



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 144 OF 2014

CHARLES KINYUA.....1ST CLAIMANT

LAWRENCE KINOTI M'ITONGA.....2ND CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OPERATIVE

UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st July, 2015)

JUDGMENT

The claimants filed the memorandum of claim on 08.11.2014 in person. They each prayed for reinstatement and costs of the suit. The 1st claimant also prayed for terminal dues as per the collective agreement.

The respondent filed the defence on 09.12.2014 and prayed that the claim be dismissed with costs.

The claimants were terminated from employment by the letters dated 15.03.2011 on account of insubordination. It was said that on 19.08.2011 between 10.00am and 1.30pm they were jointly guarding the respondent's gate when one Paul Kirimi, an employee of the respondent, entered and left the factory without following the laid down procedures. It was alleged that the general manager had given instructions that the said Paul Kirimi was not to be let out from the factory. It was alleged that the 1st claimant was rude to the general manager when the general manager tried to find out about the case. It was alleged that the 2nd respondent's explanation that the instructions were not given was not satisfactory. The respondent's board heard the claimants at the meeting of 9.11.2011.

The 1st claimant testified that on the material date he was deployed as an effluent treatment attendant and not as a day guard. The 2nd claimant denied that instructions had been given by the general manager that Paul Kirimi was not to be allowed to leave the respondent's premises.

The court has considered the evidence on record and finds that the respondent has not showed that the general manager gave specific instructions to the claimants about the said Paul Kirimi. The court finds that the reason for termination has not therefore been shown to have been valid. The respondent failed to call relevant witnesses in that regard. Further the minutes for the disciplinary hearing of 9.11.2011 filed for the respondent clearly show that the claimants were merely informed the allegations as levelled against them without their being heard in self defence or at all and the meeting found them culpable as

alleged without considering whether the alleged misconduct had been established. The general manager who was the complaint was an active participant at that hearing and the claimants were not heard at all. In the opinion of the court, such casual and biased proceedings cannot be relied upon to show that at the time of the termination the respondent had a reasonable basis to believe that the claimants had engaged in the misconduct as was alleged by the respondent.

The court finds that the termination was unfair for want of a valid reason for the termination as envisaged in section 43 of the Employment Act, 2007. The claimants may have been deployed at the gate on material date but it has not been shown that they disobeyed some specific instructions or that the 1st claimant was rude to the general manager as it was alleged for the respondent.

The court has considered that 3 years have lapsed since the time the claimants were terminated from employment. The court considers that an order of re-engagement will be sufficient in this case. As the claimants have succeeded in their respective claims the respondent will pay them costs fixed at **Kshs. 20,000** for each claimant.

The claimant purported to file a preliminary objection on 27.07.2009 long after parties had closed their respective cases and the claimants had already filed their final submissions. The court finds that the preliminary objection was late and therefore an abuse of the court process as a preliminary objection must be urged at the earliest possible stage in the suit and invariably not when a party has filed final submissions like in the present case. In any event the verifying affidavit in support of the claim was clear that it was made for both claimants and the court finds that there was no reason to find that the 1st claimant lacked authority to make the affidavit as was done and at time of the preliminary objection, both claimants had already testified towards establishing their respective cases. On the other hand the court finds that the defence filed on 09.12.2014 was not signed and dated as it was incurably defective and is amenable to be expunged from the record.

In conclusion, the court enters judgment for the claimants against the respondent for orders:

- a. That the termination of the claimants' employment by the respondent was unfair.
- b. The claimants are re-engaged with effect from 1.08.2015 in the employment of the respondent in the respective positions they held at termination with the terms of service prevailing as at date of this judgment and the period between date of termination 15.11.2011 to 1.08.2015 be treated as leave without pay so that there shall be no break in the claimants' service for purposes of pension, service pay, gratuity or such other retirement or terminal benefits.
- c. In view of order (a) and (b) the claimants shall report to the respondent's chief executive officer for appropriate deployment on 3.08.2015.
- d. The respondent to pay each of the claimants **Kshs. 20,000.00** by 1.09.2015 being costs of the suit in default interest at court rates to be payable thereon from the date of this judgment till full payment.

Signed, dated and delivered in court at **Nyeri** this **Friday, 31st July, 2015.**

BYRAM ONGAYA

JUDGE