REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1068 OF 2012

BETWEEN

1. DANISH JALANG'O

2. CHRISTPOHER KISIA KIVANGO…….. CLAIMANTS

VERSUS

AMICABRE TRAVEL SERVICES LIMITED ……. RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Ilako Advocate, instructed by K'Oceyo and Company, Advocates for the Claimants

Mr. Njiru Advocate, instructed by the Federation of Kenya Employers, for the Respondent

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The 2 Claimants filed their joint Statement of Claim on 21st June 2012. They were employed as Drivers by the Respondent Transport Company. The 1st Claimant states his contract was terminated by the Respondent on 23rd March 2012, on the ground of misconduct, while the 2nd Claimant's contract was terminated by the Respondent on the ground of negligence/ incompetence, on the same date. They hold termination was unfair and unlawful and seek the following Orders:-

1st Claimant

- 12 months' salary in compensation for unfair termination at Kshs. 167,496.
- 1 month salary in lieu of notice at Kshs. 13,958.
- Kshs. 6,979 in annual leave pay.

2nd Claimant

- 12 months' salary in compensation for unfair termination at Kshs. 183,276.

- 1 month salary in lieu of notice at Kshs. 15,273.
- Kshs. 7,636 in annual leave pay

The 1st Claimant seeks a total sum of Kshs. 188,433, while the 2nd Claimant seeks a total of Kshs. 206,185. They both seek interest on these amounts at the rate of 20% per annum from 23rd March 2012 until payment is made in full. They pray for 'damages for loss of gain,' costs, and any other suitable remedy.

2. The Respondent filed a joint Statement of Response on 3rd July 2013. It is conceded the Claimants were employed by the Respondent as Drivers, both on 1 year contracts, commencing 6th October 2011 and 1st January 2012 respectively. Their contracts of employment were terminated on 23rd March 2012. The 1st Claimant declined to take the lawful instructions from his Supervisor; engaged in physical confrontation with his Supervisor in the presence of Delmonte [K] Limited Employees; he harassed other Employees; and delayed other Delmonte [K] Employees from their duties. He had a volcanic temper. The 2nd Claimant failed to drive Vehicles assigned to him by the Respondent with due care, leading to frequent breakdown. He was still under probation on the date of termination. In both cases the Respondent acted on valid and fair grounds, termination was carried out fairly, and the Claimants were paid their respective terminal dues.

3. Hearing opened and closed on 14th February 2014. The 2 Claimants gave evidence as did Mr. Hezron Owallo, the Human Resources Manager of the Respondent. The Advocates confirmed the filing of their Final Arguments at the last formal mention on 14th July 2014, and the Award was reserved for delivery on 10th October 2014. The date for delivery of the Award has been brought forward as the undersigned Trial Judge has been transferred to Mombasa.

4. Mr. Jalang'o testified he was employed by the Respondent on 6th October 2011. He was assigned duty at Delmonte [K] Limited in Thika. The Respondent had a contract with the Delmonte [K] Limited, for provision of transport services. He discharged his duties well.

5. He was assigned an un-roadworthy Vehicle, by the Respondent, which did not have a road licence or insurance. On 4th March 2012, he worked throughout the day. He drove to salvage a Vehicle which had broken down at a place called Kilimambogo. He returned to base fatigued and was not even able to sleep. The Respondent then alleged that the 1st Claimant had questioned why he was assigned an un-roadworthy Vehicle. He was dismissed on 23rd March 2012. He was called before the Disciplinary Panel and fired the same day. He was subsequently employed by another Transport Business, Easy Coach at UN Gigiri, as Transport Coordinator.

6. Questioned by the Respondent's Counsel, the 1st Claimant told the Court he was employed on 6th October 2011. He signed a Code of Conduct. He reported to the Management that the Vehicle assigned to him was not roadworthy. He wrote a letter to Management. He could not recall the details of the Vehicle. It is not true that he refused to transport Members of Staff to their workstations on another occasion. He was issued a letter to show cause why disciplinary action should not issue. He was invited to a disciplinary hearing. He did not attend the hearing. No complaint had been made on the way he was discharging his duties. No fellow Employee complained about him. He refused to take the cheque for terminal benefits offered by the Respondent. He was issued the Certificate of Service. He worked for 24 hours, and slept for only 2 hours in a day. He denied that he ever insulted any Delmonte Employee. He was called by the Supervisor whenever Employees of Delmonte required to be transported.

7. The 2nd Claimant testified he was employed on 15th December 2011, and confirmed from 1st January 2012. He is a Mechanic by training, employed as a Driver. His Vehicle had mechanical defects. The Workshop Manager declined to act on it. Instead, the Respondent alleged the 2nd Claimant had driven a

Vehicle with defects. He was hauled before a disciplinary panel. He was not given much of a hearing. He was transported to the Respondent's Offices in Nairobi and dismissed. He had been told he was been transferred to work in Nairobi. Nothing was paid to him on termination. He fortunately secured fresh employment with a Dairy Firm.

8. Cross-examined, the 2nd Claimant testified there was a fleet of 16 Vehicles. He drove a Nissan Bus or Tata Truck. This Truck had problems. He drove UD Bus which had a clutch problem. The Workshop Manager would quarrel him when he reported the defects. He drove Staff to their Workstations within the Delmonte Farms. Some of the Employees worked for 24 hours. There were 3 shifts. The shift had about 8 hours. The 2nd Claimant would be called to drive the Employees any time. He was issued a letter to show cause why disciplinary action should not issue, and attended a disciplinary hearing. He was offered terminal benefits less deductions on the damage allegedly caused by the 2nd Claimant to the Respondent's Vehicle. He worked for about 3 months. He testified on redirection that he would prepare a report on any defects and forward to the Workshop Manager. He was not allowed to speak at the disciplinary hearing. The Panelists just talked to the Workshop Manager. Delmonte deals in pineapple plantation, and employs different categories of Employees such as sprayers, harvesters, and packers. It was like a military facility. He would be called to duty any time. The Claimants pray the Court to allow their respective claims.

9. Hezron Owallo confirmed the Claimants were employed by the Respondent as Drivers. Jalang'o was employed at Nairobi. He had a problem with the Workshop Manager at Nairobi, and was transferred to Thika. He had problems with Employees at Delmonte. He did not take the instructions of the Supervisor. He would refuse to drive the Employees within the Facility. He quarreled with almost every Member of the Staff. Owallo talked to the 1st Claimant in an attempt to correct him. The Workshop Manager wrote e-mails to Owallo, requesting the Respondent to move the 1st Claimant away from Thika. The Security Officer as well, wrote complaining about the 1st Claimant.

10. Owallo told the Court the 2nd Claimant was a Mechanic employed as a Driver. Every Vehicle he touched developed mechanical problem. The Respondent thought Kivango was tampering with the Vehicles. Both were Members of the Trade Union and did not involve their Trade Union in the dispute. The Trade Union did not raise any issues concerning the Respondent's decision to terminate. The Panel heard both Claimants on 23rd March 2012. Jalang'o was heard first, followed by Kivango. Owallo chaired the Panel. They were asked questions and allowed the opportunity to respond. Jalang'o was dismissed while Kivango had his contract of employment terminated. They did not drive for 24 hours. They transported the Employees within the Farm in turns. There were 27 Drivers, none of whom worked every shift. The shifts were structured. Their working hours were regulated by the CBA. Jalang'o was offered terminal dues comprising salary for days worked, prorata leave, and certificate of service which he declined. His cheque is still available. Kivango left while still serving under probation. Termination in either case followed the CBA and the Employment Act 2007.

11. Cross-examined, the Human Resources Manager testified that the 1st Claimant appeared to have domestic problems, which impacted adversely on his relationship with his Colleagues at work. The 2nd Claimant tampered with the Vehicles, but the Respondent did not know how the tampering happened. He was supposed to report any problem the Vehicle had, to the Workshop Manager. Owallo closed his evidence on redirection with the explanation that the 1st Claimant was taken to Thika, to afford him a second chance. Delmonte however complained about him intermittently. There were two major incidents involving breakdown of Vehicles assigned to the 2nd Claimant. The Respondent prays for dismissal of both claims.

The Court Finds and Awards:-

12. The 2nd Claimant Christopher Kisia Kivango was employed as a Driver for 1 year, which commenced on 1st January 2012. He was to work under probation for the first 6 months. Termination was on 23rd March 2012, within the probation period.

13. Clause 2 of the contract issued to the 2nd Claimant allowed either Party to terminate the contract during probation, by giving not more than 7 days' notice of termination, or by payment by the Company to the 2nd Claimant of 7 days' wages in lieu of notice.

14. Section 42 [1] of the Employment Act 2007 states that the provisions of Section 41, which contain the law of fair termination procedure, shall not apply with regard to probationary contracts. Section 42[4] provides for termination through 7 day notice or payment of 7 days' wages by the Employer to the Employee. This is the provision adopted by the Parties in the contract issued to the Claimants.

15. The effect of this is that Employers have no obligation, to hear Employees who are serving probation for any of the reasons stated under Section 41, i.e. poor performance, misconduct or physical incapacity, before arriving at the termination decision.

16. There is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days' wages before termination, there can be no further demands made on the Employer. If the Employee is advised termination is because the Employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.

17. Breaches of probationary contracts are addressed through the law of wrongful or unlawful termination, as opposed to the law of unjustified or unfair termination. In the ***Industrial Court of Kenya, Cause Number 784 of 2010 between Catherine E. Nyawira Nyaga v. the Wilderness Lodges Limited [UR]***, the Court found the extension by the Employer, of the Claimant's probationary period, without the Claimant's consent, to have been unlawful and in breach of her terms of probation. Damages were granted for the breach.

18. In ***Industrial Court of Kenya Case between Carole Nyambura Thiga v. Oxfam [2013] e-KLR,*** the Court affirmed that the protection afforded regular Employees under the unfair termination provisions, are not available to Employees whose contracts are terminated while on probation.

19. Justice Stephen Radido in the ***Industrial Court of Kenya at Mombasa Cause No. 337 of 2013 between Mercy Njoki Karingithi v. Emrald Hotels and Resorts Limited [2014] e-KLR*** went further and concluded that the protections against unfair and unlawful dismissal under Section 43 and 45 of the Employment Act 2007, in light of the invalidation of Section 45[3] by the Constitutional Division of the ***High Court in Samuel G. Momanyi v. the Attorney General & Another [2012] e-KLR [Lenaola J],*** are available in full, to Employees whose contracts are terminated while serving probation. The Industrial Court held that termination is evaluated on both procedural and substantive fairness, and invoked Article 41 of the Constitution of Kenya as justifying full protection to probationary Employees.

20. This Court begs to differ. The correct interpretation is that Section 43 and 45 of the Employment Act, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts. Section 42 would have no meaning, and probation, which is a period granted to the Employer and the Employee to get to know each other before making any firm commitments, would itself be meaningless. Section 43 and 45 require Employers to prove fair and valid reason or reasons for termination. Assuming these laws are relevant in termination of probationary employment contracts: where an Employee is advised the reason for termination is because he/ she is on probation; and the contract and the law allows for termination while on probation, through the specific

mode given under Section 42; is this not a substantive ground in itself? What more substantive justification would be needed, beyond the explanation that the contract has a probationary provision, based on a substantive law under Section 42? Substantive justification requires the Employer to show the correctness, validity or existence of the reason for termination. Should Employers be asked to show the validity, correctness or existence of Section 42 comprising the probation law, in justifying termination? An Employee, whose contract is terminated while on probation, has no reason to demand to be shown by the Employer, other reasons for termination, outside the probationary contract. It is completely illogical to expect the Employer to prove any substantive grounds relating to misconduct, poor performance, physical incapacity, or any of the offences listed under Section 44 [4] of the Employment Act 2007, in terminating contracts of Employees on probation. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damages, weighed against the contractual notice period, or in the assessment of the Court, the gravity of the contractual breach. The effect of the High Court decision of ***Samuel G. Momanyi*** and that of the Industrial Court in ***Mercy Njoki Karingithi*** is to nullify certain fundamental employment laws, such as the law of employment probation, and blur the intention of Parliament in creating qualifying periods for Employees to access certain rights and obligations. Employers could find themselves compelled to retain Employees who are not fit for the job from day one. They risk the high cost of administering procedural justice, and in meeting compensation for unfair termination, when they act against relatively new, and unsuitable Employees at the workplace. Employees are not normally recruited at face value; there is a period of uncovering if they are fit for the job. Labour is flexible, and to have a strong, long term, and productive employer-employee relationship, the Parties must be allowed a period of learning each other.

21. The probation law should be retained. Employers should retain a freehand in evaluating Employees' suitability, and in terminating the relationship during probation, where the Employee is found wanting. Where there is breach, such as unilateral extension of the probationary period by the Employer, or where notice of termination is not given, such breaches can be redressed through contractual damages as done in the case of ***Catherine E. Nyawira Nyaga***, not through statutory compensation for unfair termination. It is not proper that rules of natural, procedural, and substantive justice under Sections 41, 43 and 45 of the Employment Act 2007 are imported into probationary contracts. Section 42 of the Employment Act 2007 is a standalone law, regulating a special, formative, employer-employee relationship, and should be read as a reasonable limitation, on the constitutional rights flowing from Article 41 of the Constitution of Kenya, as well as those rights and protections given under the other provisions of the Employment Act 2007.

22. In the case of the 2nd Claimant, he was serving probation. The only obligation imposed on the Employer on termination during probation is stipulated under the contract of employment and Section 42 of the Employment Act 2007. There was no obligation imposed on the Employer under any other law. If Sections 43, 45 of the Employment Act 2007 or Article 41 of the Constitution, required the Respondent to demonstrate substantive justification, this obligation was discharged by the proof of the existence of a valid probationary Clause. It was not even necessary for the Respondent to reveal to the Court, or to the 2nd Claimant that his contract was terminated because he tampered with the Respondent's Vehicles. It was sufficient that the Respondent observed, and weighed the 2nd Claimant's suitability for the job, while on probation, and in exercise of the managerial prerogative, was satisfied his employment should not be confirmed. It was not necessary to issue the 2nd Claimant with the letter to show cause, or hear him at all. He was paid 7 days' wages as notice pay, which was in accordance with the contract and Section 42 of the Employment Act 2007. This was sufficient remedy for his economic injury. The Court cannot ask more of the Respondent. Sections 42 and 45 [3] are laws which reasonably define the contours of the rights and obligations of Employers and Employees. They are not the kinds of laws, which should be removed from our Industrial Justice System, and cast to the swine, or liberally thrown into the mists of antiquity, through Judicial Edicts. The 2nd Claimant is not entitled to 12 months' salary in compensation and 1 month salary in lieu of notice as prayed. Why should the 2nd Claimant be paid compensation the equivalent of 12 months' salary, which is the total salary he would have earned in his 12 month-contract, while he did not even complete his probation of 6 months successfully? Why seek a full month's notice pay, while the contract gave him 7 days' pay which the Respondent offered to the Claimant in the

computation of final dues? He was kindly offered prorata annual leave pay, on top of the notice pay. He should accept what was given by the Respondent. ***The 2nd Claimant's Claim is dismissed in its entirety.***

23. As for the 1st Claimant, he was employed on 6th October 2011. His contract allowed for a shorter period of 3 months of probation. Dismissal was 23rd March 2012, well after the end of the probation. He had worked for about 5 months, which under the condemned Section 45[3] of the Employment Act 2007 would not have allowed him to claim under the law of unfair termination. It galls time-tested employment jurisprudence that an Employee, with no more than 5 months in service, should demand to have, the whole gamut of the unfair termination protection laws. The remedies for unfair termination include reinstatement, re-engagement and compensation. These are the remedies for unfair termination, which under the cases of ***Momanyi*** and ***Karingithi,*** Employees on probation, now have access to. Ordinarily, under the provisions of Section 42, regular employment may be preceded by up to 12 months of probation. Why should Employees on probation be considered for reinstatement, re-engagement or up to 12 months' salary in compensation? Is it for the Courts to determine the suitability of Employees on probation, or force such Employees on the Employers? This cannot have been intended by the Social Partners who are the real Authors of these laws.

24. That said, the 1st Claimant was clearly shown to suffer incompatibility at his workplace, quarreling with his Colleagues both at Nairobi and Thika. He was transferred to Delmonte in Thika, from Nairobi, to give him a chance to reform. He did not mend, and the Workshop Manager there, as well as the Security Officer wrote to the Respondent's Nairobi Office, requesting that the 1st Claimant be removed from Delmonte. He quarreled with Employees of Delmonte, which had contracted the Respondent to render transport services. Under Section 45 [2] [b] of the Employment Act 2007, an Employee's incompatibility is a fair reason for termination.

25. In ***Industrial Court of Kenya Cause Number 635 of 2010 between Dede Esi Annie Amanor- Wilks v. Actionaid International [2014] e-KLR,*** the Court upheld employee-incompatibility as a fair termination reason, observing that Employers generally are entitled to have harmonious working relationships in their Organizations, and can do so by weeding out trouble-makers, eccentrics, and disruptive Employees from their Organization. Employers are required to show that they gave such Employees the chance to explain or rectify the incompatible behaviour. The 1st Claimant was given such a chance but did not reform. He remained volcanic of disposition. The Respondent had valid and fair reason to dismiss the 1st Claimant from employment.

26. The 2nd Claimant was given a letter calling on him to show cause why disciplinary action should not be taken against him. He was called to a hearing, presided over by Owallo. There was no record availed to the Court indicating that he was accompanied by a Colleague of his choice or a Trade Union Representative at the Shop Floor level, to the hearing. The specific charges are not captured in any written document. These were procedural violations under Section 41 and 45 of the Employment Act 2007. It made no difference that the Claimant's Trade Union did not raise issues with the manner of termination. The protections are given to the Employee and are not diminished by the non-involvement of the Employee's Trade Union.

27. Considering that the 2nd Claimant had only worked for 5 months, it would be unreasonable to grant him 12 months' gross salary as compensation for unfair termination. He is allowed 1 month gross salary in compensation for the procedural violation, at Kshs. 13,958. He is not entitled to the other prayers. Both Claimants did not show to the Court what the prayer for damages for loss of gain entails. The prayer is rejected. In total:-

[a] The 1st Claimant's contract was terminated on valid and fair ground, but carried out unfairly.

[b] The Respondent shall pay to the 1st Claimant 1 month gross salary at Kshs. 13,958 in compensation for unfair termination.

[c] The 2nd Claimant's Claim is dismissed in its totality.

[d] Both Claimants to receive terminal benefits as tabulated and offered by the Respondent on the date of termination.

[e] No order on the costs and interest.

Dated and delivered at Nairobi this 18th day of September 2014

James Rika

Judge