



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1962 OF 2013**

**SAMSON R. KARUBARA.....1ST CLAIMANT**

**BAKERY, CONFECTIONERY FOOD MANUFACTURING**

**AND ALLIED WORKERS UNION .....2ND CLAIMANT**

**VERSUS**

**WRIGLEY COMPANY E.A. LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The first claimant was employed by the respondent from 8.8.1990 to 31.12.2012 when he was for alleged poor performance. He denies the alleged reason for the termination and avers that he was terminated without fair hearing. He therefore brought this suit claiming terminal dues plus compensation for unfair termination totaling to Kshs.10,351,127.40. The second claimant alleged that the first claimant was her member and was entitled to audience in this suit under the law.

2. The respondent objected to the joinder of the second claimant contending that she lacks locus standi because the first claimant was a management staff as at the time of his discharge. On the other hand, she averred that on 8.10.2008 the first claimant was placed under performance improvement plan but he failed to improve and after a meeting with his manager on 15.12.2010, he was terminated. It is defence case that the termination was for a just cause and he was offered terminal dues totaling to Kshs.374,470.28 after clearance but he declined.

3. The main issue for determination herein is whether the termination of the claimant was unfair. Before the trial, the court directed that the second claimant be removed from this suit. The suit was heard on 2.2.2016 and 9.4.18. Thereafter both parties filed written submission which I have carefully considered herein.

**Claimant's Case**

4. The first claimant testified that he was employed by the respondent as a stores supervisor on 15.8.1990 joined the second claimant union. He was later promoted to Stores Clerk Management Grade D. In 2009 his performance was reviewed and scored between 80% and 100% in the 5 tasks under consideration and graded an excellent.

5. He was however surprised to received termination letter dated 21.12.2010 citing poor performance as the reason for the termination. The areas of poor performance were not specified to him. He contended that the alleged poor performance was false and added that he was terminated without being accorded a hearing. He, consequently maintained that the termination was unfair and it was done before the retirement age. He ended by stating that he has since not secured another job because he was terminated at the age of 50 years. He prayed for the reliefs sought in the suit but admitted that he was paid his pension.

6. On cross examination claimant maintained that his performance was excellent and that is why he was severally promoted his salary severally increased and earned bonuses. He however admitted that his employment could still come to an end before retirement. He admitted that on 8.10.2008 he was placed in a performance improvement plan and in February and March 2009, he was reviewed. Thereafter he was never reviewed again but in February 2010 he was paid Kshs.33,674.60 as bonus. He admitted that he was a management staff as at the time of his termination but contended that he never resigned from the union after promotion to management position.

**Defence Case**

7. Susan Osoro is the respondent's Associate Relations Manager since August 2010 and she testified as Rw1. She confirmed that the claimant was employed by the respondent on 15.8.1990 as stores supervisor and was later promoted to the Management position of stores Clerk Management on 3.1.2005. Thereafter his performance declined and he was placed on a performance improvement plan on 8.10.2008 on his areas of responsibility. He was then monitored for one year without improvement and on 15.12.2010 a meeting was held to discuss his performance and a decision to terminate him was reached. A termination letter was written on 21.12.2010 and after the claimant was cleared a cheque for his terminal dues was written but he declined to take it alleging that the particulars of the payment were not clear.

8. Rw1 contended that the particulars of the payment were clear and they included a 3 months salary in lieu of notice, (Kshs.211,155) 3 months salary appreciation for long service (Kshs.2,111,444), 30 days annual leaving (kshs.95,979.53) and leave travelling allowance for 2010 (Kshs.8,000) totaling to a gross pay of Kshs.526,289.55 less tax (Kshs.151,819.27) leaving Kshs.374,470.28 as the net pay (see Appendix 11 annexed to the defence). She however stated that she was unaware whether the particulars were explained to the claimant. She further testified that the claimant was paid his pension and added that under the Respondent's Employees terms and conditions of service, the mandatory retirement age is 55 years. She therefore prayed for the suit to be dismissed.

9. On cross examination, Rw1 admitted that in February and March 2009 performance review, the claimant scored 100% in 3 out of 5 tasks and 80% and 90% respectively on the other 2 tasks. Considering the said scores, she admitted that the claimant had not under performed. She further confirmed that after the March 2009, the claimant's performance was not reviewed again before his termination on account of poor performance. She however confirmed that performance review was supposed to be done every month.

### **Analysis and Determination**

10. There is no dispute that the claimant was employed by the respondent on 15.8.1990 as a unionized employee and later promoted to a management staff in January 2005. There is further no dispute that he was terminated on 31.12.2010 after serving for 20 years. The issues for determination are:

- (a) Whether the termination was unfair
- (b) Whether the reliefs sought should be granted.

### **Unfair termination**

11. Under section 45(2) of the Employees Act, termination of employees contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason cited for the termination was poor performance. However, Rw1 admitted in evidence that going by the claimant's performance review done in February and March 2009, his performance was not poor. The said reports marked him 100% in 3 tasks out of 5 and 80% and 90% in the remaining 2 other tasks. There being no other review done before the termination on 31.12.2010, I find that there was no basis for rating the claimant as a poor performer. Consequently, I proceed to hold that the respondent has failed to a valid and fair reason for terminating the claimant's services.

12. On the other hand, the claimant's evidence that he was terminated without being told the reason for the termination and being accorded a hearing has not been rebutted. Starting with the pleading, the respondent did not plead in her defence that the claimant was accorded a fair hearing. In addition, Rw1 never testified on any hearing as having been accorded to the claimant as provided under section 41 of the Act.

13. Under the said section, before the employer terminates the services of his employee on ground of misconduct, poor performance on physical incapacity, he must explain to the employee in a language he understands, and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is being considered, and thereafter accord the employee and his chosen companion a chance to air their representations for consideration before the termination is decided.

14. In this case it is alleged that the claimant was called to meeting with his managers on 15.12.2010 to discuss his performance. The claimant contended that he met with only one manager and there was no other employee present. The said persons who allegedly met him were never called to give evidence herein on the nature of the meeting and whether it was in line with the mandatory requirements section 41 of the Act. Consequently I find and hold that the respondent has failed to prove that she accorded claimant fair hearing before termination as required by section 41 and 45(2)(c) of the Act. The foregoing default plus the failure by the respondent to prove a valid and fair reason for terminating the claimant's services, I must as I do, return that the termination of the claimant's services on 31.12.2010 was unfair within the meaning of section 45 of the Act.

### **Reliefs**

15. In view of the foregoing opinion, I make declaration that the first claimant was unfairly, wrongfully and unlawfully terminated. I however decline to order his reinstatement because 3 years permitted by the law have lapsed. Instead, under section 49 and 50 of the Act, I award him 3 months salary in lieu of notice as provided in the appointment letter plus 12 months gross salary as compensation for the unfair termination of his contract of service. In awarding the maximum compensation, I have considered the claimant's long service of 20 years without any disciplinary issues and also the fact that he was 5 years to retirement and therefore not reasonably expected to secure another job due to his advanced age. His salary was Kshs.70,386.32 and hence and under section 49 equals to 15 months. = Kshs.1,055,794.80.

16. The claim for Kshs.70,386.32 in respect of accrued leave, Kshs.70,386.32 being salary for December 2010, Kshs.8,000 leave travelling allowance for 2010 and Kshs.211,158.96 being 3 months' salary award for long service are all granted because they were offered by the respondent to the first claimant vide the termination letter.

17. However, the claim for lost earning due to premature termination before the retirement age is dismissed for lack of legal and contractual

basis. It is now trite that salary can only be paid for work done unless otherwise allowed by the law or the contract between the parties. Likewise, the clam for pension is dismissed because the claimant admitted having been paid the same. Finally, the claim for bonus for December 2010 was not prosecuted and it is dismissed.

**Conclusion and Disposition**

18. For the reasons that the termination of the claimant's services was unfair, I enter judgment for him in the sum of Kshs.1,415,726.45 plus costs and interest from the date hereof. The sum award shall be paid subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**