



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.9 OF 2014**

*(Before D. K. N. Marete)*

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

**JUDGMENT**

This cause was originated by a memorandum of claim dated 22nd July, 2014 and filed on the same date. The issue in dispute is therein cited as;

*“Wrongful, unlawful and/or unfair dismissal of Bethseba Kerubo.”*

The respondent denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the grievant was employed by the respondent on 13th April, 2012 as a general worker and deployed her at Tagabi Factory. She was however, not issued with a letter of employment. On 31st October, 2012, the respondent wrongfully, unlawfully and unfairly dismissed the grievant on allegations of absenteeism and destruction of the respondent's property. The grievant denies all these. At the time of dismissal, the grievant earned Kshs. 9,256.00 per month.

The claimant's further case is that on 9th September, 2012 a sunday, the grievant left her place of work for her rural home and came back in the evening. On 10th September, 2012, she reported to her place of work only for the assistant manager to inform her to go and see the factory/plant manager. On getting there, she was astonished to be informed that she had broken the respondents window panes. She was requested to explain this in writing which she did.

On 13th September, 2012, the grievant was issued with a show cause letter which required her to show cause why disciplinary action should not be taken against her for destruction of the respondents property. This was done and the matter went silent.

On 16th October, 2012, the grievant reported on duty only to be deployed elsewhere as relief to an absentee employee. She however pleaded that she was unwell and unable to take up the new deployment due to the duties involved. The team leader requested that she explains this to the manager who had issued the redeployment duties. On so doing, she was allowed a day off and resumed on 7th October,

2012 and continued with her work until 12th October, 2012 where she fell sick while attending a talk on safety. She stepped out of the lecture room to take some water whereupon the Assistant Manager found her and scolded her, ordering that she goes to the dispensary for a note on her medical condition on her health. (This court notes lack of coordination and discrepancy on dates adduced in evidence: Is this typographical?)

The medical officer assessed her condition and informed that the grievant and the assistant manager of the grievant's pregnancy but he (manager) ordered her back to work. This was past working hours and she left for home.

On her reporting on 13th October, 2012, she was not allocated any duties but sent home until further communication. Due to the state of her health, she decided to travel to her rural home as she awaited further communication. On reaching home, she experienced pregnancy complications whereon she was admitted to Nyamira District Hospital for four (4) days, annexure KPWU 4 refers.

Upon discharge, she went to the respondents dispensary for drugs but was referred to the Central Hospital of the respondent. Here, she was issued with drugs and further sick off.

On 29th October, 2012, she was served with a letter requiring that she attends disciplinary proceedings which she did attend on 31st October, 2012 despite her state of health. She was ordered to sit despite protesting that she was disabled due to the state of her health. She was later to be excused from the meeting and instructed to stay outside only to be informed and issued with a letter of a decision of dismissal by the manager after the meeting had long ended. On 5th November, 2012, she was given a letter requiring that she vacates the respondents residential premises.

This matter was reported to the claimant union and a letter done to the respondent but all attempts to a resolution of the issue was fruitless. This was even after a conciliation process ordered by the minister backfired. She prays for;

*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 she 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. Should 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), and (g), above.*
- k. Any other relief this Honourable Court deems fit to grant.*

The respondent, in defence denies the claim and submits that she received a report that the grievant had on 9th September, 2012 left her place of work without permission to beat up a fellow employee's (George Nyakina) wife and in this event caused grievous damage to the respondents property. The grievant was on 13th September, 2012 invited to show cause why disciplinary action should not be taken against her for gross misconduct and at a disciplinary meeting held on 31st October, 2012 she was dismissed for gross misconduct. She was issued with a dismissal letter on the same date.

It is also the respondents case that the grievants branch secretary appealed the decision but the respondent upheld the decision on dismissal. At a conciliatory meeting at the Ministry of Labour, a disagreement was entered. She denies unlawful dismissal or termination.

The matter came to court variously and on several instances attempts were made at an out of court settlement. These however failed and the matter was ultimately heard on 23rd June, 2015.

At the hearing, the claimant called the grievant who reiterated her case as afore stated whereas the respondent called DW1 Mutua Mutuku. The branch manager, Tagabi factory who also reiterated 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 bears the costs of this cause.

The 1st issue for determination is whether the termination of the employment of the grievant was unlawful, wrongful and unfair. The evidence adduced by the parties agrees on a disciplinary meeting by the respondent for the grievant's case. The grievant in her evidence denies participation in these proceedings due to her failing health condition. She admits attending the disciplinary meeting but adds that from the onset she requested to be excused from sitting at the meeting as she was not bodily able to do so or participate in the meeting due to her state of health. Despite information that she was not in a position to pursue the process, she was only asked to stay out of the meeting only to be stamped with a letter of dismissal far after the meeting. The entire evidence of the grievant is replete with bouts of hostility and indignity on the part of the respondent's agents in dealing with this matter. It would appear that there was a pre-determination and finality in the manner of dealing with the grievant's case, all this while she was pregnant and sickly. This is unfair, to say the least. It is sadistic and inhuman.

The respondent in his written submissions

*2.6 The respondent submits that the conduct of the grievant aforesaid warranted summary dismissal under section 44(3) of the Act. The Grievant demonstrated by her conduct that she had fundamentally breached her obligations to the respondent. Specifically Sections 44(4) (a) and (g)*

of the Act entitle an employer to summarily dismiss an employee if the employee absents himself from work without leave or other lawful cause and if the employee commits, or on reasonable and sufficient grounds is suspected of having committed any criminal offence against or to the substantial detriment of his employer or his employer's property. This is consistent with clause 24 (a) and (g) of the CBA. The reasons set out in the dismissal letter dated 31<sup>st</sup> October, 2012 (page 30 of the claimant's documents) are consistent with the evidence adduced by RW1 to justify its decision i.e the grievant failed to follow proper procedure and without leave or lawful cause absented herself from her proper place of work and destruction of company assets.

2.7 Section 43(2) of the Act provides that the reasons for termination are the matters that the employer at the time of the contract genuinely believed to exist and which caused the employer to terminate. In the circumstances, the respondent has proved that the reason for the grievant's dismissal was justified and fair. The respondent's burden of proof in respect of the validity of the termination is on a balance of probabilities and not beyond reasonable doubt. We rely on this honourable court's decision in 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?”*

To further buttress her case the respondent relies on the authority of **Dock Workers Union v Kenya Ports Authority (2015) eKLR** where Hon. Justice Rika stated;

*“The Employer retains the managerial prerogative to run its business, as held in the cases of Miguna Miguna v Permanent Secretary, Office of the Prime Minister and Samuel Muchiri Gikonyo v Henkel Chemicals Limited cited in the Respondent's submissions. This managerial prerogative includes the right to investigate employment offences and to impose disciplinary sanctions. This was the same holding in Industrial Court at Nairobi, Cause Number 1200 of 2012 between Professor Gitile G. Naituli v The University Council, Multimedia University College of Kenya & Another, where the Court concluded that Employment Law merely seeks to protect the weaker party in the employer-employee relationship, and not to deprive the Employer the power to run its business altogether. In the Industrial Court at Nairobi, Cause Number 1567 of 2011 between Kenya Game Hunting and Safaris Workers Union v Lewa Wildlife Conservancy Limited, the Court upheld the managerial prerogative, stating this is a fundamental principle in capitalist production, which must be protected, and not consumed, in the liberal slide into egalitarian anarchy.”*

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 bearing 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, like the respondent, 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 am most agreeable with the submissions of the respondent in pursuit of her case. These are apt and logical but unfortunately fall short of the circumstances of this case as presented. These may not be amenable to the desired results. RW1 testified on the breakage of the respondent’s window and this is captured in the opening of the respondent’s submissions as hereunder;

2. *“The grievant testified that she was in a relationship with Mr. George Nyakina, one of the respondent’s employees. Mr. Nyakina lived with his wife Damaris Kemunto. RW1 testified that when the incident of 9<sup>th</sup> September, 2012 relating to damage of the Respondent’s property was reported to him, he immediately commenced investigations. A statement was taken from Mr. Nyakina who confirmed that it was the grievant who broke the window (see page 2 of the respondent’s documents). A further statement was taken from Mr. Barnabas Ngeno who also confirmed that the grievant broke the window (see statement to the left of page 7 of the respondent’s documents). In the statement, Mr. Ngeno stated when he asked at the scene who had broken the window, “the children answered by saying it is Kerubo who broke the window.”*

This is the defence evidence on destruction of the respondent property. It must be noted that incidences of romantic relationships between workers are likely to and do occur at the work place. In her evidence, the grievant clearly and occasionally referred to Mr. George Nyakina as *my husband*. It is on these situations that the maturity of the employer is put at utmost test. Any goof at this stage, like I suspect was in this case produces harzadous results. Proper and considered management of these situations by all parties would best serve appropriate labour relations. Unfortunately for the respondent, even this formula does not tilt the case in its favour but that of the claimant. This jurisprudence is not relevant in the circumstances.

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.

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 no consideration for procedure in the determination of disciplinary proceedings. A failure on this forbears a perverted decision of termination of employment. I therefore find a case of wrongful, unfair and unlawful termination of employment of the grievant.

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;

1. That the grievant, Bethseba Kerubo be and is hereby reinstated to employment without loss of benefits, promotion or emoluments.
2. That the grievant be and is hereby ordered to report to work tomorrow, 15<sup>th</sup> December, 2015 at 800 hours.
3. That the respondent be and is hereby ordered to pay the claimant twelve (12) months salary as compensation for economic loss due to unlawful termination of employment; that is Kshs.9256 x 12months = **Kshs. 111.072.00.**
4. The respondent be and is hereby ordered to pay the grievant for all leave untaken at the time of termination.
5. The respondent be and is hereby ordered to return to the grievant all household goods and other property withheld at the time of eviction from her living quarters.
6. 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