



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 908 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> December, 2015)**

**FRANCIS WAIHAKA KAMAU.....CLAIMANT**

**VERSUS**

**DELMONTE KENYA LTD.....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant Francis Waithaka Kamau filed his Memorandum of Claim through the firm of Njeru Gichovi and Company Advocates. The Claimant avers that he was employed by the Respondent with effect from 1<sup>st</sup> June, 1980, as a trainee headman for a probationary period of three (3) months at a monthly salary of Kshs. 660/= plus Kshs.150/= house allowance. The Claimant successfully completed the probationary period and was confirmed in employment by a letter dated 6<sup>th</sup> November 1980 and his basic salary was increased to Kshs. 968/=.

2. The Claimant further avers that he worked for the Respondent diligently and received numerous awards and promotions over the years as follows:-

- i. By letter of 3.3.1981 the /claimant was promoted to higher office***
- ii. In 1989 and 1997 the Claimant was promoted again;***
- iii. In 2010 the Claimant received a special award;***
- iv. In January 2011 by letter of 19.01.2011 the Claimant's salary was increased and his salary rose to Kshs. 103,716.94, plus a transport allowance of Kshs. 5,000/= per month.***

3. The Dispute giving rise to the cause of action herein allegedly arose on 15<sup>th</sup> March, 2011, when the Respondent wrote a suspension letter which was served upon the Claimant on 17-03-2011 suspending the latter from work/employment on the allegation that he was negligent in failing to prevent wrong labeling of products. The Claimant avers that the allegation against him was false as the function in issue was not in his exclusive control and despite his written explanation by letter dated 17.03.2011.

4. Subsequently the Respondent wrongfully terminated the Claimant's services by a letter dated 22.3.2011 but failed to pay the terminal benefits. Despite demand and notice to sue the Respondent has failed to respond to the Claimant. The Claimant seeks terminal benefits to the tune of Kshs. 42,939,988/= and general damages to be assessed by the Court.

5. In cross – examination by counsel for the Respondent, the Claimant informed Court that at the time of

dismissal he was getting house allowance of Kshs. 18,200/= and he had school going children. That he got authority from the Quality Control department on labeling products. The Claimant admitted that labeling of products was his work and he provided leadership to other staff under him.

6. The Claimant's work was to receive, read and interpret an order correctly. It was not his mistake if products were labeled wrongly as it was the duty of the Quality Control (QC) department who have people along the entire product line. The QC people are not answerable to the Claimant but have their own supervisor. The QC staff who was working on his side was fired for the same mistake. That products are sealed in the cook room and then they are forwarded to him and the labels he attached to them are given to him by the QC staff.

7. The Respondent filed their memorandum of Defence to the claim on 15.11.2012 through the firm of Simba & Simba Company Advocates. It is the Respondent's contention that the services of claimant were lawfully terminated after complying with procedural fairness after the claimant was grossly negligent in the performance of his duties.

8. The Claimant was asked to show cause why he should not be dismissed but failed to give a satisfactory response. The Respondent alleges that the Claimant all along knew that wrong labeling of products would result in shipping of wrong products to its Clients some of whom are overseas. That in lieu of the Claimant's long service to the Respondent, the Respondent opted to terminate his employment instead of summarily dismissing him which in any event he was entitled to do.

9. The Respondent avers that the Claimant is not entitled to any of the reliefs sought since due process was followed in terminating the Claimant's employment.

10. RW1 is a Warehouse and Logistics Manager at the Respondent Company having joined the Respondent after the Claimant had been dismissed. That had the Claimant still been in the employment of the Respondent RW1 would have been his immediate supervisor.

11. The Respondent's witness stated that it was the Claimant's duty as a warehouse and logistics foreman to plan, supervise, and direct labeling operations. He was also to receive, read and interpret sales orders correctly and apply them as per the customer. The Respondent's products have a code so as to ensure that they are properly labelled. A person in the production line must know the difference of the various codes. It was RW1's testimony that in his view, the Claimant did not perform his duties well.

12. In cross examination RW1 admitted that in the production line there was a Quality Checker who was not under the Claimant administratively. The QC is usually seconded to a department. This meant that the warehouse foreman needed an extra check from quality checker but everyone under the foreman must do the right work. RW1 continued to state that unlabeled cans come from the canning warehouse with a code. If canning put a wrong code on a product then the warehouse foreman will go by the code on the product. The foreman asks for the labels from the labels store and directs labelling procedures. After labelling there is no more checking by QC. RW1 stated that proper procedure was followed in dismissing the Claimant.

13. Having considered all evidence and submissions from both parties, the issues for determination are as follows:

1. ***Whether there were valid reasons to termination the Claimant's services.***
2. ***Whether due process was followed in the circumstances.***
3. ***What remedies if any the Claimant is entitled to.***

14. On the 1<sup>st</sup> issue, the reasons given for the termination is wrong labeling of cans by the Claimant and staff under him. The Claimant on his part stated that the issue of labeling was a QC job and there were staff who specifically were responsible for this and they were not under his control. He stated that the QC

staff forwarded empty cans with labels to his department all his staff did was to attach the labels assuming that the labels corresponded with the product. He contends that he was not to blame for this mistake.

15. The Respondents on their part insist that the Claimant had a duty to ensure proper labels were put on the products.

16. Given that there is a blame game with the Claimant insisting that his work was just to put labels and the Respondents insisting he had to cross-check the labels, the best way to resolve this issue is for this court to counter the schedule of work assigned to each department.

17. Appendix 4 of the Respondents documents is the job description of the Claimant who is Warehouse Foreman prepared and served on him on 20.7.2010. Some of the duties include:

***“Plan, supervise and direct labeling operations; receive, read and interpret sales orders correctly as per customer requirements-----“.***

18. To achieve the function of receiving, reading and interpreting sales orders correctly the Claimant is expected to ensure that labeled products meet Del Monte quality standards.

19. This job description further states the functions under the Claimant who include code checkers and labeling crew. It is therefore apparent that checking the code of the tins and labeling the same was a direct responsibility of the Claimant with the staff under him.

20. The omission though not explained is the work of the QC staff in relation to Claimant's work and the said QC were not working under the Claimant. It is apparent their work was complimentary though. It is therefore this Court's finding that there were valid reasons to find Claimant culpable.

21. The next question is on due process. The Respondent after discovering the mistake, issued Claimant with a show cause letter. He replied to it on 17.3.2011. On 22.3.2011, he was issued with a letter terminating his employment.

22. Section 41 of Employment Act 2007 states as follows:

***“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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 under section 44 (3) or (4) 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 within subsection (1) make.”***

23. The Respondents failed to adhere to rules of fair procedure by failing to give the Claimant an opportunity to be heard. This omission is also against the provision of the Constitution Article 50(1) which states as follows:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

24. The Claimant was a long serving employee having served the Respondent from 1980 for over 30 years. The Claimant's performance had over time been satisfactory and I believe the Respondent would

even have served him with a warning or reprimand instead of opting for the harsh penalty of termination.

25. This termination I find it to be unfair and unjustified in terms of Section 45 (1) and (2) of Employment Act 2007 which states that:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
  - a. *that the reason for the termination is valid;*
  - b. *that the reason for the termination is a fair reason:-*
    - i. *related to the employee's conduct, capacity or compatibility; or*
    - ii. *based on the operational requirements of the employer; and*
  - c. *that the employment was terminated in accordance with fair procedure.*

26. Since fair procedure was not followed, I find this termination unwarranted. I accordingly find for the Claimant and I award him as follows:

1. *12 months salary as compensation for unlawful termination of employment = 12 x 103,716.94 = 1,244,603.28/=*
2. *The Claimant is entitled to his pension from the pension providers without any loss whatsoever upto the time of the wrongful termination.*
3. *Other claims prayed for are not payable in view of the fact that the Claimant was housed and was a member of a pension scheme.*

27. The amount awarded will attract interest at Court rates with effect from date of this judgment until payment in full. The Respondent shall issue the Claimant with a Certificate of Service.

28. The Respondent to pay costs of this suit.

Read in open Court this 14<sup>th</sup> day of December, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Respondent

No appearance for the Claimant