



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 293 OF 2014

WYCLIFF NGAIRA

CLAIMANT

v

FARMERS CHOICE LIMITED

RESPONDENT

JUDGMENT

1. Wycliff Ngaira (Claimant) was employed by Farmers Choice Ltd (Respondent) on a fixed term contract on 1 October 2010 as a general hand. The contract was for 5 months and 2 weeks.
2. On expiry of the contract, the parties entered into another contract of indefinite duration to run from 1 February 2011. On 10 October 2012 the Respondent promoted the Claimant to position of Farrowing Attendant.
3. However, on 3 September 2013 the Respondent summarily dismissed the Claimant and the reason(s) given were that a piglet had been laid on the previous day and that on 29 August 2013, 5 piglets died under the Claimant's watch.
4. The Claimant was aggrieved with the dismissal and he informed the Kenya Plantation & Agricultural Workers Union. After discussions, the Union and the Respondent agreed on 3 March 2014 to reduce the summary dismissal into normal termination with payment of one month wage in lieu of notice. The minutes indicate that the Claimant had been paid other dues.
5. The Union and the Respondent consequently signed an agreement witnessed by a Labour Officer to settle the dispute by paying the Claimant Kshs 12,551/-. The Claimant disowned the agreement in Court.
6. On 19 August 2014 the Claimant commenced the present action alleging unfair, wrongful and unlawful dismissal, underpayments and seeking a total of Kshs 516,443/- being notice pay, compensation, underpayments, overtime, gratuity, pension and house allowance.
7. The Respondent filed a Response on 9 October 2014, and the Cause was heard on 7 May 2015.
8. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal was unfair, whether Claimant was underpaid, whether the claim was compromised and appropriate remedies/ claimant's entitlements.*

Whether dismissal was unfair

Procedural fairness

9. Section 41 of the Employment Act, 2007 protects employees from procedurally unfair termination of employment.
10. I have previously attempted to outline the ingredients of procedural fairness. In *Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR, I stated thus

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

11. The Claimant stated in examination in chief that he was called to a hearing before dismissal on 30 August 2013 but that he was not accompanied by a colleague. In cross examination, he admitted the shop stewards were present during the meeting on 30 August 2013.
12. The Respondent called its Pig Unit Manager to testify. He stated that he asked the Claimant to explain what had happened but he turned rude. He then summoned a supervisor Tom Mboya and 2 shop stewards Joseph Wainaina and Nekesa Nalianya for a meeting. The meeting recommended that action be taken against the Claimant. He also stated that the Claimant signed a disciplinary form.
13. It is clear that the Claimant was informed of the allegations against him and a meeting in the presence of 2 Union representatives was held and recommendation made for action against the Claimant. The Claimant did not deny signing a disciplinary form.
14. An employer is not expected to hold a mini-court to meet the standards envisaged under section 41 of the Employment Act, 2007.
15. The Court finds that the Respondent complied with the statutory requirements as to procedural fairness.

Substantive fairness

16. The Claimant was a Farrow Attendant. He stated that his duties included checking pigs and piglets to ensure that the pigs did not lie on the piglets.
17. He confirmed that a pig gave birth on 29 August 2013 but denied that a piglet died.
18. The Respondent's witness stated that 2 piglets died after being laid on. 3 had been mauled. He also stated that the Claimant had been issued with a muzzler to place over the mouth of the mother pig but he did not use it on the material night. The Claimant had also been issued with a torch.
19. He also stated that among the responsibilities of the Claimant was separating the piglets from their mothers.
20. The testimony on the issuance of torch and muzzler was not challenged or controverted. The Claimant did not challenge the evidence that his duties included separating the piglets from the pigs.
21. Although the Claimant denied that any piglet died, the Court finds as a fact based on the testimony of the Respondent's witness and documents produced that 5 piglets died.
22. The piglets died because the Claimant did not carry out his duties as required and the Respondent has so proved in Court.
23. In the view of the Court, the Respondent has proved the reason for the dismissal and that the reason was a valid and fair reason.

Whether Claimant was underpaid

24. The Claimant pleaded that in 2009 he was underpaid by Kshs 20,340/-, in 2011 by Kshs 17,988/- and in 2012 by Kshs 14,580/-. He cited 3 Legal Notices.
25. During testimony, he stated that in 2009 he was earning Kshs 770/- every fortnight, Kshs 6,068/- per month from January 2011 and Kshs 6,999/- from August 2011 to May 2012 when the wage

- was increased to Kshs 7,915/-.
- 26.The Claimant annexed to his pleading Legal Notice No. 64 of 2011 and Legal Notice No. 71 of 2012.
- 27.The Claimant did not lead any evidence as to the Industry the Respondent is involved. But common sense dictates that rearing of pigs is an agricultural sector industry.
- 28.I have keenly perused the 2 Legal Notices and they are not applicable to minimum wages within the Agricultural Industry. This is because regulation (2)(1) of the Regulation of Wages (General) (Amendment) Order out rightly provides so.
- 29.The Claimant therefore cannot rely on them and the Court is therefore not satisfied that the Claimant has made a case for underpayment of wages.

Whether claims were compromised

- 30.The Claimant disowned the Union in Court. His pay slips clearly indicate that he was being deducted union subscriptions in favour of Kenya Plantation & Agricultural Workers Union. He was not being forthright therefore in disowning the Union.
- 31.The Union was therefore legally competent to represent the Claimant in attempting to settle the dispute. A meeting was held and agreement reached on 3 March 2014 to reduce the dismissal into normal termination. The agreement was signed by the Union and Respondent. A certificate of agreement was signed on 7 March 2014 and was witnessed by the Labour Officer.
- 32.The Claimant cannot run away from the compromise. It was signed by his authorised representative in law and in so far as it dealt with the issue of dismissal, that issue was settled.

Appropriate remedies

1 month pay in lieu of notice

- 33.This was paid and nothing more needs to be said.

Compensation

- 34.This head of relief does not lie with the conclusion reached that the dismissal was fair and was also compromised.

Responsibility allowance

- 35.No contractual or statutory basis for this relief was shown and it is declined.

Underpayments

- 36.Claimant did not prove he was underpaid.

Overtime/rest days

- 37.The Claimant did not prove he worked overtime. In fact the evidence was that the employees were working in 3 shifts every 24 hours.

Service gratuity

- 38.Claimant was a contributor to National Social Security Fund and by virtue of section 35(5) and (6) of the Employment Act, 2007 not entitled to service pay.

Pensions pay

- 39.This was not proved.

House allowance

40.This was abandoned during testimony.

Conclusion and Orders

41.The Court finds and holds that

- i. the Claimants cause of action for unfair dismissal was not only compromised but the dismissal was fair.
- ii. the Claimant has not proved he was underpaid.
- iii.the Claimant is not entitled to compensation, responsibility allowance, overtime, service gratuity, pension pay and house allowance.

42.The Memorandum of Claim filed in Court on 19 August 2014 is dismissed.

43.Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 17th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondent Mr. Kinyanjui (Legal Officer) Agricultural Employers Association.

Court Assistant Nixon