



IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 47 OF 2014

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

IYEGO FARMERS CO-OPERATIVE SACCO.....RESPONDENT

JUDGMENT

1. The claimant in this case is a trade union registered under Laws of Kenya. It has brought this action on behalf of one of its members namely Ayub Kamau seeking from this court an order of reinstatement to employment or alternatively an order that the member was unlawfully and unfairly terminated from employment by the respondent hence entitled to for compensation.
2. The facts briefly were that the grievant who was an employee of the respondent was dismissed from employment on account of negligence in carrying out his duties.
3. According to the respondents the grievant who at the time of dismissal was in the position of a Factory Manager was found to be responsible for the loss of the electric motor and further that in the stock card he declared that the electric motors were three while in actual fact they were only two. These actions according to the respondent, constituted negligence for which it felt justified in dismissing the grievant with loss of benefits.
4. At the hearing of the suit, the grievant testified that on 2nd April, 2012 he was asked to explain whereabouts of the electric motor which he did in writing. It was his testimony that the electric motor was under the watch of the machine operator and not him. He was subsequently suspended and later called for disciplinary hearing at the conclusion of which he was dismissed. According to the grievant he worked for the respondent 29 years and had never faced any disciplinary issue.
5. The respondent on its part called two witnesses. DW1 testified that on 2nd April, 2014 there was stock taking and the grievant prepared a checklist indicating among other items that the electric motors were 3 while in actual fact they were two. The grievant was therefore asked to explain where one motor was but could not do so satisfactorily. DW2 on his part stated that stock-taking was the responsibility of the grievant and that he indicated that the motors were three while in actual fact they were only two. She was therefore directed by the management to issue the grievant with a show cause letter. According to DW2 the grievant's explanation was found unsatisfactory hence she issued him with a suspension letter and later called for the disciplinary hearing.
6. Mr. Owiyo, appearing for the grievant submitted that it became a fact during the hearing that the

machine operator who was the user of the electric motor was the one who removed and dismantled it and later kept it in the tools store. According to Mr. Owiyo, therefore, there was no evidence that the motor was lost or stolen.

7. According to Mr. Owiyo, the dismissal of an employee has always been declared unfair, unlawful and unwarranted if there are no valid grounds for the action or evidence of misconduct or other violation of the grievant's contract of employment. He further submitted that the court would declare a termination unfair and unlawful if the employer fails to adhere to the rules governing its grievance handling or disciplinary machinery or where the employer fails to observe rules of natural justice or where the punishment inflicted is disproportionate to the offence allegedly committed. Taking the foregoing into account, Mr. Owiyo submitted that the respondent's actions were wanting since one could not be accused of negligence on an issue that was never his job.
8. Mr. Cheruyiot for his part submitted that employment relationship is guided by amongst others a trust relationship and to support this submission he cited South African case of **National Union of Mineworkers & Another Vs Commission for Conciliation, Mediation and Arbitration & 2 others.**
9. According to counsel, there is no dispute that the grievant was informed of the accusations against him and afforded an opportunity to be heard before he was dismissed. Counsel to support this contention relied on section 44(4) of the Employment Act which sets out what constitutes justifiable or lawful grounds for dismissal due to gross misconduct which include neglect by employee to perform any work which it was his duty to perform or careless performance of ones work.
10. The issue which requires to be resolved in this dispute is whether the dismissal of the grievant was justified in terms of reasons for such dismissals and whether it was the best action to take against the grievant in the circumstances.
11. The facts of this dispute have briefly been set out earlier in this judgment. The grievant was accused of negligence leading to loss of an electric motor. He was suspended and later called for a disciplinary hearing at the conclusion of which he was dismissed.
12. Minute No. 64/2011/2012 of the Disciplinary Proceedings held on 4th June, 2012 records that the grievant admitted that the electric motor in question was missing and that he did not know how it went missing until the date of stock taking. It is recorded that the grievant further explained that on realizing the motor was missing he called the machine operator to explain where the motor was and the machine operator informed him that he together with a casual employee kept the motor in another store.
13. It is further recorded in the minutes that the meeting called Mr. Kanyungi, the casual employee, and he explained that he, together with the machine operator had carried the motor which had been dismantled by the machine operator from the pump house to another store where the factory tools were kept. It is recorded that Mr. Kanyungi emphasized that by the time the machine operator was going on leave, the motor was in the tools store where they kept it.
14. The grievant's show cause letter dated 3rd April, 2012 stated that during the routine stock taking of Monday, April 2nd, 2012, it was discovered that one electric motor for the recirculation pump was missing and that no report of the missing motor had been made by the grievant. He was therefore called upon to show cause why action should not be taken against him for gross-negligence. The grievant vide his letter dated 5th March, 2017 and also at the disciplinary hearing maintained that the machine operator and the casual employee were the ones who knew the whereabouts of the missing motor. Indeed Mr. Kanyungi informed the disciplinary hearing that it was in fact he and the machine operator who kept the motor albeit in a dismantled state, in the factory's tools store. In the circumstances can it be reasonably said that the grievant failed to satisfactorily discharge the burden of showing cause why he should not be found guilty of gross negligence? The court finds to the contrary. The grievant reasonably explained the whereabouts

of the presumably missing motor and this was further supported by the testimony of Mr. Kanyungi at the disciplinary hearing.

15. Section 45 of the Employment Act prohibits unfair termination of employment. Further a termination of employment shall be deemed unfair if an employer fails to prove among others that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility. A termination of employment is further deemed unfair where it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

16. From the foregoing provisions of the law, the court is of the considered view that the grievant's termination of employment fell short of the reasons and or justifications contemplated under section 45 of the Employment Act.

17. With regard to remedies, the grievant sought as one of the prayers an order for reinstatement. This can be granted but sparingly. The grievant was terminated on 13th June, 2012 hence has been out of the respondent's employ for almost two years. Further the respondent is a private enterprise with a more or less localized operation. Reinstatement therefore would not be advisable in the circumstances. The court therefore converts the grievant's summary dismissal to termination under normal circumstances together with benefits. In that regard the court awards the grievant as follows:

(i) One month's salary in lieu of notice..... Kshs. 11,600

(ii) Gratuity at 2 months pay for every year

worked (as per CBA)

(11,600 x 2 x 17)..... Kshs.394,400

(iii) 6 months salary as compensation for

unfair dismissal..... Kshs. 69,600

Kshs. 475,600

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18. This award shall be subject to statutory deductions and applicable taxes.

19. The respondent shall issue the grievant with a certificate of service in accordance with section 51 of the Employment Act.

20. It is so ordered.

Dated at Nyeri this 30th day of September, 2014.

ABUODHA J. N

JUDGE

Delivered in open Court in the presence of Mr. Mutahi Advocate for the Claimant and in the presence of Mr. Warutere h/b for Mr. Kiraha Advocate for the Respondent.

ABUODHA J. N

JUDGE