be attributable to the grievant as a Lead Man and the grievant was to give his defence in 24 hours showing why disciplinary action should not be taken against him.

The grievant wrote his response dated 29.05.2014. His explanation was as follows:

- a) Fresh fruits are harvested per orders from field supervisors conveyed by sales department.
- b) At the packing shed each customer presents a receipt and invoice bearing the date and stamp.
- c) His superiors at the shed being SDH, supervisor and security confirm invoices and receipts and approve gate pass for each customer.
- d) If the allegations in the memo were true, cost per Kg being Kshs. 40, it meant that the two clients collected 8,196.875 Kgs each day for 16 times (12+4=16 times) being 8.197 tons per day but which was impossible and not true since average harvest per day was 5 to 7 tons and it was impossible to harvest 8+7=15 tons per day. Thus, if fraud took place, the fruits must have been harvested and given to the customer directly from the field without passing through the grievant's assigned shed.
- e) The fruit trucks used to carry fruits at the farm lacked capacity to load 8 tons.
- f) The grievant was innocent as the superiors who went through every transaction would have

known and exposed the alleged fraud.

The grievant attended an oral hearing on 04.06.2014 upon an oral summon and in absence of the union representative. On 06.06.2014 the grievant was summoned by telephone and was given the letter of dismissal from service dated 06.06.2014. It was conveyed that from the written response and at the hearing the grievant acknowledged handling pro forma invoices and cash receipts for the 2 customers but the grievant had failed to recognise that the receipts serial numbers had been repeated; such amounted to careless and improper performance of work thus negligence of duty under section 44(4) (c) of the Employment Act, 2007 and clause 11(c) (iii) of the collective bargaining agreement. Thus the claimant was dismissed from employment effective 05.05.2014 and to be paid days worked up to 05.05.2014, leave days due and less liability to the respondent. The statutory conciliation process failed to yield an amicable settlement as the conciliator found on 18.12.2014 that the grievant neglected his duties knowingly or otherwise and the dismissal was valid. The claimant filed the present suit. At termination the grievant earned Kshs.31,701.00 as basic pay per month.

The respondent failed to call witnesses despite repeated opportunity to do so.

The **1st issue** for determination is whether the claimant is entitled to remedies as prayed for. The evidence is that the grievant was casually invited to the disciplinary hearing by a telephone call and was not given an opportunity to attend accompanied with a union representative as envisaged in section 41 of the Employment Act, 2007. The court has considered the complexity and gravity of the allegations that were levelled against the grievant and taking into account his relatively lower rank as a lead man, the court finds that the failure to accord him the presence of the union representative rendered the procedure at the disciplinary hearing unfair. Second, it was the burden of the respondent to prove that the reason for termination was genuine as at the time of termination and as envisaged under section 43 of the Act. Further it was for the respondent to justify the grounds for termination or dismissal as provided in section 47 (5) of the Act. The court finds that the respondent failed to call a witness to establish the reasons for the termination and thus the respondent failed to discharge the burden of proof as was vested upon it as the employer.

The grievant testified that the records showing his daily transactions were taken away and were not made available during the disciplinary hearing. The grievant has showed that under the prevailing operational policy his duty as a lead-man was to check the pro-forma sales invoice and payment receipt, to record the receipt number on the pro-forma sales invoice and to give the receipt back to the customer. The grievant's further duty was to count the fruits as they are loaded in presence of the security guard who filled the details on the fruit weighing record. The court finds that the respondent has not showed that the alleged reasons for dismissal were consistent with the grievant's duties as defined in the respondent's operational requirements and as envisaged in section 45 (2) (b) (ii) of the Employment Act, 2007 so that the termination was unfair. It was not established that the grievant failed to perform any of the duties as were vested upon him and the court's considered opinion is that if the receipts bearing the same serial number were forged and presented, the grievant would not be culpable in that regard. The court considers that the fact that the grievant made the relevant record as instructed was good enough and it was for others, like the auditors, to analyse the records and discover any such forgery of receipts or pro-forma sales invoices. In the court's opinion, a discovery of discrepancies as was alleged against the grievant suggests that the grievant in fact performed his duties and that is why the respondent was able to unearth the alleged fraud – and the grievant should not have been punished for such good performance. In such circumstances the court finds that as at the time of the dismissal, the respondent cannot be said to have had a genuine or valid reason for the dismissal of the grievant from employment. The dismissal was unfair.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) As the termination was unfair, the claimant is entitled to the declaration that the dismissal of the grievant herein was unlawful, illegal, unfair and wrongful.
- b) The termination was unfair. The court has considered the grievant's long clean record of service

starting 26.08.1996 to 06.06.2014. The claimant desired to continue in employment and did not contribute to his dismissal. The aggravating factor is that he appears to have been dismissed despite having performed his duties. He is awarded 12 months' gross under section 49(1) (c) at Kshs.32,674.38 per month making **Kshs.392,092.56** as prayed for.

c) The claimant prayed for gratuity pay for each completed year of service as provided under the collective agreement. Clause 8 (h) (iii) entitled the grievant to 31 days for each completed year of service and he is awarded **Kshs.705,138.25** as submitted for service from 26.08.1996 to 06.06.2014.

d) Leave due but not taken is awarded at **Kshs.40,214.62** as submitted and in terms of clause 9(a) (i) of the collective agreement being 32 days for the last served year.

e) In lieu of notice pay per collective agreement is awarded at **Kshs. 100,535.56** as submitted and as per clause 11(a) (iii) being 80 days' pay.

f) The grievant is awarded 6 days worked in June 2014 making **Kshs. 6,283.55** and as prayed for.

g) The respondent will pay the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The declaration that the respondent's termination of the grievant's contract of employment was unfair.

b) The respondent to pay the grievant **Kshs.1,244,264.54** by 01.02.2017 failing interest to be payable thereon from the date of this judgment till full payment.

c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 9th December, 2016.**

BYRAM ONGAYA

JUDGE