



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1685 OF 2011
KENYA BUILDING CONSTRUCTION,
TIMBER, FURNITURE UNION.....CLAIMANT
VERSUS
PEPCO CONSTRUCTION COMPANY LTD.....RESPONDENT
JUDGMENT

1. The Claimant filed the suit seeking resolution of a dispute framed as unlawful termination of employment of Mr. John Njuguna Chege. The Claimant averred that there was no collective bargaining agreement between it and the Respondent. It was averred that the grievant was hired on 2nd October 1996 as a machine operator until 8th May 2008 when his services were terminated. The Claimant averred that the grievant was arrested on allegations of theft of diesel preceding his dismissal from service. It was averred that the grievant was dismissed two months after the arrest while still serving the Respondent. The Claimant averred that the Respondent failed to pay terminal dues being 2 months payment in lieu of notice, earned annual leave for 121 years, pro rata leave, service at the rate of 14 days for each completed year. The Claimant also sought 12 months compensation for the grievant, costs of the suit and any other relief the Court may deem fit and just to grant.
2. The Respondent filed a reply to the memorandum of claim on 17th April 2012. In the reply, the Respondent averred that the claim was a non starter as there was no collective bargaining agreement between the parties. The Respondent averred, without prejudice to the foregoing, that it had employed one Njuguna Chege as a casual and his employment was terminated on 8th May 2008 after he had stolen 300 litres of diesel and absconded from duty. The Respondent denied that the grievant was entitled to any terminal benefits and averred that the termination of the grievant was proper and all the terminal benefits duly paid. The Respondent averred that the claim was filed out of time. The Respondent filed a preliminary objection on 1st March 2014 seeking dismissal of the suit as being filed out of time in terms of the Employment Act Section 90.
3. Just before the hearing commenced on 12th February 2015, the Respondent withdrew the preliminary objection it had filed on 1st March 2014. The grievant was sworn in and testified that he was employed by the Respondent as a machine operator from 2nd October 1996 and served as such till May 2008. He stated that he operated the backhoe, bulldozer and was not given any letter of appointment. He testified that he did not get any payslip and would sign a voucher which was retained at the office. He stated that he did not recall the date that he was arrested though it was in

January 2008. He testified that he was performing his duties in Ntulele, Narok when he was asked to leave the shovel he was driving. He stated that he was asked to do this by the staff from Maltauro and a security officer in the company of two police officers. He was incarcerated at Ntulele Police Station and he called his boss Pino Chichini and informed him of the arrest. That was in the evening. The grievant testified that his boss came the next day and got him out of the cells. He was replaced by another operator and was relocated to the workshop in Karen. He testified that he worked there until 8th May 2008 when he was dismissed from service. The grievant reported to the union and the Labour office. After the Respondent did not attend the conciliation meeting the matter was referred to Court.

4. In cross-examination by Mr. Rweya for the Respondent, he testified that he joined the union in 2001 but could not recall how much he paid as union dues. He testified that he was working in Narok at a site Maltauro was working on. He stated he was picked from his vehicle and was taken to the police station and that he was accused of stealing diesel. He was not employed by Maltauro but was working at a site run by them. He had served in Narok for 3 months. He called his boss who came and got him out of the cells. He stated that it was a trumped up charge and that he did not know where they had got the diesel from.
5. He was re-examined by Mr. Chege and stated that he was a member of the union that had come to Court from 2001. He testified that when he went with the union official to the Respondent they listened to him and he was never told he was not a union member. He stated that he was not charged in any Court and that it was the Maltauro officials who got him arrested.
6. The Respondent called Checchini Guiseppe the director of the Respondent. He testified that he was introduced to the grievant by the grievant's father and he took in the grievant to help at the workshop. The grievant later became an operator. He stated that there was an incident in Narok where Maltauro were doing the Mai Mahiu Narok Road and that he was called by the security of Maltauro and informed that they had found some stolen diesel and one of the people said to be involved was the operator (the grievant). He went to see what happened and found the grievant had been arrested. He had four machines there and he lost the contract and because of the incident he had to dismiss the grievant. The grievant did not give a proper explanation and did not apologise and only kept saying he was not the one. He stated that diesel was taken and he lost the contract.
7. In cross-examination he testified that he could not remember when he had employed the grievant and that they were in Narok for a few months. He testified that he was called by people from Maltauro and was told a few people were arrested. He could not recall if the grievant had called him. He went to see the grievant and the Respondent organized the grievant's release. He testified there was a special relationship with the grievant as the grievant was introduced to him by the grievant's father. He stated that he did not have a problem with the grievant. He was told diesel had been removed from the machines, he was not told who did it and he was not involved in the investigations. He testified that the grievant came to workshop in Nairobi and he gave the grievant a dismissal letter personally. He testified that he lost the contract. He stated that he did not follow up on the other case because it was not his people who took the grievant to the police. He testified that the grievant was not given notice but was paid his dues.
8. Parties filed written submissions. The Claimant filed written submissions on 25th March 2015. In them the Claimant submitted that the dismissal of the grievant was improper. The Claimant relied on the case of **Titus Musau Ndivau & Another v Waridi Limited [2012] eKLR** where Ongaya J. held that it was not just sufficient to allege gross misconduct without evidence of that misconduct. He thus sought judgment as prayed.
9. The Respondent filed written submissions on 24th March 2015. The Respondent submitted that the dismissal was in keeping with provisions of the Employment Act Section 44(4)(g) as the grievant had committed an offence. The Respondent submitted that the grievant had admitted to being arrested on suspicion of stealing diesel and later released on bond. The Respondent submitted that

the grievant absconded from work and that the grievant's suit was fit for dismissal.

10. The undisputed facts are that the grievant was an employee of the Respondent and was working on a site in Narok where the Respondent had been contracted by Maltauro the contractor on site. The grievant was a driver of one of the machines and that he was arrested on suspicion of stealing diesel. It was not contested that the grievant was released from police custody by the employer and was later dismissed. The Claimant claimed the grievant was not paid his terminal dues. The Respondent's witness admitted that the grievant was dismissed after he had been brought back to the workshop in Nairobi. The reason for dismissal was stated to be the loss of the contract with Maltauro which had been cancelled after the incident.

11. Section 44(4)(g) of the Employment act provides as follows:-

44(4)(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.

12. In determining whether an employer was justified in terminating the services of an employee, this Court is bound to consider the procedure adopted in the process of dismissal and the handling of the appeal that ensues. The Employment Act Section 45(5) makes provision as follows:-

45(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; ?

(b) the conduct and capability of the employee up to the date of termination; ?

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41 ?

13. The procedural fairness under Section 41 cannot be emphasized enough. Section 41 makes provision as follows:-

41 (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.

14. The Claimant had a burden of proving that the dismissal was unfair. While the Respondent had the burden of proving that the dismissal was justified.

15. It is clear the grievant was not accorded the procedural fairness under Section 41 of the Employment Act. Whereas there could have been basis for dismissal on account of gross misconduct in accordance with Section 44(4)(g) of the Employment Act, the Respondent was bound to adhere to the law in dismissing the employee. In the case cited, **Ndivau v Waridi** (above) my brother Ongaya J. held that it is not sufficient to just allege gross misconduct. This is different from the case before me. It was not an allegation made by the Respondent but by a third party. The grievant was not dismissed on account of the incident but as a result of the fallout between the Respondent and the contractor on site in Narok. The grievant's case was thus different from the scenario that was before the learned judge. The authority though sound is not

relevant to the dispute before me.

16. I do not for one buy the argument that the grievant was a member of the Claimant. In any event, there is no recognition agreement between it and the Respondent. The Claimant is an imposter and intruder in these proceedings. I substitute the name of the Claimant with that of Njoroge Chege the grievant herein.

17. I find and hold that the notice period the grievant was entitled to is a month as he was a month to month employee. He asserts he was not paid his terminal dues. The Respondent asserts the grievant was paid but has no documents to prove payment. The employer was required in law to maintain records and none were produced to the Court. It is clear there were terminal dues the grievant was entitled to. He did not however prove he never went on leave for all the years he worked for the Respondent and that portion of his claim would fail.

18. In the final analysis I enter judgment for the grievant against the Respondent for:-

- a. One month's salary in lieu of notice Kshs. 10,500/-
- b. 3 months compensation for wrongful dismissal Kshs. 31,500/-
- c. Severance pay of Kshs. 63,000/- being 15 days for each completed year of service
- d. Certificate of service in terms of Section 51 of the Employment Act
- e. The sums in a), b) and c) above are subject to statutory deductions to be paid to the relevant authorities.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of May 2015

Nzioki wa Makau

Judge