



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 121 of 2012**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**KILIFI PLANTATION LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant has brought this suit on behalf of Mr. Joseph Ndungo hereinafter called the grievant claiming employment terminal benefits and compensation for wrongful and unfair termination of employment by the Respondent.

The respondent had denied liability and sought to justify her decision to dismiss the grievant on ground of Negligent Performance of work.

The case came up for hearing on 29.11.2012 when Dalphin Muunde and Mr. Ombok appearing for the Claimant and Respondent respectively agreed to proceed by way of filing written submission upon which the court would make a decision.

I have carefully perused and considered the pleadings and the written submissions filed on behalf of each party to the suit. It is not in dispute that the grievant was employed by the respondent as pleaded by both parties. It is also not in dispute that the contract between the grievant and the respondent was governed by the Collective Bargaining Agreement (CBA) between the claimant and the Respondent marked as exhibit 1 for the Respondent and Exhibit A for the claimant.

It is also not in dispute that the grievant was suspended from work on 30.8.2008 and eventually dismissed on 6.9.2008 vide letters marked as exhibit D and D1 for the claimant.

As a consequence of the foregoing undisputed facts, this court has the jurisdiction to entertain the dispute as donated under Article 162(a) of the Constitution and section 12 of the Industrial Court Act (ICA).

The issues in dispute are;-

1. Whether the suit is incompetent for want of a Verifying Affidavit?
2. Whether the respondent has wrongfully and unfairly terminated the grievant's employment?

### 3. Whether the grievant is entitled to the reliefs sought?

To answer the first issue, I have considered several provisions of the law. Rule 5 of the Industrial Court Procedure Rules (ICPR) provides in mandatory terms that a statement of claim filed under rule 4 “shall” be accompanied by an affidavit verifying the facts to be relied upon. Rule 6(1)(b) of ICPR, then clarifies that where a trade dispute is referred to the court in accordance with the provisions of the Labour Relations Act (LRA), where the trade dispute has been subject of conciliation, the statement of claim shall be accompanied by the conciliator's reports and minutes in support and a Certificate of Conciliation issued by the conciliator under section 69(a) of LRA.

In the present case, there is the Claim and the Conciliator's Certificate but no affidavit to verify the facts relied upon by the claimant. The question in my mind is whether the lack of the verifying affidavit renders a suit a nullity because of mere legal requirements or because it affects the validity of the facts relied upon by the claimant?

In my view, the argument that the lack of verifying affidavit is fatal to the suit is not grounded on any jurisprudential argument but only because the rules of procedure provide for it. Consequently I will be guided by Article 159 of the constitution and section 20(1) of the ICA to deem the requirement of a verifying affidavit non-fatal legal technicality which this court will not have undue regard to in deciding the outstanding dispute. I will therefore not strike the Suit because the lack of the Verifying Affidavit would not affect the validity of the documentary evidence on record. The parties agreed voluntarily to dispense with oral testimonies from witnesses and thereby bound themselves to submit on the documents filed. In my view the objection should have been raised in the defence or before the consent to ask for the Suit to be struck out *in limine*. In any event the documents relied upon by the claimant emanate from the respondent and therefore the objection at this point in time is late and an after thought. This view is fortified also by the priority given in the written submissions where it was raised as the last issue after submitting on all the substantive issues. The space given in the submission and the lack of Judicial Precedents to support the objection cannot also go unnoticed. Consequently the objection for want of the verifying affidavit is dismissed in favour of substantive justice.

Turning to the substantive issues, I will start with the issue of wrongful termination. Exhibit D1 is the Summary Dismissal Letter dated 6.9.2008. it refers to warning letters dated 26.7.2008 and 30.8.2008 and then dismisses him for negligence at work which was gross misconduct under section 44(4)(c). The letter offered to pay salary for accrued days worked, overtime, leave and one way transport. The letter was by the Human Resources Manager a Mr. Joseph Rotich. The claimant contends that such dismissal was wrongful in the face of section 41 of the Employment Act.

Section 41(a) provides in mandatory terms that an employer shall before terminating the employment of an employee on ground of misconduct, poor performance or physical incapacity, explain to the employee, in a language he understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice during the explanation. Section 41(2) provides again in mandatory terms that before terminating the employment of an employee or summarily dismissing an employee under section 44(3) and (4) that employer shall hear and consider any representations made by the employee and the person she chooses to accompany him under section 4(1) on the grounds of misconduct or poor performance.

The burden to prove that the unfair termination is on the employee while the burden of justifying the grounds for termination or dismissal rests on the employer under section 47(5).

The claimant has averred that the grievant was denied his rights under section 41 of the employment Act. He denies ever being given a disciplinary hearing before the dismissal. According to him, he was never served with any warning letters dated 26.7.2008 and 30.8.2008 but only a letter referring him to the Human Resources Manager for further Communication. The next communication was a verbal dismissal followed by a letter dated 6.9.2008. The grievant denies the authenticity of the alleged minutes of the disciplinary hearing on 30.8.2008 marked as Respondent's Exhibit 5. According to him, the minutes are not signed.

The claimant has also denied the validity of the reason relied upon by the respondent in dismissing the grievant. According to her the grievant was not a trained technician or mechanic and the maintenance of machines were not within the scope of his duties. She adduced the employment letter to show that he was not a machinist but a panel beater.

The respondent on the other hand, has contented that the grievant was diligent performer until July 2008 when he poorly did his work leading to machine breakdown and for which he was given a warning letter. That he repeated the same misconduct between 15th to 21<sup>st</sup> August 2008 leading to breakdown of machine. That on 30.8.2008, the grievant was advised by letter dated 30.8.2008 to see the HRM for a disciplinary hearing which letter was copied to the claimant's branch office and the shopsteward. That during the disciplinary hearing, the grievant admitted the misconduct as charged which led to the summary dismissal.

The question to answer is whether section 41 of the Act was complied with. The answer is simply that the respondent did not comply with section 41 of the Act. Firstly, the letter dated 30.8.2008 was by the senior most officer of the respondent. It did not mention the word hearing or show cause anywhere. It shows the fate of the grievant had been sealed. The letter did not even give any instructions to the HRM on what nature of communication he was to give to the grievant. In my view, no hearing was done and the alleged minutes marked respondent's exhibits 5 are not minutes by all standards. It is only a piece of paper whose author is mysterious. It does not even tell the nature of the meeting it was about nor does it tell who was the chair or secretary. It does not tell whether the grievant's rights under section 41 were granted. It does not also say who was the prosecutor and who were the witnesses. There is no connection between the alleged minutes of meeting and the letter dated 30.8.2008. In my view, the alleged hearing even if it was to be believed to have taken place, the same would not be just and equitable within the meaning of section 45 of the Act.

As regards the validity of the reason for termination, I am persuaded by the appointment letter produced as Respondents exhibit 2 and the arguments by the claimant that the duty to maintain machinery was not within the job description of the grievant's employment. The letter says that the grievant is employed as a Panel Beater whose duties were to be directed by the Respondent from time to time depending on situations. To me that is vague job description for an employee with a particular line of skill. This was in breach of section 10(2)(c) which requires that the employer shall state the job description of the employment in the letter of employment. In my view, that provision is vital in protecting the parties to the contract in cases like the present one. There is no relationship between employment to do panel beating and maintaining machinery in this case. I blame the respondent for not providing the link through evidence.

As such, it is my finding that the reason upon which the dismissal was grounded to be invalid and not proved as required under section 43, 45 and 47(b) of the Employment Act. Consequently, the court finds and hold that the summary dismissal was wrongful and therefore unfair within the meaning of section 45 of the Employment Act.

The last issue to consider is that of the reliefs sought. Section 47 provides for notice pay, accrued salaries, accrued leave and other benefits necessitated by the termination plus a maximum of twelve months gross salary for unfair termination. The claimant prays for 3 months salary in lieu of notice, 15-days gratuity pay per year of service, annual leave for the year 2008, baggage allowance, 12 months compensation for loss of job, and a certificate of service. The respondent in the dismissal letter offered to pay for accrued salary, overtime, prorata leave and one-way transport. The respondent did not however provide any calculations.

This court will award damages in respect of termination notice, service gratuities, accrued salary for 6 days September 2008, leave on prorata basis as prayed and 12 months compensation for unfair termination.

Clause 12(a)(111) of the CBA marked respondent exhibit 1 entitles the grievant to 3 months termination because he had served for over 5 years continuously before the termination. I therefore award him

Kshs.14340X3 which total to Kshs. 43,020/=.

As regards the prayer for Service Pay, clause 23 of the CBA entitles the grievant to 15 days per complete year of service. This translates to  $15 \times 5 \times \text{Kshs.}14340$  which equals to Kshs. 35,850/=. The claimant's prayer for annual leave prorated as  $5/12 \times 14340$  to give Kshs.5975 has not been contraverted and I will therefore award it.

I will not award leave travelling allowance because the grievant was not going for leave but was being dismissed.

The Baggage allowance prayed for is not provided for clearly in the CBA but the respondent had offered to pay. I will not make the award but leave it to the respondent because I believe that the respondent acted gratuitously in the offer.

On the unfair termination, I award Kshs.  $14340 \times 12$  which equals to Kshs. 172,080/=. I will award the grievant salary for the six days in September 2008 before dismissal which is  $\text{kshs. } 14340 \times 6/30 = 2868$ .

In summary I enter judgment in favour of the claimant and against the respondent as follows:-

- (a) The dismissal of grievant from employment by the respondent is declared unprocedural, wrongful and illegal and therefore unfair.
- (b) The respondent is ordered to pay the grievant Kshs. 259793/=.
- (c) The respondent is ordered to issue the grievant with a certificate of service.
- (d) The respondent will also pay costs of the Suit plus interest.

**Signed, Dated and Delivered** on the 12<sup>th</sup> day of April 2013.

**Onesmus N. Makau**  
**JUDGE**