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| Case Number: | Cause 244 of 2015 |
| Date Delivered: | 30 Nov 2015 |
| Case Class: | Civil |
| Court: | Employment and Labour Relations Court at Kericho |
| Case Action: | Judgment |
| Judge: | D.K. Njagi Marete |
| Citation: | Edward Kipyego Biwott v Koisagat Tea Estate Limited [2015] eKLR |
| Advocates: | Mwakio, Kirwa & Company Advocates for the Claimant. S.K.Kitur & Company Advocates on record for the Respondent. |
| Case Summary: | - |
| Court Division: | Employment and Labour Relations |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Cause dismissed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

EMPLOYMEN AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.244 OF 2015

(Before D. K. N. Marete)

EDWARD KIPYEGO BIWOTT.....CLAIMANT

VERSUS

KOISAGAT TEA ESTATE LIMITED.....RESPONDENT

JUDGMENT

This cause is brought to court vide a Memorandum of Claim dated 22nd September, 2015. The issue(s) in dispute is or are therein cited as;

a. *Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;*

b. *Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the this memorandum of claim;*

c. *Whether the claimant is entitled to an award of certificate of service contract and*

d. *Who should pay costs and interest of the suit;*

The respondent in her Respondents Response to Memorandum of Claim denies the claim and puts the claimant to strict proof thereof. She also in defence avers that she is wrongfully sued and shall therefore raise a preliminary objection to strike out the suit at the earliest instance.

The claimants case is that at all material times and particularly from 1st March, 2013 to 9th May, 2015, he was employed by the respondent as a day and night watchman at a monthly salary of Kshs.9,000.00. He served the respondent with loyalty and diligence until the 9th May, 2015 when he was wrongfully, unprocedurally and unlawfully summarily dismissed for employment on allegations of willfully neglecting to perform his duties and also concealing to report incidences that occurred at the forest to his supervisors. The claimant denies these allegations and avers that the particulars of these allegations were not availed to him and neither was he accorded an opportunity to defend himself against the same.

The claimant further avers that the respondent unlawfully and unprocedurally terminated his services and failed to pay his terminal benefits as hereunder;

a. *One month pay in lieu of Notice* *Kshs. 10,116.15/=*

b. *Leave dues*

26 days x yrs worked x 10116 26

26 days x 2yrs x10116 26 days

(One month salary x yrs worked) *Kshs. 20,232/=*

c. *Service benefits*

15 days x yrs worked basic 30

15 days x 2 yrs x 10116 30 *Kshs. 10,116.16/=*

d. *Compensation for unfair termination*

Gross pay x 12months

10116 x12 *Kshs. 121,392/=*

e. *Unpaid public holiday*

11 days per year x yrs worked x basic 30x12

11 days x 2yrs x10116 30x2 Kshs. 14, 836.8/=

f. *Unpaid house allowance*

15% x basic x months worked x yrs worked

15% x 10116 x 26 months Kshs.39,452

g. *Overtime dues*

45hrs pwk

12hrs x 6days=72 hrs-45 hrs=27 hrs OT

27 hrs x 4wks = 108 hrs overtime p.m

108 x 26 months=2808 hours

Kshs. 46.63 per hour x 2808 hours Kshs. 136,566/=

h. *Under payment of wages*

Legal notice no. 197 of 2013

Kshs. 10116/= - 9000/= 1116/= per month

May, 2013 to April, 2015 =24 months

1116 x 24 months. Kshs. 26,748/=

TOTAL CLAIMS

KSHS.379,494/=

He therefore prays for;

a. *Declaration that the summary dismissal was unlawful, unprocedrual and unfair in the circumstance the claimant is entitled to compensation as prayed for herein above;*

- b. *The sum of **KSHS.379,494/-**;*

- c. *Cost of this suit AND interest on (b) at court rates from time of filing the suit until payment in full and*

- d. *A certificate of service as per section 51 of the Employment Act.*

- e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The claimant further relies on the provisions of the Employment Act, 2007 in support of his case as hereunder;

Section 41 (1) of the Employment Act 2007 which provides that;

“when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language he employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

Section 44 (4);

“however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusation.”

Section 45 (2);

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*

- b. *that the reason for the termination is a fair reason-*

i. *related to the employees conduct, capacity or compatibility; or*

ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

He posits and submits that the termination of his employment by the respondent was unfair as it violated these clear provisions of the law on the subject.

The claimant further avers that the respondent offends his basic rights as provided for under Articles 41 and 77 (read 47) of the Constitution of Kenya, 2010 that call for fair labour practices and administrative action to the citizenry in that;

i. *The respondent's working environment was not reasonable as the claimant was subjected to witch ant, ill motive and was a victim of scapegoat.*

ii. *The claimant was never issued with notices to show cause and an opportunity to dispute the same.*

iii. *The claimant was unfairly terminated without a valid reason.*

iv. *No evidence of the alleged neglect of performance of duty and*

v. *Concealment of the alleged incidences in the forest was availed to the claimant.*

- vi. *No evidence of investigation was availed to the claimant.*
- vii. *The claimant did not admit anything as alleged in the summary dismissal letter.*
- viii. *The claimant was never accorded a hearing nor an opportunity to call his witness in his defence.*
- ix. *No show cause letter was availed to the claimant to answer to the allegations cited in the summary dismissal letter.*

The claimant again avers that the termination was unlawful and or illegal on the following grounds;

- a. *The respondent did not give the claimant termination notice as provided by Section 35 (1)(b)(c) & 36 of the Employment Act.*
- b. *The respondent terminated the claimant's employment without following the procedure laid down in the Employment Act, especially the procedures laid out in Section 45 and 41 of the Employment Act.*
- c. *The respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under Section 43 of the Employment Act.*
- d. *The respondent did not act in accordance with justice and equity as provided by section 45(2) and 4b of the Employment Act.*
- e. *The respondent did not give the claimant his lawful rest days and that the claimant worked during holidays without pay contrary to section 27(2) of the Employment Act.*
- f. *The respondent failed to pay the claimant his 12 months wages for loss of Employment as provided under section 15 (c) of the Labour Institutions Act.*
- g. *The respondent failed or neglected to give the claimant his entitled service benefits as per the Employment Act.*
- h. *The respondent declined to give the claimant certificate of service as required under section 51 of the Employment Act.*

The respondent vide a response dated 14th October, 2015 as aforesaid denies the claim and puts the

claimant in to proof thereof. In her defence the respondent lists four (4) witnesses and also provides for any other witnesses who may be called to adduce evidence with the leave of court. These are;

1. Daniel Keter- General Manager
2. Evans Muguya- Security Officer

The respondent, in her response further annexes a show cause letter dated 28th April, 2015 addressed to the respondent by the Human Resource/Public Administration Manager. This is also accompanied by a suspension letter to the claimant from the same office and bearing the same date. The respondent further attaches a letter of summary dismissal dated 9th May, 2015 which letter dismissed the claimant from employment with effect from 29th April, 2015. The respondent's document in defence also include a letter of apology by the claimant to the respondent dated 28th April, 2015. Attached also is a witness statement by Daniel Kiptanui Keter, the General Manager of the respondent which narrates a sequence of events leading to the claimants dismissal from employment.

The respondent however, did not appear in court or at all during the proceedings and neither does she tender any further evidence in defence. This is despite service of hearing dates in all instances of these proceedings as evidenced by the claimant's filed affidavit of service.

The issues for determination in this cause therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
2. Whether the claimant is entitled to the relief sought.
3. Whether the claimant is entitled to the costs of the cause.

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in evidence testified in reiteration of his claim at examination in chief.

The Respondent in the Respondent's Response to Memorandum of Claim however provides her list of witnesses besides other documents aforementioned in defence. Of note is the witness statement of the one, Daniel Kiptanui Ketter, the General Manager of the respondent which is reproduced as hereunder;

"I state that my names are Daniel Kiptanui Ketter and I am the General Manager of DL Koisagat Tea Estate Ltd. I am aware that Edward Biwott used to work for this Company from 26th January, 2014 to 29th April, 2015. I am also aware that he was summarily dismissed on 9th May, 2015. The circumstances leading to his dismissal are as follows:-

a. From 27th March, 2015 up to the time of termination of services he was posted to do guard duties (watchman) at Lugari Zonal Forest, block 1 (p) where the Company was harvesting and transporting firewood to the Factory.

b. On 25th April, 2015 a team of senior staff, comprising of Simion Koech- Process Assistant and Evans Muguya – Security Supervisor visited the site for routine inspection of work progress and on reaching the site, they found strangers loading company firewood on cattle/donkey drawn carts. The strangers on being confronted stated that they had bought the wood from the guards, one of whom is Edward Biwot.

c. The inspection team reported the issue to HR & Administration Manager immediately they came back to the estate. Edward Biwot was therefore suspended from duty pending investigations on two issues that arose i.e. Deserting duty and unauthorized disposal of company property. Both issues considered serious and constituting gross-misconduct.

d. On completing suspension and being unable to explain the two offenses to the satisfaction of the disciplinary committee, Edward Biwot was summarily dismissed from Company employment on grounds of gross-misconduct. The dismissal was effected on 9th May, 2015.

In conclusion, I wish to state that the grounds for compensation as stated in the plaint have no basis, given the offenses on which the dismissal was based."

This now brings the issue for determination at cross-roads. The claimant in his evidence and testimony reiterates the claim and vouches for its truthfulness. His main ground in support of unfair, wrongful and unlawful termination is that he was not afforded an opportunity to dispute the truthfulness of the accusations against him and therefore the process fell short of fairness, validity and procedure. The respondent on the other hand adduces the following documents in support of her defence;

1. A show cause letter (memo) to the claimant dated 28th April, 2015.

2. A letter (memo) of suspension to the claimant dated 28th April, 2015.
3. A letter of summary dismissal dated 9th May, 2015 addressed to the claimant.
4. A letter of apology written by the claimant to the respondent's Human Resource Administration dated 27th April, 2015.

So which of these contrasting versions by the parties would one want to rely on. In such circumstances, the law is facilitated by the principles of balance of probabilities and preponderance of evidence in coming out with a decision on the subject. The offside issue for determination and which closes our finding on the matter is which of the two testimonies by the parties would, on a balance of probabilities take precedence and prevail in the circumstances. It is my humble finding that, in the circumstances, the evidence tilts in favour of the defence. There is very little possibility that the respondent conjured and concocted all the evidence set out to this court against the claimant. This is not probable or even practical. The sequence of events per the defence evidence coupled with the evidence of Daniel Kiptanui Keter, the General Manager brings out a credible case for lawful termination of employment. On a test of balance of probability and preponderance of evidence, I find a case for the defence as against the claim: a case of lawful termination of employment. This would answer the first issue for determination.

The conduct of the case provided for a situation where neither party had the benefit of interrogating the other's case. It is incomprehensible as to how the respondent came out and filed a credible, substantive and arguable defence but altogether failed to come and tender the same in court. This can only be the subject of conjecture. However, it would appear that neither party had the benefit of interrogating the other's case or at all. This equates their respective positions. It would therefore not hurt any of them if this matter was determined on its merits and under the prevailing circumstances.

It would in the circumstances, be insecure to make a finding in favour of the claimant. This would be tantamount to rewarding default. It would be an overt miscarriage of justice - travesty in its truest form. I would not wish to get entangled in this web. This cause also offers the truest test of judgment: an interrogation of the thin line between the rules of procedure, law and justice.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost a case of wrongful, unfair and unlawful termination, the claimant is not entitled to the relief sought.

The last issue for determination, costs would rest with the discretion of the court as to which route would afford fairness to the parties. The analogy that costs follow the event is not universal. I therefore, in the circumstances, decline to make an order for costs.

I am therefore inclined to dismiss this claim with no order as to costs. However, I order that the respondent issues the claimant with a certificate of service as per the dictates of the law.

Delivered, dated and signed this 30th day of November 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio, Kirwa & Company Advocates for the Claimant.
2. S.K.Kitur & Company Advocates on record for the Respondent.



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