



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 255/2013**

**(Before Hon. Justice Hellen Wasilwa on 17<sup>th</sup> June, 2014)**

**JOSEPH SHIVANGA LUYINGO ..... CLAIMANT**

**-VERSUS-**

**KENYA AGRICULTURAL RESEARCH INSTITUTE ..... RESPONDENTS**

**JUDGMENT**

The claimant herein filed their memo of claim on 12.9.2013 through the firm of Andambi & Co. Advocates. It is the claimant's claim that, he worked for the respondents from 4.3.1996 to 26.8.2011 when the respondents interdicted him and eventually dismissed him on 13th April 2012 without paying him his dues.

The claimant further avers that on 14.9.2010, he was lawfully walking in Kitale along Laini Moja Street when he was arrested by Kitale Prison warders who were in pursuit of a suspect who had been in their custody. He was later charged with four counts of a criminal nature and arraigned in court at Kapenguria Law Courts where he entered a plea of not guilty to all the counts. On 26.8.2011, the respondents sent him a letter of interdiction on the grounds that he had impersonated various public officers and obtained goods by false pretence. The interdiction was backdated to 1st August 2011 and would remain until the case was heard and determined. On 19.4.2012, the claimant further avers that he received another letter dated 13.4.2012 dismissing him from service on the same grounds of impersonation and obtaining money by false pretences. The claimant appealed against the decision by the respondents on 7.5.2013. He was summoned to appear before the AD HOC Committee on 14.5.2013 which he did. On 8.8.2013 the committee wrote to him upholding the earlier decision to have him dismissed from service and majorly citing impersonation, obtaining goods by false pretences, fraud and absenteeism. On 15.5.2012 however the claimant was found not guilty of all counts levelled against him and he was acquitted under S. 215 of CPC.

The claimant avers that the decision to have him dismissed from service on 13.4.2012 before criminal proceedings against him would come to logical conclusion defeats the intent, purpose and purport of the interdiction letter in the first instance and also defeats the letter and spirit of Article 236 (b), of the Constitution of Kenya 2010, and also defeats the intent purpose and purport of Section 12(11) and 72 (12) of the Public Service Commission Regulation, 2012 and amounts to wrongful dismissal. The claimant further believes that he was not accorded a fair hearing before the AD HOC Appeals Committee as the respondents seems to have sealed his fate long before the criminal case against him would be concluded. On absenteeism, the claimant avers that it was based on the times he was attending court and it violates his right under Article 50(2) (a) and (f) of the Constitution of Kenya 2010.

The claimant therefore claims against the respondent's 3 months salary in lieu of notice, 12 months

compensation for unlawful termination, service pay for 15 years served. He also seeks a declaration that his termination was unlawful. He seeks for general damages plus costs of this suit.

The respondents on the other hand filed their reply to the statement of claim on 13.11.2013 through the firm of Keengwe & Co. Advocates. It is their defence, they aver that the claimant had been under investigation for fraud, dishonesty and absconding duties during the period of 2007 – 2010 and had been issued with several warning letters regarding his misconduct. That at a meeting held at the respondent's centre director's office in the presence of the claimant, it was resolved that the claimant was responsible for misappropriation of Ksh 35,277.20 and forging signatures for the purposes of illegally accessing project funds. It was then resolved that the claimant be surcharged as per annexure (**KARI 1**). A communication was sent to the respondents director on this issue as per Annex **KARI 2**.

It is also apparent that the claimant was interdicted on 17.9.2007 on this issue of fraud and he wrote pleading for leniency and lifting of the interdiction as per his letter App **KARI 3**. The interdiction was lifted on 18.7.2008 on humanitarian grounds and the claimant was given a stern warning against similar misconduct. The respondents further avers that the claimant was further under investigation for being absent from duty without permission for a period of 91 days and this matter was referred to the Centre Staff Advisory Committee for directions as per App **KARI 5**. The Centre Staff Advisory Committee held a meeting on 16.11.2011 and the conduct of the claimant was discussed and he was given a chance to defend himself on allegations of misconduct (**KARI 6**). Vide a letter **KARI 7**, of 20.12.2010, he was reinstated and given a warning against future misconduct.

It is therefore the respondents case that the claimant had been warned severally against his misconduct but he did not heed any of these warnings. It is also the respondents case that the dismissal was not solely based on the criminal allegations of impersonation and obtaining money by false pretences (**KARI 8**) but on his entire employment history. The respondents further avers that they accorded the claimant a fair hearing and asked this court to dismiss this case accordingly.

After considering the evidence of both sides and their respective submissions; the issues for determination are as follows:-

1. **Whether the respondent's action of dismissing the claimant was unfair or wrongful.**
2. **Whether the claimant was accorded a fair hearing.**
3. **Whether the claimant is entitled to remedies he has sought.**

From the evidence of claimant, he was arrested and charged for some offences for which he was finally acquitted. During the pendency of the criminal case, he was terminated by the respondents. The respondents contend that the reason of termination was not solely the criminal charges but were based on the previous conduct of the claimant involving in fraud, and absenteeism amongst others. The respondents exhibited evidence of this misconduct and previous communication on the same where claimant had been interdicted and interdiction lifted on two different occasions.

Section 43 of Employment Act states that:-

**“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

Such reasons must be reasons that the employer genuinely believed to exist and caused the termination.

In the letter terminating the claimant's services, reasons given range from the criminal charge that the claimant faced but also others on his employment history – where in 2007, he had been accused of

defrauding the institute of Ksh 35,277.20/= by manipulating the payroll. In 2010 he was accused of being absent from duty for 78 days. From his previous work history, he had been disciplined of these issues and warned of severe disciplinary action. It was also stated that the previous issues will go on record and may be used as a point of reference in future.

In deciding whether the respondents action in dismissing the claimant was fair or not, reference is made to S. 43 of Employment Act 2007 quoted above and S. 41 of Employment Act which states that:-

**“(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 reasons 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 sub – section (1) make.”**

The reasons for the claimant's dismissal were put to him. However, there is no proof that he was accorded a hearing on the same. There is proof of previous disciplinary hearings but as to the period just before his dismissal he was served with a letter dated 26.8.2011, the letter which placed him on interdiction with effect from 1.8.2011 pending determination of the criminal case. The letter informed him that he would be on ½ salary and would be required to report to the centre and sign an attendance register on days to be determined in the centre but not less than twice a week. In this letter it was also stated as follows:-

**“In the meantime, severe disciplinary action in conformity with regulations is contemplated against you. However before such action is taken, you are allowed fourteen (14) days from the date of this letter to show cause why the intended disciplinary action should not be taken against you.”**

The respondents replied to this letter vide his letter *App. No 3* dated 15.9.2011. No further action was taken nor any other disciplinary proceedings held but on 18.4.2012, the claimant was given a dismissal letter.

Whereas the respondents may have had good reasons to dismiss the claimant, the respondents flouted S. 41 of the Employment Act and Article 50(1) of the Constitution on the right to be heard.

ILO's Committee of experts in the general survey on Termination of Employment Convention No. 158 and Recommendation No. 166 of 1982 para 150 has expanded this requirement of a hearing before termination and stated :-

**“It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the application of Article 7 that the worker be given an opportunity to defend himself before his employment is considered to have been terminated.”**

It is therefore clear that the respondents failed in not according claimant a hearing as envisaged by law and this is answer to issue No. 1, the termination was unfair and wrongful in the circumstances. In answer to issue No. 2 then the procedure to be followed is as envisaged in S. 41 of Employment Act and the ILO Convention and Recommendation cited. The claimant was not accorded a fair hearing in the circumstances.

On the last issue, is on the prayers sought. The claimant seeks to be paid 3 months salary in lieu of notice. The basis of this however needs to be established. This will start with establishing his pay at the

time of termination which he has not exhibited in form of a payslip but relying on his pleadings I take it to be 20,289.00. In any case under the Employment Act what is envisaged is one month's notice which is based on a known salary and so I award him that 20,289.00. On severance pay, this is awarded only in case of redundancy as envisaged under S. 40 of the Employment Act 2007.

The claimant proved to court that he was a member of the staff pension scheme and so he should pursue his benefits if any under the said scheme. Service pay is also not payable to him as this is expressly outlawed under S. 35(6) of Employment Act for those officers who are under a pension scheme as the claimant herein.

All in all, I make orders as follows:-

- 1. A declaration that the claimant's termination was unlawful and wrongful.**
- 2. The claimant should be issued with a certificate of service.**
- 3. The claimant to be paid 12 months salary as compensation for unlawful termination**

**= 20,289 X 12 = 243,460**

**TOTAL AWARDED = Ksh 263,749/=**

- 4. Respondents to pay costs of the suit.**

**HELLEN WASILWA**

**JUDGE**

**17/6/2014**

**Appearances:-**

Busienei h/b Andambi for claimant present

Keengwe for respondents present

CC. Wamache