



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 24 OF 2015

**SILAS KAUMBUTHU
MBUTURA.....CLAIMANT**

VERSUS

**MERU CENTRAL DAIRY CO-OPERATIVE UNION
LIMITED.....RESPONDENT**

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

JUDGMENT

The claimant filed the suit on 24.02.2015 in person. The claimant prayed for:

- a. A declaration that the termination was unlawful and the claimant be reinstated back to work.
- b. To declare the acting appointment unfair labour practice and the claimant be confirmed as a production supervisor.
- c. Costs of the suit.

The respondent filed the defence to the memorandum of claim on 16.04.2015 through Kiauthi Arithi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The only issue for determination in this suit is whether the claimant is entitled to the remedies as prayed for.

The claimant has prayed for a declaration that the termination was unlawful and the claimant be reinstated back to work. The claimant's case is that the reason for termination was not valid. The claimant received the respondent's letter on alleged insubordination dated 22.12.2014. It was alleged that on 22.12.2014 at the reception the claimant was given instructions by one Nahashon Gitonga and one Kendi to ensure that the milk brought forward being 14,000 litres in tank one was handled separately. That there was a purpose for such instructions which were not implemented so that the milk mixed-up and at the end of the packaging the figures required could not be verified. The claimant was asked to make a written explanation by 23.12.2014 before 9.30am.

The claimant replied by his letter dated 23.12.2014 but which was not filed by either party. The claimant stated that he did not keep a copy of the letter and it is not disputed that he replied in writing. The claimant's explanation in his evidence before court was that on 22.12.2014 he was assigned by Nahashon Gitonga to receive milk from farmers. The said Nahashon then further assigned that the previous day's milk was to be put in packets so that it did not mix with the previous day's milk. On material day the claimant said he failed to hand over the day's record to Nahashon and he apologised. At the reception on the material day his job was to receive milk from farmers and he was not responsible for the previous

day's milk and the milk did not mix at all. If the milk mixed up, then the other supervisor called Kiogora was responsible because he was the one assigned the previous day's milk at the production section and that was different from the reception section. Thus his defence was that Kiogora caused the mix up and that was a valid defence because he was not assigned the production section which handled the previous day's milk.

The claimant attended the committee hearing and the respondent decided to terminate the claimant's services because he failed to follow the instructions.

Respondent's witness RW confirmed that on 22.12.2014 the claimant was assigned as the reception supervisor and another supervisor was assigned as production supervisor. RW confirmed that on that date the claimant's duty was to receive the fresh milk from farmers and the 14,000 litres in issue being milk brought forward meant milk not received on the material date but the previous day; so that it was not part of the claimant's responsibility on the material date. It was the duty of the supervisor on the production floor to ensure that the mix-up did not occur and the claimant was not the production supervisor on the material date.

The respondent did not call Nahashon to confirm by testimony whatever instructions he might have given and whoever was to implement the instructions. Even if the claimant admitted in his evidence that he apologised for the instructions that were not implemented, the court considers that even if they were directed to the claimant, they could not legitimately be so directed because the claimant being deployed at the reception, it has been shown that he was not responsible for the previous day's milk but which was the responsibility of the production supervisor. The instructions as allegedly directed were therefore invalid as they were not legitimate.

The court finds that the respondent has failed to establish that the reason for the termination was valid as the evidence shows that on the material date the claimant was not the production supervisor and could not be responsible for the previous day's milk. The reason was not genuine as the termination was unfair for want of a valid reason as provided for in section 43 of the Employment Act, 2007. The court finds that the claimant is entitled to the declaration as prayed for.

The court has considered the claimant's long service of over 18 years and the respondent has not showed any good reason why reinstatement would not be granted in this case. RW being the respondent's human resource manager testified that the claimant was a trusted employee. In the circumstances the court finds that the claimant is entitled to reinstatement.

The claimant lamented that he was never emplaced on any substantive post and he was always told to act as a production supervisor.

The evidence showed that the claimant had indeed not been appointed to a substantive position since his employment over 18 years ago. By letter of appointment signed 27.01.1995 he was appointed on temporary basis as a dairyman with effect from 1.03.1995. By letter of 25.07.1996 he was appointed to act as a machine operator effective 1.08.1996 by letter dated 19.12.2006 he was appointed to act as a production supervisor with effect from 4.12.2006 to 22.06.2007. By the letter dated 7.07.2008 he was appointed to act as a production supervisor from 24.06.2008. By letter of 17.12.2009 the claimant was given some salary increment in view of his long acting appointment as a production supervisor effective 24.06.2008. However the claimant was told to retain the position he held before the acting appointment (which substantive position remains unknown as was not referred to in the letter or elsewhere) and that the salary increment did not mean a promotion or demotion. The staff change advise dated 1.12.2013 advised that the claimant was on permanent terms of service to act in the post of production supervisor from 1.12.2013 to 7.01.2014 and the advise did not indicate the then prevailing and new grade the claimant had been emplaced. He was to earn Kshs.3, 500.00 per month. The letter dated 3.02.2014 informed the claimant to act in the post of production supervisor while one supervisor (who was not named) is said to have taken his accumulated annual leave. In the termination letter dated 19.01.2015 the position held by the claimant was not referred to and the claimant was terminated effective 19.01.2015.

The claimant submitted that the continued emplacement on acting appointment was unfair labour practice as it contravened Article 41 of the Constitution. The claimant submitted that he had worked for twenty years for the respondent and for 18 years he served as acting production supervisor. He submitted that he was appointed acting, acting, acting, acting, acting and again throughout his service as acting production supervisor. It was his submission that such was very demoralising and calculated to defeat his otherwise earned promotion and he was denied enjoyment of the prestige and payment attached to the substantive position of production supervisor. It was his case that the respondent whimsically and at instance of unjustified resolve denied him the substantive appointment. The claimant told the court that he was gravely disheartened by the said respondent's actions.

Further, it was the claimant's submission that after the respondent realised that the claimant was about to retire the respondent decided to terminate the claimant so that the claimant would not claim his benefits as attached to the post of a production supervisor. There is no reason to doubt the claimant's position as there was no evidence or submission to rebut the position.

The court finds that the claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of the production supervisor. The claimant's claim to substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of the Constitution, the court finds that a compensation of **Kshs.300, 000.00** under Article 21(3) (e) of the Constitution will meet the ends of justice. While making that finding, the court finds that for over 18 years of service the claimant was required by the respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a production supervisor or any other suitable position in the respondent's establishment. Such conduct on the part of the respondent, in the opinion of the court, was a gross violation of the claimant's entitlement to fair labour practices as provided for in Article 41 of the Constitution.

The respondent will pay costs of the suit fixed at **Kshs.25, 000.00**.

In conclusion, judgment is entered for the claimant against the respondent and for orders:

- a. The declaration that the termination was unlawful and the claimant be reinstated back to work with effect from 19 January 2015 with full monthly pay from that date till date of reporting on duty and to continue in the respondent's employment as per prevailing terms and conditions of service.
- b. The declaration that the unrelenting acting appointments amounted to unfair labour practice and the claimant is entitled to be confirmed or substantively appointed as a production supervisor in the respondent's service not later than 1.10.2015.
- c. The claimant to report to the respondent's chief executive officer on 3.08.2015 at 9.00 o'clock in the forenoon for appropriate deployment in view of order (a).
- d. The claimant to file in court the schedule of withheld pay in view of order (a) from 19.01.2015 till 3.08.2015 and serve by 15.08.2015 with a view of recording the amount in court at the next mention date.
- e. The respondent to pay the claimant **Kshs. 325,000.00** being compensation and costs as found due in this judgment.
- f. The payments as ordered in this judgment to be effected by the respondent by 1.11.2015 in default interest to be payable thereon at court rates 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