



**IN THE COURT OF APPEAL**

**AT NAKURU**

**CORAM: KOOME, MUSINGA, & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO 71 OF 2017**

**BETWEEN**

**KENYA UNION OF**

**COMMERCIAL, FOOD & ALLIED WORKERS.....APPELLANT**

**AND**

**KISII BOTTLERS LIMITED.....RESPONDENT**

*(Appeal against the judgment and decree of the Employment and Labour Relations Court at Kericho (Marete, J.) delivered on 31st January 2017*

*in*

*ELRC Cause No 85 of 2016)*

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**JUDGMENT OF THE COURT**

**Background**

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (**Marete, J.**) at Kericho in Cause No. 85 of 2016 where the **Kenya Union of Commercial, Food & Allied Workers** (the appellant) filed a suit against **Kisii Bottlers Limited** (the respondent) for and on behalf of one of its members, **Obed Gesagwa Orara** (the grievant).

2. The grievant is a member of the appellant, which allows the latter to bring this action, pursuant to a valid recognition agreement and Collective Bargaining Agreement with the respondent.

3. The background to the appeal as can be gleaned from the Statement of Claim is that the grievant was employed by the respondent as a Technical Operator (Filler) on 5th March, 2009; that on 22nd September 2015, he was served with a memo from his

Production Shift Supervisor (**Ms Janet Nyamongo**) and given notice to show cause why disciplinary action should not be taken against him; that in that memo, it was alleged that he had been habitually attending work while drunk; that in particular, on 20th September 2015, he had reported to work while he was visibly drunk; and that instead of attending to his duties as required, he left his workstation at 8:00am, which caused losses during production. It was also claimed that he was unreachable when a problem occurred on the production floor, and that he had appeared at work drunk, on previous occasions and had had to be sent to the doctor to ascertain the level of his drunkenness. He was therefore required to show why disciplinary action should not be taken against him.

4. The grievant responded to this letter the next day, on 23rd September, 2015, denying that he had ever been to work drunk. He stated that on the date in question, he had reported to work at 6:00am and worked until 9:00am when he went for tea break; that he was then summoned by a colleague who informed him that the Production Shift Supervisor had summoned him; and that upon meeting her, she asked him to leave the factory premises.

5. On 25th September, 2015, the grievant was suspended from duty. In the letter communicating his suspension, the respondent informed the grievant that his explanation to the allegations leveled against him was unsatisfactory. He was issued with a letter suspending his services on suspension on half pay pending investigation. He was invited to appear before the Staff Advisory Committee (SAC) on 2nd October, 2015. He attended the meeting but received no further communication from the committee. Subsequently, the respondent sent him a letter dated 14th October, 2015 relieving him of his services, and termed the termination as being on a without prejudice basis and referred to clause (c) of the grievant's employment contract.

6. Despite the grievant demanding from the respondent the reasons for his termination, these were never provided, which led to the appellant herein writing an appeal to the respondent, asking for a reconsideration of the termination of his employment. A further meeting was called on 30th October 2015 between the grievant and the respondent but the respondent refused to give reasons for termination of the employment; the respondent also declined to participate in proceedings before a conciliator, which led to the appellant filing suit on behalf of the grievant ELRC. In that suit, he claimed that the termination of his employment was unlawful and unfair, as there was no evidence that he had ever attended work while drunk. He further argued that the procedure of termination of his employment was unlawful as he was not afforded an opportunity to be represented during the Staff Advisory Committee meeting.

7. The respondent on its part in its Statement of Response maintained that the grievant had gone to work drunk on 22nd September, 2015, and that it was not the first time that he had gone to work drunk. The respondent conceded that there was no evidence of drunkenness on the part of the grievant, but maintained that the grievant had been afforded an opportunity to be heard as well as to have someone represent him during the staff advisory committee meeting.

8. The respondent argued further that the termination of the grievant's employment was pursuant to the contract of service entered into between it and the grievant, and that he was fairly and fully compensated within the terms of the contract and the Collective Bargaining Agreement negotiated by the appellant. In the respondent's view, it had every right to summarily terminate the grievant's employment due to the fact that he had attended work while drunk, and therefore saw no merit in the claim.

9. Having considered the evidence adduced by both parties, the trial court held that the termination of the grievant's employment was lawful. The court found that the evidence adduced by the respondent, that the grievant was drunk on the morning of 20th September, 2015 was cogent and therefore dismissed the claim with costs.

10. The appellant was aggrieved and filed an appeal on various grounds, among them that the trial court: erred in failing to consider the facts advanced by him during trial; failing to consider that the respondent had not in fact demonstrated that the

termination of the grievant's employment was procedurally fair; and making findings that were not based on the evidence before the Court.

### **Submissions**

11. The appellant filed written submissions in support of its claim.

The appellant's first submission is that the trial court failed to consider that the respondent's action of terminating the grievant's contract was contrary to Sections 41 and 45 of the Employment Act as despite the fact that the grievant had undergone disciplinary proceedings for being drunk at work, and for being absent during start-up of the factory, there was no evidence of this, and further that none of this featured in the letter of termination. The respondent therefore gave no reason for the termination of the grievant's employment.

12. The appellant further submitted that **Section 41** of the **Employment Act** must be adhered to when terminating any employee's services; that the respondent's letter was therefore bad in law. Further, that **Section 45** of the **Employment Act** provides for unfair termination, and termination without any lawful cause is unfair, a fact which the trial court failed to consider.

13. The respondent on its part opposed the appeal. In its written submissions, the respondent argued that at all times, the respondent was aware of the charges that he was to respond to during the Staff Advisory Committee meeting; that he was well advised of this meeting and he was given an opportunity to call his colleagues. Further, that during the meeting, he was allowed to give evidence and he was also allowed to have a representative of his choice, although he did not exercise this latter option. The respondent further submitted that there was no requirement to give the grievant written reasons for termination, as it was understood that this course was followed as a result of his showing up to work drunk, which is a valid reason for termination within **Section 44(4)(b)** of the **Employment Act**.

Counsel urged us to dismiss the appeal with costs.

### **Determination**

14. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. (See *Selle V Associated Motor Boat Company Ltd, (1968) EA 123, 126 paras H-I, Kenya Ports Authority V Kuston (Kenya) Ltd, (2009)2 EA 212 and PIL Kenya Ltd V Oppong, (2009) KLR 442*).

15. We have set out this history of the termination of the grievant's employment to determine the first issue that arises in this appeal, which is whether the termination of the grievant's employment was unlawful.

16. The appellant's argument, in brief, is that he was unfairly and unlawfully terminated. His first argument is that no evidence of his drunkenness or any other misconduct was evident after the outcome of the Staff Advisory Committee. The appellant therefore argues that he was terminated for no lawful reason as there was no reason given by the respondent in its letter of termination, or thereafter during the meeting of 30th October, 2015.

17. The genesis of the action against the respondent is the claim that he attended work drunk on the morning of 20th September, 2015, absented himself from his place of duty and missed the start-up. The respondent contends that on that date, the grievant was so intoxicated that he was unable to perform his duties, and that it therefore had good reason, as outlined under **Section 44(4)(b)** of the **Employment Act**, to terminate his services.

18. The respondent maintained in its submissions before us that the grievant's employment was terminated on account of his drunkenness at work. We find it apposite at this point to rehash the evidence by the respondent that was led before the trial court.

19. The respondent called two witnesses in support of its case. **Janet Nyamongo (Janet)** who was the grievant's Production Shift Supervisor testified that on 20th September, 2015, the grievant did not present himself for the start-up process of the day, that he disappeared from his work station, and that the grievant was drunk and disoriented, so she asked him to leave the premises. **Janet** further testified that thereafter, she wrote a letter to the grievant asking him to show cause why disciplinary action should not be taken against him.

20. **John Angwenyi Basweti (John)** sat in the Staff Advisory Committee meeting which heard the disciplinary proceedings against the grievant. He first stated that while there was a record of those proceedings, these did not form a part of the documentation that was presented to the trial court. He further stated that after hearing of the allegations presented against the grievant, the Committee made a decision, but that the Committee did not give the grievant a copy of that decision. John admitted that the letter of termination does not cite any reason as there was no proper evidence of drunkenness. In this regard, **John** stated that *"we did not disclose the grounds of termination because there was no proper evidence of drunkenness. It was not enough"*.

21. This leads us to the second assertion by the respondent which was that it was entitled to terminate the grievant's employment by invoking contract of service. Indeed, the termination letter indicates that it was done on a 'without prejudice' basis and invoked clause (c) of the contract, which allows termination by either party giving one month's notice, served in writing by either party on the other. Based on this, the respondent paid, and the grievant did indeed admit to receiving, one month's salary in lieu of notice. The evidence clearly demonstrates that despite the assertions by the respondent that it was entitled to summarily dismiss the grievant due to his drunkenness, it in fact, did not.

22. **Section 41** of the **Employment Act** requires employers to explain to employees prior to termination on the grounds of misconduct the reasons for such termination. Further, **Section 43** of the **Employment Act** requires that every employer provide reasons for termination in the following terms:

*"in any claim arising out of termination of a contract, the employer shall be required to provide the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45."*

23. Neither of these two provisions of the law were complied with by the respondent, which leads us to the inescapable conclusion that it did not discharge its obligation to prove that the reasons for terminating the complainant's employment were valid. Where that is not done, the termination of employment is deemed unfair. (See **Section 45(2)** of the **Employment Act**).

24. **Section 45** of the **Employment Act** sets out instances in which terms of employment would be unfair. Unfair termination is where the employer fails to prove that the reasons for termination is valid, or a fair reason related to the employee's conduct, or that he was terminated in accordance with the following of due procedure. Unfair termination is also, per **Section 46** of the **Employment Act**, where it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. In the instant appeal, the respondent failed to prove either the question of drunkenness or that it had other valid reasons to terminate the grievant's employment. We therefore find that in the circumstances of this case the termination of the grievant's employment was effected in an unprocedural manner and was therefore unlawful. In the circumstances, the grievant is entitled to compensation.

25. What remedies then are appropriate to grant" In its statement of claim, the appellant claimed a raft of remedies, among them reinstatement as well as compensation for unfair and unlawful loss of employment. **Section 49** of the **Employment Act** provides a raft of considerations to give the court guidance on the appropriate remedies to be granted in proven cases of unlawful and unfair termination. This Court in *Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKLR (Civil Appeal No. 42 of 2015)* advised that in considering the remedies to be granted:

*“the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee’s contribution, practicability of reinstatement, employee’s length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee.”*

26. The award of remedies under **Section 49** of the **Employment Act** is a question of judicial discretion, which is to be exercised prudently, and not capriciously, and having due regard to the fact that the objective of the remedies is to compensate the grievant, and not necessarily punish the employer. The grievant in his evidence did indicate that he would not wish to be reinstated, and we entertain no doubt on our part that this would not be an appropriate remedy in the circumstances.

27. We take cognisance of the fact that the grievant was placed on suspension with half pay from 25th September, 2015 up until his contract was terminated on 14th October, 2015, which suspension was for the reason of his alleged habitual drunkenness, which we have established remained unsubstantiated.

28. Having carefully considered the circumstances of the appeal, we make the following orders:

a. The appeal is hereby allowed to the extent that the judgment of the Employment and Labour Relations Court made on 31st January, 2017 is hereby set aside;

b. The respondent will pay to the grievant the amount of salary, benefits and dues due to him that remained unpaid during the period of suspension.

c. The grievant will have three (3) months’ salary as compensation for unlawful termination.

d. The respondent shall issue to the respondent a certificate of service;

e. The appellant shall have the costs of the suit in the trial court and in this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2021**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

*Signed*

**DEPUTY REGISTRAR**



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