



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.11 OF 2014

(Before D. K. N. Marete)

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

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGMENT

This matter was brought to court vide a memorandum of claim dated 22nd July, 2014. The issue in dispute is therein cited as;

“Wrongful, unlawful and/or unfair dismissal of Robert Ondieki.”

By a memorandum of defence dated 30th September, 2014, the respondent denies the claim and prays that the same be dismissed with costs.

The claimants case is that the grievant, Robert Ondieki, was employed by the respondent as a general worker on or about July, 2002. He was not issued with an employment contract or letter of appointment. On 3rd September, 2011 the respondent wrongfully, unlawfully and unfairly dismissed the grievant on account of purported use of abusive language and threatening to cause bodily harm to the leaf inspector. This is denied by the grievant.

The claimants further case is that on 18th August, 2011, the grievant reported to work and proceeded to weigh his first pluck normally done at around 900 hours. He poured out the tea leaves for sorting and informed the leaf inspector of this event. The inspector rudely told the grievant not to instruct him on what to do as he knew his work and would do the weighing at his own pace. Later, this was done but the inspector demanded that grievant goes home. He complied but this was after an enquiry on the reasons for this action to which he got a rude answer from the leaf inspector.

As the grievant walked home, some worker colleagues enquired on what was happening and as he answered this, the leaf inspector appeared and threatened the grievant that he would report to the estate manager that the grievant was holding an illegal meeting. The grievant left for the manager’s office and informed him of what was happening whereby the manager asked him to reduce his complaint in writing. He did and forwarded the write up to the manager’s office.

The grievant made a follow up on this but would not find the manager until 24th August, 2011 when the manager instructed him to resume work. He did and received his salary at the end of the month. On 3rd

September, 2011, as the grievant set for work, one of the respondent's inspectors instructed him not to report to work but instead report to the stores as there was an issue to be addressed. He did and upon arrival he was informed that he had abused and threatened the leaf inspector. He enquired on the particulars but was told to wait outside. After about thirty minutes, he was called in and issued with a letter of dismissal and evicted from his living quarters. He therefore reported the matter to the union and also the minister for labour but this bore no fruits as the appointed conciliator entered a disagreement on the dispute. It is his submission that all this time, he was not afforded an opportunity to be heard on his accusations.

19. The grievant was not accorded the opportunity to put forth his defence to the allegations leveled against him. The Respondent violate the grievant's right to natural justice by condemning him unheard.

20. The circumstances and events leading to the summary dismissal of the grievant point out to a well orchestrated scheme to dismiss him from employment in flagrant breach of the law. Further, the shop stewards were neither involved in the resolution of the dispute nor were they notified of the dispute or even involved in the meeting leading to the decision to dismiss the grievant.

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 I above fails, an order directing the Respondent to do the following:-

- a. Pay the grievant gratuity for the years she 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), (g), (h) and (I) above.

The respondent denies all the allegations of the claim and submits that on 18th August, 2011 the grievant plucked substandard leaf and when he was instructed by the leaf inspector to sort it out, he used abusive language and threatened bodily harm on the leaf inspector. This amounted to misconduct under clause 24 of the parties' collective bargaining agreement.

It is the respondent further case that at a disciplinary hearing conducted on 3rd September, 2011 in the presence of Kapgwen Estate shop stewards where the grievant was given a fair hearing and an opportunity to give a written and verbal explanation to the misconduct. He was dismissed on account of his inadequate and unsatisfactory explanation. Attempts to resolve this before an appointed conciliator of the minister for labour failed and a disagreement was entered. She therefore denies unlawful dismissal and prays that the claim be dismissed with costs.

The matter came to court variously until the 15th June, 2015 when it was heard. At the hearing CW1-Robert Ondieki the complainant/grievant testified in reiteration of his case. The respondent in defence called DW1, Elijah Olomodo and DW2, Shadrack Opiyo and DW3, Peter Kiprono Ngeno who testified in reiteration of the defence case.

The issues for determination therefore are;

1. Whether the termination of the employment of the grievant was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who shall bear the costs of this cause.

The 1st issue for determination is whether the termination of the employment of the grievant was wrongful, unfair and unlawful. The respondent, in his written submissions seeks to rely on Section 44 of the Employment Act, 2007 as follows;

"2.4 The respondent submits that the conduct of the respondent aforesaid warranted summary dismissal as under section 44(3) of the Act, the grievant demonstrated by his conduct that he had fundamentally breached his obligations to the respondent. Specifically Section 44(4) (d) of the Act entitles an employer to summarily dismiss an employee for using abusive or insulting language or if the employee behaves in a manner insulting to the employer or to a person placed in authority over him by his employer. This is consistent with clause 24 (d) of the CBA."

The respondent further submits that the reasons set out in dismissal letter are consistent with the evidence of the respondent's witnesses DW1, DW2 and DW3 who testified on the use of abusive language and threat to harm to cause bodily harm to leaf inspector who was in authority over the grievant at the workplace.

The respondent further relies in the authority of **Bernard Shisiali Muhatia v Speedex Logistics Ltd (2013)** where 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?"

The claimant, as aforesaid reiterated a case for unlawful dismissal by relying on Section 41 of the Employment Act, 2007 as follows;

1. *"Subject to section 42 (1), an employee shall, before terminating the employment of an employee, on grounds of misconduct, poor performance and or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering terminating the employee 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 claimant further relied on the authority of **Fredrick Saundu Amolo Vs. Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR** as hereunder;

“It is not for the claimant to call for representation. The employer, the respondent herein had the duty to inform the claimant of the allegations against him as remind him of his fundamental right to have at the hearing a person of his choice, his union or a fellow employee. Whether the claimant was aware of this right or not, the duty vested upon the employer to reiterate these rights and dully accord them to an employee being subjected to disciplinary proceeding such as the claimant faced. Where an employee chooses not have such representation or the presence of a fellow employee of his choice then this must be carefully recorded as when raised at any hearing before the Industrial Court, the court is as a matter of justice, caused to refer to such proceedings. In the absence of such confirmation that the claimant was represented by his union or a fellow employee of his choice present, then the respondent made a fundamental omission in the disciplinary process that does not meet the tenants (read tenents) of section 41 of the Employment Act, thus negating the proceedings and any decisions therefrom. Section 41 of the Employment Act is stated in mandatory terms as;

She, further seeks to rely on Section 45 (1) of the Employment Act, 2007 which provides as follows;

“A termination of employment by an employer is unfair if the employer fails to prove

a. That the reason for termination is valid;

b. That the reason for termination is a fair reason-

i. Related to the employees conduct, capacity or compatability; or

ii.

c. That the employment was terminated in accordance with fair procedure.”

I also agree with the respondent that primarily, this matter has to be decided on a balance of probabilities. This is because the evidence of the parties is largely an issue of your word against mine. In such situations a test of a balance of probabilities and preponderance of evidence comes in to aid a decision on the matter. It would unfortunately appear that this test would not bring out the desired results for the respondent. A balance of probability and preponderance of evidence in the circumstances of this case tilts in favour of the claimant.

The test here is one of wrongful, unfair and unlawful termination of employment. This can only be had bearing in mind the evidence of the parties on the matter. This would in essence clear the way for fair termination on the template of procedural fairness.

To me, the respondent does not in any way contradict the evidence of the grievant in this cause. The claimant brings out an overwhelming case of absence consideration for procedure in the determination of disciplinary proceedings. A failure on this forestalls a perverted decision of termination of employment. I therefore find a case of wrongful, unfair and unlawful termination of employment of the grievant. This answers the 1st issue for determination.

On a positive test for unlawful termination, one would be entitled to relief and this squares the 2nd issue

for determination.

The 3rd issue for determination is on who bears the costs of this cause. The circumstances of this case are elusive. This relationship must not be torn apart. I would therefore order that each party bears its own costs of the cause.

I am therefore inclined to allow the claim and order as follows;

- i. That the grievant, Robert Ondieki be and is hereby reinstated to employment without loss of benefits, promotion and or emoluments.
- ii. That the grievant be and is hereby ordered to report to work tomorrow, 15th December, 2015 at 800 hours.
- iii. That the respondent be and is hereby ordered to pay the grievant for all leave due and untaken before termination.
- iv. That the respondent be and is hereby ordered to return the grievant's household goods and other property withheld during the eviction process from the respondent's residential premises on termination.
- v. That each party shall bear its own costs of this cause.

Delivered, dated and signed this 14th day of December 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Muli for the Union.
2. Miss. Alubale instructed by Kaplan & Stratton Advocates for the Respondent.