



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 698 OF 2010

JAMES KIBATHI CERE.....CLAIMANT

VERSUS

WILHAM K. LIMITED.....RESPONDENT

JUDGEMENT

1. On 8th October 2012 the appearances were as follows:- Mr. Ndegwa appeared for the Claimant while Mr. Nyaberi appeared for the Respondent. The Claimant's Claim was against the Respondent for resolution of a dispute he framed under two heads -

A. unfair and/or illegal termination of employment

B. non-payment of dues owed to Claimant

The Claim was opposed by the Respondent who filed a Memorandum of Response. The Respondent pleaded that the Claimant was not declared redundant but his contract of service was terminated.

2. The Claimant James Cere Kebathi testified. He stated that he was the Claimant in this suit which was about termination of work. He testified that he worked for 11½ year and was unlawfully terminated on basis that he did not report on duty on a certain date. He thus sought intervention of the Court to ensure that he got compensated for the lost time and years. He testified that 6th November 2008 was declared a public holiday as a result of the election of the 44th US President Barrack Obama. He testified that the announcement was made when he was away at a funeral and he had been authorized to be away. He stated that he informed his senior George Solomon by phone and told him that since it was a holiday and because there was a sequence of work between the 4 managers and since we were not always busy on the holiday 1-2 managers would manage the staff in the absence of the others.

3. He had worked for 11½ years before he was terminated. He started working for the Respondent on 11th May 1997 as a Pack Shed Manager Day and he was Pack House Manager at time of termination. He testified that he was last in the office on 8th December 2008 which was the day he was to report after summary dismissal. He was to return on 7th November 2008 after the leave and public holiday. He was served with a show cause notice dated 7th November 2008 and he explained orally and in writing why he was absent from work. He got another letter suspending him and which required him to come back to work on 8th December. He testified that on 8th December, he went to his office but found someone else in his office. He went to the Human Resource office and found Priscah and was told that Damaris who is the Group Human Resource Manager was handling his case and she was not in. He was told to report on 18th December 2008. He returned on 18th December and Damaris – the Group HR was not in. She had

visited the farms and he asked for another date and returned in January. He testified that he had been affected by the state of affairs and he went to Nakuru to look for work. When he went back on 16th January 2009 he met Damaris and she told him to come back on 20th January 2009. On 20th January 2009 the Group HR Manager was in a meeting and Priscah tried to reach her on phone but could not get her. He waited for half of the day then he went home. He was bothered by this state of affairs. He found a job in Nakuru on 7th March 2009. He came to Nairobi and sought his dues if he had been terminated or an explanation as to when he would report back to work. When he met Damaris on 7th March 2009 he was given a summary dismissal letter which he declined to sign as he need to consult his lawyer. Later in March he got a letter of termination through the post office and he did not get any reply to his letters. The only letter he got was the letter in his mail. He was not paid any dues on termination until he sought legal advice. It was only in January 2012, that he got payment. The sum was on judgment on admission for Kshs. 172,726/=.

4. He got a warning in September 2008 and he was suspicious of this and kept records. He wrote mails to the Respondent. The Respondent dealt in produce and sometimes there were delays from the field and he maintained that he gave satisfactory explanations. There were no replies, to the mail he wrote, in writing.

5. He testified that there were others who were discharged at around the same time – Charles Musau, Beatrice Matheni, Paul Mukuhi, Betwel Maina and many more who he could not name. He stated that the year was a bad year and the economy was not good and there was resizing, the company had to reduce the labour. He was directed to do so and he had to reduce staff. His, he thought, was on that line. He testified that he was terminated and that it was not true that he absconded. He felt that the employer wanted to get rid of him. If the contract was followed to the letter, the reasons for termination were not correct. He thus sought his terminal dues, severance pay, accruing benefits as per his contract, notice pay for 2 months, 7 days leave not taken. His earnings were Kshs. 74,042/= per month. He was also entitled to 3 off days accumulated but not taken. The Severance pay etc. he seeks are for the 11½ years. He urged the Court to grant his claim.

6. He had served a demand notice through his lawyer and the Respondent responded to his lawyer but no response was given to the demands. He readily admitted to receiving some amount paid after coming to Court to the tune of Kshs. 172,726/=.

7. In Cross-Exam by Mr. Nyaberi for the Respondent, he testified that he was employed for 11½ years. As at the time he was earning Kshs. 12,000/=. On the letter of employment, there was an amount of Kshs. 25,000/=. This included bonuses. Bonuses could be earned depending on the achievements of targets. He testified that he never failed to meet these. His duties as Pack-shed Manager were:

- Labour organization
- Orders completion according to customers specifications.

8. The orders were processed by the Company for export. For the produce to be exported they had to reserve space on aircraft. The shipping was under a different Department but it was his duty to ensure the shipment was in order. The portfolio he held was crucial. It was crucial for the 11½ years he worked for the Respondent. The space on aircraft if not filled with produce could remain empty. He testified that the role he held was crucial in the day to day running of the company. The salary was adjusted gradually and in 1998 it amounted to Kshs. 50,000/=. As he was promoted, the amount rose gradually. No other letter for appointment was given he only had payslips as proof of the increases. He testified that in September 2008 there were problems and he received a first Notice to Show Cause which he received on 8th September. On 7th November he got 2 letters. One from Priscah and another which was a follow up. The letter of 13th September 2008 was after the first show cause notice. He testified that the Notice of 8th September was not work related while the Notice of 13th September 2008 was the first which was work related.

9. He was asked whether he consistently fail to release shifts on time and he answered that sometimes he

did not release shifts on time. As to whether he always met targets, he stated that he did so almost 100% and when he did not he would give an explanation. He testified that he was the only one in charge of pack-house. There was a quality check manager and none of the others received similar letters. He confirmed that he received the letter advising him that his performance was under scrutiny. As regards his absence on 6th November 2008 he testified that 2 managers stepped in on his behalf. On his part he had stepped in for other managers on October 20th. He testified that on 18th August 2008 he was to go on his annual leave and his leave was approved on Friday but the manager failed to communicate and he reported to work on Monday. He then proceeded to go on leave and the leave was to end one month later. He stated that for 11½ years he had never had serious issues with the company. He was referred to a summary of shortfalls as exhibited on Annexure C3. He confirmed that there was shortage of tonnage specifically 9.4 tonnes which had an average revenue of Kshs. 2.6 million. He admitted that he was partly responsible for supply of orders as per client needs. Once raw material was in place he was to ensure package. He testified that if you get the raw material shortage the final will be less.

10. The termination was on 1 month's notice or pay if service was less than 2 years. He testified that he did not receive notice of termination. He was paid Kshs. 172,000/= and he had 7 days leave and 3 unpaid rest days. He stated that pay in lieu of notice was to be for 2 months. He testified that he did not retire and that he was willing to work. He testified that he was forced out and has not attained 65 years. He denied that he was summarily dismissed. He stated that there was no communication between himself and Human Resource on performance. He testified that his suspension was to be without pay as per the letter exhibited as C8.

11. In Re-Examination by counsel Ndegwa, the Claimant stated that the salary he was earning was Kshs. 50,000/=. It was made up of Kshs . 25,000 salary, Bonuses of Kshs. 15,000, Kshs. 10,000/= making a total of Kshs. 50,000/=. The take home was 50,000/= and there was no month he took less than 50,000/-. He testified that the amount of Kshs. 70,000/= is from the year 2000 as basic salary. He stated that the loss of tonnage is normal and that the shortfall was beyond his control as it happens due to non-deliveries. He testified that the manager's duties are not similar but they would step in where one person is absent. The duties overlapped. His Annual leave was communicated on Monday which was late. He testified that it was normal for one to have an extension if leave was taken late. He testified that he informed his supervisor of the 4 days he'd be away and he also informed the manager he'd be absent. He stated that his salary was not to be paid in December as per letter and the issue of salary for September, November, January and February was not addressed. He testified that the termination was for absenteeism not performance. He was terminated at 39 years and thus claimed the sum for the pay he would have received till retirement.

12. The Claimant called a witness Elizabeth Wamaitha Waweru a businesswoman at Gikomba market. She testified that she used to work together with the Claimant at Wilham for 15 years as a receptionist. She was terminated by Wilham because the company was not doing well and her termination was on basis of redundancy. She produced her letter of termination and letter of employment as Exhibit 1 and 2 for the Defence. She was not paid immediately and was only paid after filing suit. She testified that some 50 or so employees left at the same time. She testified that leave was at times extended and this was not uncommon.

13. In Cross Exam by counsel Nyaberi she testified that she had no claim whatsoever since the matter was settled. She testified that the Claimant was a senior officer at the packhouse. He used to delegate duties to persons in the Packhouse Department. She testified that the termination was not all on the same dates. Some went on leave and on resuming the letters were given. In her letter she was told there were issues of global economic downturn. She did not know why the Claimant was terminated. She testified that most of her colleagues got letters of termination even for small mistakes. She testified that James (the Claimant) was a manager and they all used to extend their leave.

14. The Respondent called Beatrice Anam who testified that she worked with the Respondent Wilham as a Human Resource Assistant. Her duties are orientation of new employees, filing and WIBA issues. She joined the Respondent in 2009 and has access to employee files for both previous and present employees. She testified that she accessed records for Claimant and that he was employed on 8th May 1997 and he

was promoted in 2004. At his termination salary was Kshs. 85,500/= with house allowance of Kshs. 12,375/=. The mode of termination was provided for in the contract and the benefits excluded on Termination are also given. He did not execute his duties properly and he was given several warnings to show cause. The last show cause was the grounds for the Claimant's termination. She testified that he was not efficient, there was absenteeism and there were leadership gaps. She testified that these issues are documented. She referred to the memos on Shift timings and Performance index. She testified that there is issue of inefficiency as he did not release the shift in time, he did not meet production targets. He was given a show cause and he was warned there would be immediate separation if he did not improve. His services were terminated after a few other show cause letters. She testified that the Respondent paid his terminal benefits and there are other sums which were settled during pendency of this suit. He was given pay for the 2 months by cheque and his termination was in line with the terms of contract. The issue was not referred to Labour. There is a cheque which was prepared for payments due to him. She stated that separation was not by way of redundancy and the Claim should be dismissed as the Claimant was paid his terminal dues.

17. In Cross-Exam by counsel Ndegwa she testified that in the years 2008-2009 she do not know the exact number of staff who left. She testified that less than 10 left. She testified that she went through the files, and the only ones she noticed were 10. She stated the issue with the Claimant was shift timings and performance index. She admitted there was no efficiency or reference to his substandard performances. She testified that the Claimant was not separated on 20th September 2008. Show cause Notice is dated 8th September 2008 and it was for stern disciplinary action. The Claimant was given a warning and 7 days lapsed on 19th or 21st and the termination took place on March 18th March 2009. She testified that the show cause does not make reference to the previous letter. The Claimant responded to the Memo on 8th September 2012 and the next show cause was on 7th November which was approximately 2 months after. She testified that the Claimant did not come to work as per the Muster Roll which is taken by HR. He was to report to HR. She did not know whether the Claimant came back to work at all.

16. In Re-Exam by Nyaberi, she testified that between 2008 and 2009 some staff left and the reasons for leaving were not the same. She testified that the evidence produced related to conduct and execution of duties by the Claimant and there is more than 1 notice to show cause. She testified that reasons why the Respondent sought the Claimant to show cause are not the same and they are not similar. She stated that the suspension was in accordance with Employment Act. She testified that time lines on show cause were given and not all Notices to show cause were responded to.

17. The Claimant confirmed that he received the letter advising him that his performance was under scrutiny. The letter was clear failure to meet the requirement would lead to termination (immediate separation). The Claimant received the Show cause on 8th November 2008 and the suspension was on 7th November 2008. Both letters are dated 7th November 2008. Suspension was issued at the time as the show cause. This cannot be. The suspension was received before notice to show cause. Previously when the Claimant was given a notice to show cause he responded and duly showed cause. To my mind, I think he would have at least made an effort to show cause if he had been given an opportunity to do so. As to whether that would have sufficed to save his skin is another matter.

18. Section 41 of the Employment Act 2007 provides that prior to terminating an employee for poor performance or misconduct that certain strictures be followed. It provides as follows:-

41. (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.

19. There was therefore need for the Claimant to be afforded an opportunity to hear the reasons for the termination and thereafter be allowed to make representation. He was not granted this. In my finding, this was material to the termination. Failing to adhere to this requirement means that the termination was unfair within the meaning of Section 45.

20. The Claimant had been employed by the Respondent for 11 and a half years. The manner of the separation was most unfair taking this into account. There may have been cause to terminate and the Court would not interfere but where the provisions of statute are so blatantly breached as was the case here, the Court would find for the Claimant. He has been paid most of his dues.

21. The Claimant's suspension was from November 2008 till March when the contract was terminated. In the premises I award him salary for the 5 months he was out of the office on suspension. The defence witness testified that his salary was Kshs, 85,500/- per month. I also order that he be paid compensation for 6 months for the unlawful dismissal. In the final result I enter judgment for the Claimant in the sum of Kshs. 940,000/- with costs and interest at Court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this **14th** day of **June** 2013

Hon. Mr. Justice Nzioki wa Makau

Judge