



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NO. 199 OF 2018**

**SILVERSTER MALEI KYENGO.....CLAIMANT**

**VERSUS**

**KENYA MEAT COMMISSION .....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as Livestock Manager under three years' contract starting 18.3.2016. His salary was Kshs.200,000 plus house allowance of Kshs.40,000 per month. He was entitled 30 days' annual leave, Kshs.30,000 leave allowance, gratuity at 31% of annual basic pay, medical cover and Group life and Group accident cover. His principle duty was procurement of quality livestock for slaughter by the respondent. His first three months were probationary service but his appointment was confirmed by the letter dated 11.10.2016.

2. On 6.4.2017, he was served with a show cause letter accusing him of gross misconduct, namely, failing to perform his responsibilities adequately as the Livestock Manager and a member of the planning management committee on the visit by the president of Seychelles to the facility on 4.4.2017. That he presented moribund animals (weak animals) for slaughter during the visit by the dignitary and potential source market.

3. The claimant responded to the show cause letter the same day but on 11.4.2017, he was interdicted on half pay for 4 months which was extended by 2 months by the letter dated 24.7.2017. On 21.9.2017, he was invited to a disciplinary hearing before a HR Board Committee and after the hearing he received the termination letter dated 28.9.2017. Thereafter he filed this suit on 21.2.2018 alleging that the termination of his employment was unfair and prayed for the following reliefs:

- a. Declaration that the termination of his contract of service was wrongful and without justification.
- b. Damages totaling to kshs. 16,830,000.
- c. General damages for defamation.
- d. Costs and interest.

4. The Respondent never filed defence in this case despite being served with summons and pleadings on 1.3.2018 and even after leave to extent the period within to do so was given by consent on 16. 10.2018. Consequently, the suit proceeded as undefended on 6.12.2018 when the Claimant testified as CW1 and thereafter, both parties filed written submissions.

**The Claimant's Case**

5. CW1 testified that he commenced working for the respondent on 16.3.2016 as Livestock Manager earning kshs.240000 per month and term of the contract was 3 years terminable by 3 months' notice as per the HR policy. He further testified that his main duties were to procure clean and healthy livestock for the respondent from farmers, cattle mapping to identify sources of livestock, drawing LPOs for purchasing livestock and managing the staff in the livestock department.

6. He testified that Vet Surgeon with 16 years experience and before joining the respondent he had worked as a General Manager at the Maasai Ostrich Farm Limited, Unit Manager Farmers Choice and had also as such in Botswana. He further contended that he had also done private practice in the same profession.

7. He further testified that on 6.4.2017, he was served with a show cause letter accusing him of failure to procure the right animals for slaughter on 4.4.2017 during the visit by the president of Seychelles to the respondent's facility. That, he responded to the said letter denying the alleged misconduct and blamed the Chief Grading officer who is in charge of verifying the animals before and the slaughter. However, he stated that he was interdicted on half salary by the letter dated 11.4.2017 and later extended by the letter dated 24.7.2017.

8. He further testified that, by the letter dated 14.9.2017 he was invited to a disciplinary hearing before the Board on 21.9.2017. That hearing was not fair because he was not in good relationship with both the chairman and the Managing Commissioner. That he fell off with the chairman after he refused his manipulations to procure unwanted young cattle while the Managing Commissioner wanted to have his cousin replace him as the Livestock Manager. That before the meeting, he met Managing Commissioner, who told him that his case had already been concluded. That during the hearing he was taken through questions but denied ample time to respond.

9. He further testified that after the hearing he received the termination letter on 28.9.2017 offering salary upto the date of dismissal, accrued leave and pension subject to him completing clearance. That he was neither given a copy of the proceedings of the disciplinary hearing nor the right of appeal. He was also not issued with a Certificate of Service. He further accused the respondent of not remitting his PAYE after deducting it from his salary making it impossible to secure a Tax Compliance certificate.

10. In cross examination, Cw1 maintained that he was unfairly dismissed. He admitted that the President of Seychelles visit to the respondent's facility was see the process so that his country could partner with Kenya. He further admitted that the planning committee referred to in the show cause letter comprised managers of various departments. He stated that the committee met only once where all the managers addressed their roles. That an advance team from the government visited the plant and held a meeting where it was cautioned that the visiting president was allergic to Ammonia as such leaking of such gas should be avoided.

11. Cw1 admitted that his department's key role was livestock procurement but contended that there was another department dealing with production and marketing. He further admitted that when the president arrived at the production line, where carcasses are deboned and processed, there were no carcasses there but they were at the rails. He explained that the respondent exports canned beef from thin beef and also fresh cuts from fat animals.

12. He contended that although the president visited during a drought period, he chose the best animals which were not too fat or too thin and the Chief Grader verified the live animals to be excellent on the eve of the presidential visit. He therefore denied that he presented moribund animals for the occasion and challenged the respondent to avail the CCTV camera video clips to prove him wrong.

13. He admitted that the respondent's HR Manual provided for disciplinary procedure including service of show cause letter, interdiction, and hearing by the HR Committee of the Board. He admitted that he was suspended for 4 months which was extended by 2 months. That he was heard on 21.9.2017 by the said committee and he was granted the right of being accompanied by another employee to the hearing. He further admitted that the termination letter stated that his defence had been considered before the termination was decided. He also admitted that the benefits offered vide the termination letter were the correct dues had the termination been fair and lawful. He however contended that he was entitled to compensation for the unfair termination and also for ill health and mental anguish that he suffered after the unfair termination.

14. He contended that the interdiction letter never instructed him to hand over his official laptop, which he said contained classified information. He denied that after the being sent on interdiction he sent disparaging messages to the respondent's employees. He further denied ever calling suppliers to warn them against continuing to supply livestock to the respondent. He maintained that it was the Production manager who is responsible for the slaughtering and displaying animal carcasses at the production line after the Chief Grader grades the live animals. However, Cw1 contended that at times the Production Manager proceeded with the slaughter before the grading up to the stage of weighing.

### **The Claimant's Submissions**

15. The Claimant submitted that his employment was unfairly and unlawfully terminated contrary to section 45 of the Employment Act and prayed for the Court to grant the prayers as set out in his memorandum of Claim. He contended that by the respondent failing to file defence and tender evidence meant that it did not discharge the burden of proving the reason for the termination of his contract of service. He further contended that his evidence that, he provided good quality livestock for slaughter and were verified by the Chief Grader on the eve of the presidential visit, has not been rebutted.

16. He further contended that his evidence that, the responsibility of slaughtering and displaying animals was on the Production Manager, was also not rebutted. In addition, he submitted that the respondent did not adduce any evidence to prove that the livestock he presented was moribund and that they were carried by forklift from the cattle pen to the knocking box.

17. He contended that there was no valid and fair reason for his dismissal contending that he did his duty professionally and he had the necessary academic and professional qualifications for the role he was appointed by the respondent. He further contended that the procedure followed in the termination was unfair because he was not informed of his right of appeal and that he was given a certificate of service. He therefore prayed for the reliefs sought by his suit.

### **Respondent's submissions**

18. The respondent submitted that the termination of the claimant was substantively and procedurally fair. That the claimant admitted that he was a member of the planning committee for botched visit by the president of Seychelles on 4.4.2017 which aimed at entering a Bilateral Agreement between Kenya and Seychelles on the marketing of the respondent's livestock products. That he further submitted that the claimant admitted that he presented moribund animals for slaughter during the said presidential visit and as such that was willful misconduct that justified his dismissal.

19. As regards the procedure followed, the respondent submitted that she complied with the procedure provided under its HR Policy, Regulations and Procedure Manual including service of show cause letter, interdiction not exceeding 6 months, notice of disciplinary hearing giving the claimant the right of being accompanied by another employee, accorded him oral hearing and thereafter served a termination letter citing the reason for the same.

20. Finally, the respondent submitted that the claimant has not proved that his dismissal was wrongful and unjustified and prayed that the suit be dismissed save for an order that it pays the claimant salary for the days worked up to the date of dismissal, cash in lieu of the accrued leave and pension in accordance with pension scheme regulations.

### **The Analysis and determination**

21. After careful consideration of the pleadings, evidence and the submissions presented by the parties, there is no dispute that the Respondent employed the claimant from march 2016 to September 2017 when he dismissed him. The issues for determination are as follows:

- a. Whether the termination of the Claimant's employment was wrongful unfair and unjustified.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the termination was wrongful, unfair and unjustified**

22. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

### **Reason for Termination**

23. According to the termination letter dated 28.9.2017, the reason for the dismissal of the claimant was stated as follows:

***"We regret to inform you that the Kenya Meat Commission Board resolved to summarily dismiss you from its employment on account of gross misconduct with immediate effect."***

24. The background of the said misconduct is evident in the correspondences exchanged between the respondent and the claimant touching on the botched presidential visit to the respondent's facility on 4.4.2017. The respondent accused the claimant of presenting moribund livestock for slaughter which led to the failure of the expected Bilateral Agreement that would have opened a market for the respondent's livestock products. The said allegations were however not substantiated by evidence before this court since the respondent never filed any defence and tendered evidence. It follows therefore that the evidence by the claimant that he was not blame for the slaughtering of moribund animals during the presidential visit has not been rebutted. Likewise his evidence that, he provided good quality livestock for the presidential visit and that the Chief Grader verified the same on the eve of the visit, has also not been rebutted. Consequently, I return that the respondent has not proved that the dismissal of the claimant was grounded on a valid and fair reason as required by section 43 and 45 of the Employment Act and as such, it was unfair and unjustified.

### **Procedure.**

25. Save for the failure to inform the claimant his right of appeal and issue him with a certificate of service, I find that the procedure followed before dismissing the claimant was fair and in accordance with section 41 of the Employment Act. The said section provides as follows:

***"41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination 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 ...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, make."***

26. In this case the claimant was first served with a show cause letter stating the charges against him, interdicted for less than 6 months pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for the reasons cited in the letter. Such procedure in view passes the test of procedural fairness and I so hold.

### **Whether the Claimant is entitled to the reliefs sought**

27. Having established that the termination of Claimant's employment was not grounded on valid and fair reason I make a declaration that the termination was wrongful and unjustified.

28. Flowing from the foregoing declaration, I proceed to award him one month salary in lieu notice, plus 10 months' salary compensation

under section 49(1) of the said Act. In awarding the said compensation I have considered the senior position served by the claimant in the Commission and the fact that he has not been able to secure an alternative employment from the time he was dismissed. I have also considered his reasonable expectation of continued service and income for the remaining period of his fixed contract term. I have also considered the conduct of the employer during the journey of disciplinary process including prolonged interdiction of 6 months, failure to remit the claimant's PAYE, which prevented him from obtaining Tax compliance Certificate and failure to issue certificate of service.

29. The claim for leave valued at Kshs.30,000 was not disputed. In fact the termination letter and the written submissions by the defence admit the claim for accrued leave.

30. The claim for service pay is dismissed because the claimant belonged to a gratuity/pension scheme. Under section 35 (6) of the Employment Act, an employee is disqualified from claiming service pay if he/she is a member of the employer's pension/gratuity scheme or if a beneficiary of the NSSF.

31. Flowing from the foregoing I award the claim for pension to be paid in accordance with the pension scheme rules.

32. However, the claim for expected earnings, damages for mental anguish, medical treatment and financial embarrassment are not availed to the claimant by the employment law and are therefore dismissed. Likewise, the prayer for general damages for defamation is dismissed because no evidence was tendered to prove the said tort in the required standard.

### **Conclusion and disposition**

33. I have found that the dismissal of the claimant was wrongful and unjustified notwithstanding the fact that a fair procedure was followed. Consequently, I enter judgment for the claimant in the following terms:

**Notice kshs. 240,000**

**Compensation kshs. 2,400,000**

**Leave kshs. 30,000**

**Total kshs. 2,670,000**

The award is subject to statutory deductions but in addition costs and interest at court rates from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019**

**ONESMUS N. MAKAU**

**JUDGE**