



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 123 OF 2013

(Formerly Cause No. 1158 of 2010 at Nairobi)

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNIONCLAIMANT**

-VERSUS-

**EASTERN PRODUCE KENYA
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 4th October, 2013)

JUDGMENT

The claimant filed the memorandum of claim dated 24.09.2010 on behalf of its member Vincent Amwoga, the grievant. The claimant prayed for:

- a. **A declaration that the summary dismissal of the grievant was unjustified and unfair.**
- b. **The respondent to reinstate the grievant and pay for all months the grievant was out of work as per section 49 (3) (a) of the Employment Act, 2007.**
- c. **In alternative, the summary dismissal be reduced to normal termination and the grievant be awarded his terminal dues as per the collective bargaining agreement being Kshs.166,454.00 comprising gratuity, 2 months notice, transport, back pay for January to March, and unpaid 18 days in April, 2010.**
- d. **The respondent to pay grievant's costs during the conciliatory process being Kshs.10,000.00.**
- e. **Interest and costs of the suit.**

The respondent's memorandum of defence was dated 11.02.2011 and filed through Kaplan & Stratton Advocates. The respondent submitted that the claimant's case was an abuse of court process, contrary to good industrial relations and should be dismissed with costs to the respondent.

The case was heard on 15.07.2013. The grievant testified to support his case. The respondent's witnesses were Elisha Okelo Oyuga, the respondent's internal auditor (**RW1**) and Amos Odalo Etunya, respondent's senior estate manager (**RW2**).

The grievant was employed by the respondent as a general labourer on 20.11.1992 to 1996 when he was promoted to a driver. He testified that on Friday 16.04.2010, he reported on duty at 7.00 am and RW2

told him to go back home and to collect a letter on Monday. He was not aware of any issue against him.

On Monday 19.04.2010, he went to collect the letter. It was a termination letter and it stated as follows:

“RE: TERMINATION ON GROSS MISCONDUCT

This is to inform you that your services have been terminated with immediate effect.

On 16th April 2010, you being a tractor driver charged with responsibility of ferrying leaf to the factory deliberately left 17 bags of leaf weighing 197 kgs in field 23 with intentions to use this to offset some kilos defrauded in zone A earlier in the day.

Following this unbecoming conduct, you have proved beyond any reasonable doubt that you are not responsible enough to take care of company property. You are therefore terminated under gross misconduct effective 19th April 2010.

You are requested to return all company tools in your possession before collecting your dues as per the CBA.

Yours faithfully,

Signed

A.O ETUNYA

SENIOR ESTATE MANAGER

FOR:

EASTERNPRODUCE KENYA LIMITED

SITOI ESTATE”

At termination, the grievant’s gross monthly salary was Kshs.9,037.00 as per the April pay slip produced and marked as **Exhibit C1**.

The grievant testified that he was not involved in any fraud. His work was to drive the tractor. The turn boys were responsible for loading and off loading. He had served for 17 years without any complaint about his service delivery. Following the termination, he had failed to secure any employment.

The evidence shows that subsequent to the termination, there were meetings between the claimant, the respondent and the labour officer.

RW1 testified that the reason the grievant was dismissed was due to discrepancy in the weight of green tea leaves loaded at the field and delivered at the factory on the tractor driven by the grievant. RW1 failed to explain the checks and balances in the respondent’s operational system under which the loss was attributable to the grievant. At no point was the grievant involved in the inquiry to establish a conspiracy leading to the loss as alleged by RW1. The audit recommendation by RW1 was that due process be followed in punishing the culprits. RW1 admitted that the grievant was not accorded such due process because, in his view, the recommendation was not binding.

RW2’s evidence was that meetings to discuss the grievant’s case were held long after the dismissal. *Folio 29* on the bundle of the memorandum of defence is the letter by the District Labour Officer in Nandi showing that after long discussions, the parties agreed that the grievant writes an apology letter to the branch secretary to enable him continue helping the grievant to resolve the case. It was noted that the grievant had served for 17 years and the dismissal would be reduced to normal termination for the

grievant to be paid gratuity and notice. The respondent's management and shop stewards met on 22.04.2010 in absence of the grievant and long after termination on 19.04.2010 and agreed thus,

“Vincent has been found to have defrauded the company by tarring wrong trailers hence the termination on gross misconduct stands. He will be paid his wages and overtime worked up to 19.04.2010, leave prorata and fares one way. He loses his gratuity payments as per the CBA chapter 35 clause C.”

The court has considered the pleadings, evidence, submissions and the issues in dispute. The court makes the following findings:

1. The first issue in dispute is whether the termination was unfair. It is obvious that the grievant was not accorded a notice and a hearing prior to the termination of employment on 19.04.2012. That failure was contrary to sections 41 and 44 of the Employment Act, 2007. The court finds that the termination was unfair. The claimant was dismissed without any notice and hearing and as the court has held in previous similar cases, affording the employee a hearing even in cases of gross misconduct is a mandatory statutory requirement. Thus, in **SHANKAR SAKLANI -VERSUS- DHL GLOBAL FORWARDING (K) LIMITED, Industrial Court Cause No. 562 of 2012 at Nairobi**, this court stated thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

2. The next issue for determination is whether the agreement between the shop stewards and the management on 22.04.2010 in absence of the grievant and long after termination on 19.04.2010 served as bar to the claimant and the grievant making the claims in this case. First, the court finds that the meeting served no purpose because it merely upheld the dismissal of 19.04.2010 which the court has found was illegal and unfair; the agreement, in the opinion of the court validated a nullity and was therefore in itself a nullity. Secondly, the meeting was founded on no statutory or agreed procedure between the parties and the court finds that it was not open for the respondent and the shop stewards to invent a strange and illegal procedure of validating the grievant's otherwise unfair termination. Thirdly, the agreement was not a disclaimer by the claimant that the claimant was absolving the respondent from future liability in the case of the grievant's termination. Accordingly, the court finds that there is no valid plea by the respondent operating as a bar to the suit as founded upon the respondent's and shop stewards' meeting of 22.04.2010 as the authorities cited for the respondent on the binding nature of contracts do not apply to the current case.
3. The final issue for determination is whether the claimant is entitled to the prayers made. The court

makes the following findings:

- a. The claimant is entitled to **Kshs.166,454.00** as prayed for in paragraph 3.3 of the memorandum of claim.
- b. In absence of any mitigating factors by the respondent and in view of the unfair termination, the grievant is entitled to twelve months gross salaries being **Kshs.108,444.00** at Kshs.9,037.00 per month.
- c. The respondent to pay the costs of **Kshs.10,000.00** as claimed under paragraph 3.5 of the memorandum of claim the same having been not denied and the court therefore deeming the same admitted by the respondent.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the termination of the grievant's employment by summary dismissal was unfair.
- b. The respondent to pay the grievant Kshs.284,898.00 by 1.12.2013, in default interest at court rates to be payable from the date of the judgment till full payment.
- c. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 4th October, 2013.

BYRAM ONGAYA

JUDGE