

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 87 OF 2018

NELSON MUTHAMA WAMBUA.....CLAIMANT

VERSUS

KENYA MEAT COMMISSION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred in his statement of claim that he was retained as a trainee hides and skins grader on 30th October 1984 and promoted to superintendent from 2nd July 2012. He averred that he was wrongfully terminated from employment on 28th September 2017 contrary to the Constitution and the Employment Act. He thus sought one month's salary in lieu of notice – Kshs. 39,000/-, 54 leave days – Kshs. 78,000/-, ½ month of pay for 6 months – Kshs. 117,000/-, general damages for unlawful termination – Kshs. 1,287,000/- and costs of the suit.

2. In its defence, the Respondent averred that its employment of the Claimant in 1984 was for a determinate term and was not permanent and pensionable. The Respondent averred that over the years the Claimant's periodic contracts expired and he sought renewals which at some times was granted. The Respondent averred that on 23rd July 2013 it appointed him to be its production superintendent and the said appointment was permanent and pensionable. It was averred that some of his duties included but were not limited to ensuring that there adherence to standard operating procedures, supervise sectional staff ensuring efficient and effective operations, and liaising with support departments to ensure operations are not interrupted. The Respondent averred that the contract of employment was governed by the collective bargaining agreement between Kenya Union of Commercial Food and Allied Workers and the Respondent, the Employment Act, the Respondent's human resource policy and procedures manual as well as administrative circulars issued from time to time. The Respondent averred that on 4th April 2017 there was a scheduled visit by the President of Seychelles to the Respondent's premises for an official visit as part of strengthening relations between Seychelles and Kenya by providing a market for the Respondent's products to Seychelles. The Respondent averred that on the said date the Claimant who was in charge of kill at the knocking box failed to/delayed to have the animals slaughtered as scheduled/agreed an act that caused embarrassment to the Respondent, the presidency of Kenya and the country at large. On 7th April 2017 the Respondent's Human Resource Advisory Committee on Staff Discipline conducted a preliminary hearing of the botched visit during which it resolved that the Claimant and a couple of other employees were culpable and they therefore were interdicted to pave way for further investigations. On 14th September 2017 the Respondent having completed its investigations invited the Claimant for a disciplinary meeting during which he would be given an opportunity to be heard. The Respondent averred that the Claimant attended the disciplinary proceeding during which he was granted adequate opportunity to exonerate himself from the allegations and present were 2 representatives of the Union. The Respondent resolved to summarily dismiss the Claimant on account of gross misconduct and communicated this through a letter dated 28th September 2017. The Respondent averred that the Claimant was only entitled to payment for the days worked up to the time of dismissal, payment of any accrued leave not taken up to the time of dismissal and pension in accordance with the regulations governing pension scheme or gratuity. The Respondent averred that the payments would be subject to deductions of the sums lawfully owed to the Respondent by the Claimant. The Respondent thus prayed that the suit be dismissed with costs.

3. The Claimant and the Respondent's witness Okero Isaac Onsarigo testified. The Claimant stated that on the material date he reported to work at 7.00am and that the slaughter operation that they were to undertake was delayed. He testified that it was a presidential visit by the President of the Republic of Seychelles. He stated he was supposed to supervise the slaughtering of animals. He stated that he did not have the schedule or program for the day and there was no indication of the time. He testified that the production manager who was his immediate boss was to provide details. He stated that there was electric failure between 7.15am and 10.00am and that because electricity was critical to the slaughter the staff were deployed elsewhere by his boss. He stated that the President of Seychelles came between 10.20am and 10.30am and he was at the slaughterhouse when the President came though there was no slaughter going on. He testified that the animals were not ready for slaughter as they were not selected from the boma to the kill box for slaughter. He stated that the Respondent's CEO wrote after the incident and he went through the disciplinary proceedings. He stated that he was not given enough time to prepare to defend himself. In cross-examination he stated that he worked for the Respondent on and off during his career. He testified that the Respondent was reopened after a decade of closure during the tenure of President Kibaki. He stated that he would be recalled whenever the company resumed operations. He stated that he had a 1 year fixed term contract at first in 2006 and later the his employment was made permanent and pensionable on 23rd July 2013. He testified that there was a delayed slaughter operation on 4th April 2017 that led to the dismissal. He stated that the stunner was the one who started the process and that the operation involved the veterinary officer and his department. He testified that he asked for the stunner and he was not there. He stated that he was not issued with notice to show cause but was invited for hearing and he attended. He stated that he was not in the union and did not go with anyone else and did not appeal against his dismissal. In re-examination he stated that the stunner was not there at the time the killing was to start. He stated that he was not informed he could appeal and that he was not heard.

4. The Respondent's witness testified that on 4th April 2017 there was a planned visit by the President of Seychelles which visit was intended to open a partnership with the Respondent to permit export of products to Seychelles. He stated that the heads of departments were to coordinate the exercise and by the time the President arrived the killing had not started though the livestock department had lined up the animals. He testified that the process in the human resource manual was followed in respect to the Claimant's disciplinary process. He stated

that he was invited, informed of the right to appear with a representative of his choice. He stated that the correct procedure was followed and the summary dismissal ensued. He testified that the Claimant could escalate the matter on appeal if he was dissatisfied by the determination to dismiss. He testified that upon summary dismissal one was not entitled to notice pay. He was cross-examined and he testified that the Claimant was entitled to payment for days worked, leave days not taken but would have to forfeit some. He stated that the Claimant was entitled to pension. He stated that the boma is in the livestock section where the animals are held before being taken to the kill box. He testified that the stunner was under livestock section and the committee recommended his exoneration as he was not given instructions about the time he was to be at the knocking box. He conceded that if the show cause was not served it was unprocedural. He was re-examined and testified that the Claimant was given an opportunity to show cause on 7th April 2017 and the Claimant was given an opportunity to explain himself.

5. The Claimant filed submissions and submitted that he was unlawfully terminated. He submitted that he was not responsible for preparing the animals at the boma and was not in charge of the stunner or the provision of electricity. He submitted that he was a scape goat and that he was not issued with the show cause letter of 6th April 2017. He submitted that because he was not issued with the show cause letter his dismissal was contrary to the human resource manual of the Respondent and Section 41(1) of the Employment Act. He relied on the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** and submitted that just like in the instant case the respondent had failed to comply with its own procedure. The Claimant submitted that the summary dismissal by the Respondent was unfair. He cited the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** in which the Court of Appeal held that in terms of Section 44 of the Employment Act an employer may only resort to summary dismissal when the employee has by his/her conduct fundamentally breached his or her obligations arising under the contract of service. He cited the decision of **Victor Amos Nandi Otipa v Malplast Industries Limited [2018] eKLR** where the court held that the safeguards under Section 41 of the Employment Act must be accorded to an employee as well as the case of **Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR** on the same principles.

6. The Claimant was dismissed after a fiasco that led to an embarrassing presidential visit by a potential consumer of products from the Respondent. Understandably the visit by the President of Seychelles to the Respondent generated heat which caused the dismissal of the Claimant as well as other employees save for the stunner. The botched visit was sufficient cause for disciplinary hearings to commence as they did. However, the Claimant was not served with the notice to show cause letter from the evidence adduced by the Respondent. He received the letter of 14th September 2017 but had not received the notice to show cause as per the records before the court. The failure to avail him of the opportunity as required rendered the ensuing summary dismissal unlawful. As held in the Court of Appeal decision in **Bamburi Cement Limited v William Kilonzo (supra)** summary dismissal is reserved for instances when the employee has by his/her conduct fundamentally breached his or her obligations arising under the contract of service. In this case the failure to perform the slaughter operations was as a result of poor planning and even poorer execution which cannot all be lumped on the Claimant. The management of the Respondent failed to plan properly and permitted junior officers to have no clue as to what was happening. This is tragic granted the person visiting the premises was a head of state and there is some degree of carelessness in the execution of the visit that the management cannot escape. The Respondent readily conceded in its defence that the Claimant was entitled to payment for the days worked up to the time of dismissal, payment of any accrued leave not taken up to the time of dismissal and pension in accordance with the regulations governing pension scheme or gratuity. As the court has held there was unfairness in the termination the Claimant will recover compensation which under Section 49(1) is limited to only 12 months. In the claim before court the Claimant sought sums in excess of the statutory maximum and these cannot be granted. As pension is not negotiable the sums he is entitled to is to be collected as of right. In the final analysis I enter judgment for the Claimant for:-

- i. 36,400/- being payment for the 28 days worked
- ii. Kshs. 78,000/- being payment of accrued leave not taken up to the time of dismissal
- iii. Kshs. 390,000/- being compensation capped at 10 months for the unlawful dismissal
- iv. costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 27th day of November 2019

Nzioki wa Makau

JUDGE