



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1602 of 2012

JASPER ROLICLAIMANT

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD

.....RESPONDENT

JUDGEMENT

1.This is a claim dated 24th August 2012 for unlawful termination and failure to pay terminal dues. The Respondent filed their defence dated 9th November 2012 admitting that the Claimant was their employee and was dismissed legally due to misconduct and denied all the claims.

2. It was the case for the Claimant that he was employed by the Respondent on 10th January 1996 as a Trainee Factory Manager and served through the ranks at various stations and his last promotion was as the Production Coordinator at Ngere Tea Factory. He was supervised at this station by the Unit Manager following the structures of the Respondent. That on 11th February 2011 the respondent terminated his employment after he had been issued with a first warning for the reasons that on 19th August 2010 he drove motor vehicle registration number KBK 919Q without authority and caused an accident where the motor vehicle was extensively damaged. That at the time of termination he was already serving his first warning when he was terminated and the respondent was thus unfair, inhumane, irregular, oppressive, contrary to the rules of natural justice and fundamental rights of the claimant to fair administrative action and fair labour practice enshrined under the Constitution of Kenya.

3.That the Respondent was particularly unfair, irregular and in breach of the Claimants rights in that when he was issued with a notice to show cause (NTSC) on 23rd August 2010 about the motor vehicle accident, he complied and offered his defence and upon good consideration, he was issued with a first warning on 7th September 2010 in accordance with the respondent's Human Resource Policies and Procedure Manuals (2009) and thus the disciplinary process was closed by the issuance of the warning. That on 17th December 2010 the respondent re-opened the case with the Staff Disciplinary committee which decided to terminate his employment and being dissatisfied with the decision, the Claimant lodged his appeal. That on appeal some of the members who sat at the Disciplinary Committee also sat at appeal and thus he had no fair opportunity for his case.

4.That the termination was unfair in the circumstances and that all his terminal dues were not paid as the termination made him lose entitlements and benefits which he could have earned as an employee including early retirement, golden handshake, and yearly bonus and claims these losses as:

a. Severance pay/service pay gratuity of 30 days salary for every year worked being 15 years of service all amounting to Kshs.1, 357,011.60

b. Golden handshake on early retirement amounting to Kshs.100, 00.00

c. Accrued annual leave allowance amounting to Kshs.12, 000.00

d. Night-out allowance not paid amounting to Kshs.49, 700.00

e. Yearly bonus equivalent to one month's salary amounting to kshs.86, 967.44

f. Total due amounting to kshs.1, 655,179.04; and

g. Damages for unfair dismissal.

5. In evidence the Claimant stated that he was employed on 10th January 1996 as a Trainee Factory Manager, he had a letter of appointment and was later confirmed and at the time of termination he was in a management position as the Production Coordinator of Ngere Tea Factory. That previously he had served in various stations at Ragati Tea Factory in Nyeri;

Mununga Tea Factory in Kirinyaga;
Imenti Tea Factory in Meru;
Gitugi Tea Factory in Murang'a;
Chinga Tea Factory in Nyeri;
Kagwe Tea Factory in Kiambu;
Tombe Tea Factory in Nyamira;
And a station in Kericho.

6. In 2010 he was posted to Ngere Tea Factory in Thika in his last capacity as production Coordinator. He was in this position on secondment of the Respondent. That on the 19th of August 2010 while at his station of work, his boss [supervisor] Mr. Ndegwa, was on leave and the next person in authority Mr. Kinoti was on his off and therefore he was the one in charge of the station. That on this day there was no water as the pump located at the river was faulty and as a result called the watchman Mr. Samuel Bitok and used the respondent motor vehicle to go and check it. This was around 10 to 11 pm and the need for the night security. On the way back to the office they had a minor accident that was self-involving while the Claimant was driving. He reported the accident to the police and the same referred to the insurance. That he was authorised by the respondent to drive that is why he drove this vehicle without the assistance of the drivers on site.

7. Following this incident he was served with a notice to show cause (NTSC) as to why disciplinary action should not be taken against him following the accident. On 23rd August 2010 he wrote his response with an explanation on the circumstances of the accident and the reasons why he had to drive the motor vehicle to the river as water was a crucial commodity in the operations of the respondent business. That the charge in the NTSC was his use of the respondent motor vehicle without authority. Following these proceedings he was served with a 1st warning letter on 7th September 2010 and prohibited from driving any of the respondent's vehicles. This warning was to be valid for 12 months and under the HR Manual, he could get two more warning if he committed any other breach before he was terminated.

8. That he went back to his duties and in December he was summoned before the Staff Disciplinary Committee (SDC) and asked to appear to defend himself on 3rd January 2011 for the charged of driving respondent motor vehicle when he was not authorised to do so. He obliged and attended despite the charges being similar to the earlier NTSC where a decision had already been arrived at and was serving his 1st warning.

9. On 11th February 2011 he received a letter of termination the reasons being that he drove respondent motor vehicle without authority and caused an accident. He lodged his appeal and those seating on appeal were the same people seating at the Staff Disciplinary committee apart from one member. That he felt his appeal was not properly handled.

10. He now claims that by re-opening his case and ignoring the 1st warning that was already in force, he was unfairly treated and the termination equally unfair. He seeks compensation for the unfair termination. He seeks service gratuity which even though not payable during his employment was put in place after he left. He also seeks golden handshake as in a letter to all staff dated 12th May 2011 respondent staff were encouraged to take early retirement and if he had been still in employment would have been eligible and thus claims the same. That had he not been systematically discriminated against and suffered the unfair termination he would have earned these benefits.

11. Further he seeks his accrued annual leave allowance for his travel and even though he had no record of the allowance, it was due unpaid. Also when he moved on transfer he was entitled to night out allowance and when he moved from Meru to zone one Kiambu where he was entitled to the allowance for 30 days at 49,500/= he was never paid. His study expenses were also not paid since he had taken study and was issued with a certificate and upon presentation of his receipts to the respondent they refused to pay and now demand the same as due.

12. His claim for leave allowance was based on the fact that it was respondent policy that where annual leave was not taken to lapse and only 15 days would be carried over. That in 2008 he had 45 days of leave not taken. In 2010 he took 30 days leave and got travel allowance of 12,000.00 in 2007 he was paid his allowance but he did not go on annual leave. In 2009 he went on leave and he got 12,000.00 allowance. However in 2008 he only carried over 15 days as he lost the 30 days annual leave. That he did not raise the travel allowance outstanding of 12,000.00 when he did his clearance as he was so stressed up and forgot to make this demand.

13. That he was entitled to the yearly bonus payable at the end of the year and claims 86,967.44. That he is also owed damages and loss of salary and upward mobility and a Certificate of Service as he has tried to look for other jobs but needs reference from respondent which they have failed to issue.

14. On cross-examination the Claimant confirmed that being the Production Manager he required written authorization to use respondent vehicles which he did not have but in this case since the manager was on leave and there was an urgent need he used the vehicle as he had several other times before. That on the 19th of August 2010 he drove the vehicle twice to go out and check the water pump when the accident occurred around 11.30 and the policy of the respondent required prior authorization to use their vehicles before 6 am and after 6 pm. Claimant asserted he had authority to use the vehicle as his manager was on leave and could not use other authorized drivers since it would have inconvenienced other operations and that he was aware use of vehicle before 7 am to 7 pm was to be minimized. That his decision to take the vehicle was due to the fact he was the responsible officer on this day and he used it prudently as according to him he had the authority required. He did his duties in good faith, he has driven for 16 years and he had filled the work ticket and his accident was an unfortunate incident.

15. He further confirmed that he was aware of the notice that use of respondent motor vehicles at night was prohibited and could only be used upon authorization. He was cited for gross misconduct and issued with a first warning. He was aware the Staff Disciplinary Committee dismissed Mr. Mureithi over the same charges of use of respondent vehicle without authorization. That he was part of the Respondent provident fund and his NSSF and NHIF dues were remitted and that he had not applied for early retirement to be eligible for the golden handshake and on the leave allowance, he had already cleared with respondent and acknowledged to have been paid all his dues and this item was not noted as outstanding and the night-out allowance had not been approved for payment. That he had claimed for his study allowance but this was also not approved for payment.

16. The Respondent on the other hand stated that there was no double jeopardy in the termination of the Claimant and avers that the first warning issued to him was with regard to claimant driving respondent's vehicle without authority and the same was not a final disciplinary action and the officer who issued the warning lacked the mandate to close the matter by issuing the warning as this could only be issued by the Staff Disciplinary Committee. That the termination of the claimant was thus lawful, fair, in accordance of the rules of natural justice and fundamental rights and by the application of the respondent HR manual.

17. That in the NTSC he did not explain why he had taken vehicle registration KBK 919Q for over 5 hours from 6.45 to 11.4 pm not being authorised for his use and beyond the hours use policy. That the issues against the respondent were brought to his notice, he was given a chance to defend himself which he did on 24th August 2010 and that his defence was not sufficient as his statement indicating there was a water shortage was false and there are respondent witnesses to confirm that there was no water shortage requiring the Claimant to attend to the water pump or use of the vehicle to go out and check it.

18. That the first warning issued to the Claimant was only with reference to driving company vehicles and not a disciplinary action and the offence he committed was serious to warrant setting up the Staff Disciplinary Committee and the subsequent decision on appeal was accordance with due process. Therefore the claims outlined by the Claimant are not due at all as the action of the respondent was justified in the circumstances of the case. That terminal dues were paid vide letter dated 11th February 2011 which he acknowledged and cleared with a handover of all respondent property.

19. In evidence the Respondent called two witnesses Mr. Stephen Karoki and Stephen Kiragu. These are the acting Human Resource Manager and the Production Supervisor of the respondent respectively.

20. Mr. Stephen Karoki stated that as the Human Resource officer of the respondent west of the Rift Valley he is conversant with the management structure where there is a factory board, unit manager who is assisted by managers for various functions. That the respondent issued a circular dated 5th February 2002 and gave certain managers the right to use company vehicles on official duty and a Production assistant was not among those given this authority. For the Production Coordinator to use a company vehicle had to be sanctioned first. That he was aware that an officer at Ngere Tea Factory used company vehicle against the HR manual and policy and caused an accident to Vehicle registration Number KBK 919Q a double cabin pickup. He was not authorised to drive. That there was a process he could use to get authorization and the respondent thus investigated the case and found him culpable where a NTSC was issued and the first step was to give him a warning and according to the gravity of the offence other disciplinary actions were to follow like suspension, demotion or termination. That these sanctions can be simultaneously issued. That the Claimant was aware of these provisions since from his conduct of 19th August 2011 there were other cases of previous misconduct and he did not desist and thus the decision for termination was proper in his case.

21. The witness further stated that the role of water pump repairs is not for managers or Production Coordinator as this is a technical mechanical problem and the respondent has technicians on site to attend to them. According to the investigation conducted by the respondent, they established that there was no water shortage, no technician was called or the pump attendance notified of the problem and therefore the given reason for the use of the subject vehicle was not good to justify in the circumstance and thus the Claimant was not honest in this case.

22. The second limb of the charges against the Claimant was that he used respondent vehicle out of allowed hours and without authorization which was against HR policy and a condition for gross misconduct warranting termination. That he was paid his termination notice, time worked and retirement benefits and nothing is outstanding. That the golden handshake was only due to employees who applied for early retirement which was not the case of the claimant and the accrued annual leave allowance, the Claimant only had 18 days due which were fully paid for and thus nothing is outstanding. The study expenses claimed were not justified as well as the yearly bonus.

23. The second witness Stephen Kiragu that as the Production Supervisor at Ngere Tea Factory for 18 years he was the one on duty on 19th August 2011 where he received the crop from the fields which required the use of huge volumes of water and in the event there was water shortage he would have been the first to know as he coordinates the process. That on this date, there was no water shortage or problems with the water pump as the attendants did not report anything to him as per procedure required. That on 20th August 2010 he wrote to the factory unit manager about his investigations and the stated problems on 19th August 2011 where the senior Electrician and Mechanics confirmed that there was no breakdown as they were the qualified officers to check and report or be called to attend. That further to his investigations the same was investigated by factory unit manager Mr. Kinoti and Ndegwa and other

officers Mr. Cyrus Muchira and Francis Njoroge wrote statements as they were on duty at the pump on the night of 19th August 2010. These two attendants confirmed that the water pump did not have any breakage on the material date.

24. At the close of the hearing both parties submitted their written submissions and also did highlights.

25. The Claimant at this point withdrew their claim for gratuity, bonus and payment for golden-handshake. The Advocate Mr. Kuloba confirmed that the only claim now that the Claimant wishes to advance is that for:

1. Night out allowance of 49,500.00;
2. study reimbursement of 49,700.00;
3. leave travel allowance of 12,000.00; and
4. Compensation for unfair termination.

26. The Court will only assess the above 4 issues as the others have been abandoned.

Was the Claimant unfairly terminated?

Were his terminal dues all paid?

Is he entitled to compensation for unfair termination and any other dues?

27. The events of the 19th of August 2010 seem to form the bulk of the claim in Court and hence worth going back to. I note due to the use of respondent motor vehicle and the subsequent accident, the Claimant was issued with a NTSC dated 23rd August 2010 which outlined the following:

On 19th august 2010 you picked and drove the company vehicle KBK 919Q without authority (contrary to the FUM's instructions) to an undisclosed destination at 6.45 pm and came back at 11.40 pm; 5 hours later! Further, on the same night, you again picked the said vehicle and left at 11.56 pm to an undisclosed destination and without authority from the FUM and in the process caused an accident that led to the damage of the said vehicle. ... Company vehicles should only be used for official duties and within the stipulated time limits (6:00am to 6:00pm) unless otherwise advised and with express authority of the FUM...

28. This communication went further to advise the Claimant that he should show cause as to why he should not be surcharged for the repair costs of the stated vehicle as well as disciplinary action taken as per the company policy and procedures. This letter was signed by J.M. Ndegwa the FUM-Ngere.

29. The issues that were therefore pending as of this communication seem to have been:

1. use of company vehicle on two occasions without authorization;
2. use of company vehicle outside stipulated hours without authority; and
3. Causing an accident to company vehicle and damage thereon.

30. On 24th August the Claimant wrote his defence stating that:

...on 19/08/10 at around 6.30 p.m ... on opening the CTC wash down water valve, water did not flow out. I went on a fact finding mission. I told the supervisor to do dry cleaning as we had completed manufacture. Noting the magnitude lack of water, I decided to act fast to save the situation. I went to the water pump and found it was pumping.

... At around 11.00p.m, I went to my house... I realised the taps were dry. I thought the problem of water was still not solved. I went to the factory and asked the security guard to accompany me to the water

pump to find out whether it was pumping. ... On the way back to the factory I heard a loud bang. I thought it was a tire bust. The vehicle veered off the road to the left side, the brakes failed and the vehicle lost control ... [it] was slightly damaged. ... The mechanics came with the FSC and FA to site. On 20/08/10, we reported the matter to Kirwara police station.

... when I propped further on the cause of lack of water, I was informed by one Waweru, that somebody had closed a water valve from the main water tank. They themselves were not aware, nor the water attendant. Later they discovered the problem, opened the valve but closed it again after they completed using the water. It was not communicated to supervisor or me. The reason I got the CTC valve was faulty causing leakage as CTC water pump.

31. In the Court assessment of this response it does not seem to address the issues raised in the NTSC letter of 23rd August 2010. The issue of authorization, use of company vehicle outside stipulated hours and damages to the motor vehicle. This is not addressed at all in the response stated above.

32. Subsequent to this exchange from the Unit Manager and the Claimant, I note on 7th September 2010 there was further communication giving the Claimant 1st warning noting the NTSC letter and his response outlining that the Claimant had not adequately explained his whereabouts on the night of 19th August 2011 and the use of company vehicle without authority outside the stipulated hours and further that the claim on water shortage was investigated and found not to be true. The conclusion therefore was:

... In view of the above, it has been decided that you are informed in writing (and it is hereby done) that you are henceforth prohibited from driving any company vehicle. Also it has been decided to serve you with a 1ST WARNING (and it is hereby served). Upon receipt of this letter, you are required to write back to the undersigned within 48 hours stating that you have read and understood the contents here-in and that you commit to abide by the same.

33. This letter was signed by J.M. Ndegwa, the FUM-Ngere and copied to regional manager, HORO, G.M. HRADM and OD. On 22nd September 2010, the Claimant wrote back his undertaking to abide by the condition given and copied the same officers as in the letter from J.M. Ndegwa, FUM-Ngere.

34. In the assessment of the issues herein, this Court is guided by the letters of employment as between the parties, policy manual agreed on between the parties and the law in this regard as applicable. The letter of appointment is very instructive as the termination clause; either party can terminate upon giving notice of three months or payment in lieu of such notice. However the HR manual gives further interpretation to the letter of employment. Termination can occur after disciplinary proceedings and under part Six of the Respondent HR manual at 6.1.6:

Depending on the gravity of the breach, the Company may take any or more of the following actions against an employee:-

a. verbal warning/counseling;

b. warning in writing;

c. subject to the statutory provisions on authorised deductions, recover from the employee's pay the whole or part of such pay to defray pecuniary loss caused to the company by negligence, default, or breach of orders;

d. suspend;

e. demote (as management may find appropriate);

f. terminate;

g. dismiss

(emphasis added)

35. these are the conditions that help interpret the termination clause in the contract of the Claimant. And in the Court Assessment, the above seven sanctions can be issued in singular or in multiple 'depending on the gravity of the breach'. This is the condition precedent to arriving at any given sanction or sanctions.

36. Under the applicable law, Section 44 on summary dismissal gives the circumstances within which an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Under part Section 44 (4) (g);

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

37. The above notwithstanding an employer who seeks to apply the provisions of Section 44(4) must also comply with the provisions of Section 41 of the Act thus prescribing notification of alleged misconduct and hearing before termination. even where the circumstances are such that the grounds for removal are such that they do not amount to gross misconduct, Section 41 (2) still apply and an employee is entitled to the full protection of the Section. Therefore, before invoking the provisions of Section 44(4) of the Employment Act, an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can make representations and which representations the employer should consider before making a decision to dismiss the employee. This is what is universally referred to as procedural fairness within the industrial relations legal framework.

38. Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct

39. I note the letter dated 23rd August 2010 issued by J. M. Ndegwa the FUM – Ngere Tea Factory, started the process of giving the Claimant the opportunity to make his representations and indeed he made a response on 24th August 2010 in enjoyment of his right to defence. The decision communicated to him on 7th September 2010 by the same J.M. Ndegwa was equally binding noting that he acted for an on behalf of the respondent and the Respondent cannot be found to denounce actions undertaken by their officer in execution of his duties. Whatever this officer did was in his capacity as an officer in a responsible position of the respondent.

40. Having been granted the opportunity for a fair hearing in the first instance was the Respondent entitled to issue a sanction against the Claimant? As noted, under the HR Manual the available sanctions could be issued in singular or multiple. Also under the applicable law Section 44 (4) (g), the offence committed by the Claimant warranted summary dismissal.

Did the Respondent therefore apply these sanctions in a reasonable manner?

41. I find The NTSC issued to the Claimant most informative and the response therein where the Claimant decided to go on a tangent on his own instead of responding to the issues raised which were serious and weighty. The duty rested on him to prove that he had authority to use the Respondent motor vehicle as well as authority to use the same outside the stipulated hours and was therefore responsible for the damage thereon. His insistence that he had driven respondent vehicles before this incident is equally not supported by any evidence.

42. Therefore the subsequent action to call him before the Staff Disciplinary Committee based on the 1st warning issued was not exclusive based on the gravity of the charges facing him and his failure to effectively respond to the issues addressed in the NTSC. There were valid reasons and the Respondent acted fairly.

43. However, even where the Claimant was subject to these sanctions of a warning as well as the others outlined, I note under the Respondent HR Manual he had a right of appeal against the decision of the Staff Disciplinary Committee which he did. This is also commensurate to Section 45 of the Employment Act. At Section 45(5) (a);

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

43. An appeal in its essence is supposed to give a party another chance for hearing. If one is dissatisfied with any decision, this Court notes the inherent right of appeal to another body separate from the previous to allow another impartial decision is important. That right does not abet simply because a party has been found to have acted in a gross manner. The right of appeal is a constitutional right that actualizes the right of access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should be impartial, free from anything that renders its decision seen as lacking this impartiality as this would impinge on the very right of appeal. That right subsists and upon good grounds being advanced that body in appeal can actually confirm or overturn the decision of the previous body in this case the Staff Disciplinary Committee.

44. I find in this case, the Staff Disciplinary Committee seating on 3rd February 2011 comprised:

1. *Mr. PM Ndivo as Chair*
2. *Mr. D Kamau as Member*
3. *Mr. M Karuiru as member*
4. *Mr. A Njagi as member*
5. *Ms G Korir as member*
6. *Mr. B Ayub as Secretary*

Also in attendance were

1. *Mr. N Kirera*
2. *Mr. E Rono*
3. *Mr. C Gikunju*
4. *Mr. S Ngure*

And those absent with apologies were

1. *Mr. A Otochi being a Member and*
2. *Mr. D Mbugua being a Member*

45. The Staff Appeal Committee met on the 9th June 2011. Though the claimant stated that he was not given an opportunity to appear before the Appeal committee he states at paragraph 7 (e) of the Claim that he submitted his grounds of appeal. But a third of those present at the SDC were the same people that sat at the Staff Appeal Committee. This evidence was not denied by the Respondent in any material way.

46. An appeal being a right under the Respondent disciplinary process and also a right under the Employment Act as well as a fundamental requirement in natural justice and noting the circumstance of this case, I find in this regard the Respondent failed and did not give the Respondent all the available opportunities to argue his case before an impartial body to be decided fairly. This is an employee who had served for 15 years and the respondent ought to have acted fairly. On the basis that the appeal body was not impartial in the circumstances of this case, I find this to be unfair termination.

47. On the terminal dues owing, I find the claim for night out allowance was an issue that the Claimant should have raised before his termination, the same had not been approved and related to allowances due on 22nd March 2001 way out of the limitation period as under Section 90 of the Employment Act.

48. The Claim for leave travel allowance though provided for under Section 91(f) (iii) had already lapsed and based on the provisions under Section 28 (4), the Court will not grant this prayer.

49. The claim for study reimbursement, I find the practice of the respondent was to first apply for the study and the same be assessed to be relevant to the needs of the Respondent upon which an approval would be granted. No such application or approval was submitted in evidence. I find the evidence of the respondent in this regard credible that staff were aware of the requirement to apply before undertaking any study to enable the respondent determine allocation of available resources in this regard. I will therefore not grant in this regard.

50. Having established that the Claimant was not fairly treated on appeal and the same was unfair, I will award one month salary as compensation being the sum of Kshs.86, 967.44.

Accordingly, judgment is entered for the claimant against the Respondent for:

- (a) a declaration that the termination of employment of the claimant by the respondent was unfair;**
- (b) the respondent to pay the claimants a sum of Ksh.86,967.44**
- (c) The respondent to pay the costs of the case.**

These are the orders of this Court.

Delivered in open court at Nairobi this 25th day of March, 2013.

Monica Mbaru
JUDGE

In the presence of

.....
.....

Court clerk