REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 285 OF 2012

UNION OF NATIONAL RESEARCH AND

ALLIED INSTITUTES STAFF OF KENYA (UNRISK) ……………..CLAIMANT

VERSUS

KENYA INDUSTRIAL RESEARCH AND

DEVELOPMENT INSTITUTE (KIRDI) ………………………….. RESPONDENT

JUDGEMENT

1.The claim herein was filed on 24th February 2012. The claimant UNRISK filed this claim on behalf of the grievant Walter Odede Mijoge for his wrongful and unprocedural termination from his employment by the respondent KIRDI. The respondents filed their defence on 30th March 2012 and admit the grievant was their employee but were dismissed for gross misconduct and deny all the other claimants. Parties were heard where the claimant called the grievant in evidence and the respondent called two witnesses, John Njogu Kahure and Jairus Ombui. Both parties filed their written submissions dated 15th October 2013 and 25th October 2013 for the claimant and respondent respectively.

Claimant's case

2.The background of this case is that the grievant, was employed by the respondent in July 1987 as a Technician Grade III and was in their Engineering Design Service Centre for 24 years. On 23rd August 2011, management invited all their staff to a general meeting at 3 pm where the director addressed them on various staff issues especially on the new scheme of service of which the institute was working on. This was with regard to wages earned by the staff that was under review due to the rising cost of living. The respondent scheme proposal had been approved by the Minister but there was a problem as the Union, had filed a dispute at the industrial Court with regard to the basic salary. At the end of the directors address he asked the staff if there was anybody with an idea on the way forward when the grievant, who was also the Deputy Secretary General of UNRISK was given a chance to talk. The grievant suggested to the director that the matter at hand was simple matter that could be settled amicably by the director calling the Union secretary general or sending the shopsteward for an urgent meeting on the new proposed scheme to reach an amicable settlement. That the industrial Court being a court of equity, the parties could record a settlement with the court. That the entire director needed to do was to approach the union secretary general.

3.On 25th August 2011, the grievant was issued with a letter of gross misconduct where he was accused

of various offences and was required to respond immediately and the following day, he was issued with a termination letter dated 26th august 2011.

4.The claimant thus submitted that in the circumstances of this case, the grievant was targeted for victimisation due to his frankness and being vocal as a union leader and that there were no grounds to warrant his termination. That the grievant was not given a chance to defend himself and was judged unheard and the disciplinary procedure was not followed as outlined in the terms and conditions of service for employees of the respondent. The claimant had served for many years with diligence and was promoted through the ranks and when the claimant reported the dispute to the Minister a reconciliatory was appointed who recommended that the grievant be reinstated but the respondent has failed to take him back. The prayers before court at that;

1. *The termination of Mr. Walter O. Mijoge is wrongful and unprocedural*
2. *The grievant be reinstated unconditionally without loss of benefits, seniority and privileges*
3. *Mr. Mijoge be paid all his entitlement for the period he has been out of employment up to the time of reinstatement*
4. *Respondent to meet costs of this dispute*

5.With this background the grievant gave his sworn evidence in court and stated that he is aged 57 years and worked for the respondent for over 24 years and just before his retirement, he was wrongfully terminated. In 1987 he was employed on permanent and pensionable terms as a General Fitter grade III and was placed in the Engineering Service Centre and was promoted through the years. Apart from his duties with the respondent, he was also the Union official, the second secretary general of UNRISK.

6.On 24th august 2011 there were two meetings one an annual general meeting on pension and the second meeting called by the management. The first meeting was done first and the staff proceeded to the next meeting where the director addressed the staff on various issues. In the director's address, he emphasised on the need for staff to work hard to achieve their contract targets while the director was keen to resolve the issue of staff wages. That he had met the Board and convicted them to pay staff new salaries as this was the general expectation and this information at this meeting but as the director, he could not give it as the Industrial Court had stopped the salary review after the Union took the respondent to court. At the end of his address, the director asked if there was anybody who was ready to help in the situation where the grievant put his hand up and was given the chance to talk. Given the chance the grievant said that it was a very simple matter, he needed to pick the phone, write a letter to the secretary general for a round table meeting and he would resolve the matter and end the problem. That immediate the grievant finished talking, the meeting was immediately closed. That if the director had not asked people to ask questions, the grievant would not have stood to talk. The meeting ended amicably and everybody was in a jovial mood.

7.On 25th August 2011, at 10.00 am, the grievant got a letter and upon reading it he went into shock at it cited him for gross misconduct and was told to respond by 1.00 pm. He took time to reply as he was diabetic and the shock had aggravated his condition and thus needed to calm down. He replied by 4.00 pm and denied all the allegations against him. On 26th August 2011, the grievant reported on duty and at 3.05 pm, he was given a termination letter. He was not given a chance to defend himself or a chance to be on suspension or be present in the company of a fellow employee or his union representative. He went to human resource officer to get an audience but was told to leave the office. He was thus not allowed to lodge an appeal.

8.The grievant case is that he would wish to be reinstated to his employment until retirement age at 60 years as he only had 3 years left and seek the court to declare that he was wrongfully terminated and be reinstated without loss of his salaries and benefits.

9.In cross-examination, the grievant stated that during his address in response to the invitation to talk by the director, he never abused the director or any person. He was aware of his duties as an employee and as a union official. That he never told the director that he was incompetent, he was not abusive nor did he use abusive language. The meeting ended after his comment on a jovial note it was not abrupt. That he

had been invited to the meeting as an employee of the respondent but when he spoke, he did so in his capacity at a union representative as in the meeting, the staffs was also union members. That the matter of salaries was between the union and the respondent where the Union had filed a case in Court against Management of the respondent. That the workers were agitated. The grievant further confirmed that he was aware of the staff Scheme of Service where employees were required not to use abusive language and that the disciplinary action for such use of abusive language was dismissal.

Respondent's case

10.In defence the respondents stated that the grievant was their employee since 1987 and the performance of his duties was always satisfactory, he had several cautions and poor performance work record and he was bound like all employees of the respondent to observe the human resource manual rules and regulations. On 23rd August 2011, the claimant together with other staff were at a meeting called by the Managing Director where the he became unruly and rude to the Managing Director to that extent that he actually refused to be guided and spent time arguing and threatening and intimidating the director to a level of insubordination. That he uttered the words:

> *The Managing Director and the Board of Management are incompetent to run the Institute. They should not be allowed to decide the employee's welfare without consulting the Union*

11.Following the above incident, the claimant was served with a Notice to show cause (NTSC) and his response was found unacceptable when he denied the allegations and justified his conduct, he was unapologetic and sought to undermine the authority of the Board of Management as well as the Managing Director using his Union position. The claimant was thus terminated summarily fro gross misconduct as it was obvious he was keen to push the union agenda rather than follow protocol. That the claimant was never victimised for being a union official as he had joined way back in 2006 without any restrictions.

12.The respondents thus submitted that the claimant was lawfully dismissed for insubordination being gross misconduct, he was accorded a fair hearing when he got the NTSC before he was dismissed and thus the action taken was not in violation of any law and was justified and the claim should be dismissed.

13.In support of the respondents statement of defence, two witnesses were called, Mr. Jairus ombui the Director of Human Resource who knew the grievant very well having worked with him for years and noted that the grievant was not a responsible employee as he needed constant guidance as evidenced by various staff appraisals and had received warning for not working and failing to take his work seriously. On 23rd August 2011, there were two meetings, one on pension and the next with management called by the Managing Director where he attended together with the grievant. At the second meeting the director addressed the employees on salaries and twice as the director was speaking the grievant kept interrupting and murmuring disturbing other staff. Once the director finished talking the grievant was called to speak and stated;

> *We have not seen such management. You are corrupt and incompetent …*

14.That the director remained composed and left and said this was the big man of the union and part of democracy. The meeting then closed. That at this point, the grievant was talking at the top of his voice.

15.Mr. Ombui further stated that on 24th August 2011, he called the grievant and asked him why he was misbehaving to which he said it was part of democracy. A NTSC was issued to which the grievant gave a response but was not satisfactory. He denied the use of abusive language but following regulations set by the respondent, he was terminated. The respondent has a human resource manual kept at the library for all staff to access and the use of abusive language is categorised as a serious offence subject of summary dismissal. Thus by writing to the grievant and give his response, he had been given a hearing.

16.After the termination of the grievant, there was a letter from the Minister and the reconciliatory gave recommendations but the respondents did not take them as they had followed due process in terminating

the grievant and there was no basis to reinstate him. That the respondent cannot reinstate the grievant since the respondent is a technical research organisation that requires disciplined staff and he would be a bad example to other staff. That the grievant was a good union representative but abused his position. That the claim should be dismissed.

17.The second witness Mr. John Njogu Kahure the Principal Internal Auditor of the respondent stated that on 23rd August 2011 he was at the second meeting where the Managing Director addressed staff and noted the grievant was also in attendance. The director shared a road map from January to September and outlined that wages would be increased. This arose as it was a touchy subject since there was need to harmonise wages but the issue was in Court and he could not give a definite answer. That the staff received this information well as there was a CBA and the management had lobbied well for a higher pay. That as the director was addressing the meeting, the grievant interrupted twice and interjected and was told that he would get a chance to talk. That the grievant was in a charged mood and stated;

That the staff should not expect much. Management is incompetent and corrupt …

18. Mr. Kahure heard these words being uttered by the grievant at the meeting

Submissions

19.In submissions, the claimant reiterated the claim and further relied on section 41 of the Employment Act that the grievants rights to be heard were violated and that the termination was unfair as under section 45 of the Employment Act. The claimant and the respondent have a recognition agreement and the CBA setting out the terms and conductions of service to all employees and in the recognition agreement Article 4 all employees are to be represented by an accredited union representative at all stages and this was not put into force with regard to the grievants termination. That under the CBA, before the grievant could be terminated, he was supposed to be issued with 3 warning letters and this was no done. That where there was a serious offence committed by any unionised employee, a disciplinary committee was supposed to be constituted, chaired b the Director or his representative and the grievant summoned in the presence of the union representative or a person of his choice. That the CBA supersedes the human resource manual of the respondent and before its application, the respondent should have observed the CBA in force. Further that the claimant has already referred this matter to the Minister and a conciliator made recommendations that should be enforced by the court with the reinstatement of the grievant. The claimant cited the case of ***Local Government Workers Union versus Karuri Town Council, Cause No.80 of 2006*** where the court found as wrongful dismissal of 30 council employees who were union officials. That the grievant should thus be reinstated to his position as his position has been taken over by Cornelly Serem a casual employee who is not on permanent basis.

20.The respondent on the other hand submitted that the claim for the grievants unconditional reinstatement is misconceived, baseless and an attempt to get back after his grave misconduct that led to his dismissal. That since the employment of the grievant in 1987, he had been of average performance, he had received warning letters for insubordination and that there was a human resource manual that outlined the factors that could lead to summary dismissal particularly in the use of abusive language. In this case the grievant was given a chance to speak by the Managing Director upon which he told him to go talk to the Union about the status of the CBA which was a subject of a pending case at the Industrial Court. The respondent witnesses confirmed that the grievant was rude in his address as he referred to the Board of Directors as *corrupt* and *incompetent.* This prompted the meeting to end abruptly as things were getting out of hand. The grievant was issued with NTSC on 24th August 2011 to which he gave a response and denied uttering any bad words to the Managing Director and to the Board of Directors. This was however found not satisfactory. That even though the parties herein have a recognition agreement and a CBA, the respondent human resource manual is not inferior to these as the manual applies to all employees of the respondent whether unionised or not. That in the circumstances of the case the grievant was lawfully terminated and The respondent relied on the case of ***Judy Njoki versus DHL Exel Supply Chain, Cause No.713 of 2012*** where the claimant was dismissed for gross misconduct for absenteeism and improper performance of work and in the case of ***Cyrus Nyaga Kabuli versus Kirinyaga County Council, Cause No. 29 of 1985*** where the Court of Appeal held that what flows from breach of the conditions of service is

damages and cannot be aggravated and extended to the time of retirement. That in this case the court should dismiss the claim with costs to the respondent.

Analysis of the case

From the foregoing the main issue for determination are:

(a) Whether the termination of the grievant was unfair/wrongful or unlawful

(b) What are the appropriate remedies should the answer to the first issue be in the affirmative.

21.On whether the claimant was terminated unfairly I will restate some of the facts. On 26th August 2011, the grievant herein Mr. Walter Mijoge received his letter of termination for the reason that he had conducted himself with behaviour that was incompatible with his terms of employment under the respondent Human Resource Manual Section 9.3.1 (iv), (xi) and (xvi) that warranted summary dismissal. Under the manual section 9.3.1 was with regard to *Disciplinary Offences* which at 9.3.1.iv outlined;

> *any employee may be summarily dismissed from the services of the Institute of suffer such lesser penalty as the Board of Management or Director or an Employee duly authorised on his behalf may decide, if he …*
>
> *Uses objectionable or insulting language or misbehaves towards his seniors or any other member of staff or clients of the Institute.*

22.The grievant was therefore terminated and paid one month salary in lieu of notice.

23.There are few instances where the law allows an employer to summarily dismiss an employee. These circumstances are as outlined under Section 44 of the Employment Act or for any other justifiable cause outlined to the employee and found necessary in the circumstances of each case. Under section 44(4) (d) it states;

5. *Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—*

> *(d) An employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer*

24.An employee found to have violated these provisions, is subject to summary dismissal.

25.However, even in the use of 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 referred to as procedural fairness in labour relations. Due process entails that each employee be guaranteed this process particularly where they are unionised, to have a union representative present during the hearing or a fellow employee of their choice in attendance. This must be followed in the vent the employer wishes to terminate or to dismiss such an employee. 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.

26.In the instant case, the respondent pleaded that the grievant while at a meeting where the Managing Director was addressing staff, he made utterances, arguing and threatening and intimidating to the effect that;

> *The Managing Director and the Board of Management are incompetent to run the Institute. They should not be allowed to decide the employee's welfare without consulting the Union*

27.In evidence to support the respondent's case, two witnesses were called; witnesses that were at the meeting where the grievant is said to have misbehaved, been murmuring and used words that were abusive and inappropriate. Jairus Ombui stated that the grievant interrupted the meeting twice and he heard the words used by the grievant clearly when he said;

> *We have not seen such management. You are corrupt and incompetent.*

28.On the other hand, John Njogu Kahure, who was also in the meeting, said in evidence that the grievant interrupted the meeting twice and he heard him say;

> *The staff should not expect much. Management is incompetent and corrupt.*

29.The above extracts from the evidence demonstrates that the reference to section 44(4)(d) of the Employment Act can in some case be very subjective to the extent that it becomes hazy as to what 'abusive language', 'insulting language' or 'inappropriate behaviour' is termed to be. To a large extent, the respondent in the pleadings refer to actions of the grievant as disruptive in the context of the meeting called by the Managing Director and that specific words were uttered which words were seen as inappropriate causing the abrupt closing of the meeting. The witnesses present at this meeting who gave evidence also agree that the grievant was of disruptive behaviour and made utterances with regard to the competence and corruption of the director and the board. However there is no agreement as to the exact words used to enable an objective assessment as to the nature of abuse, insult or inappropriateness of them. This assessment would be crucial as the sanction for the use of insulting, abusive or inappropriate language at the work place is a very serious offence that can justify summary dismissal.

30.I find no evidence of what abusive, insulting or inappropriate words were used by the grievant to warrant his dismissal. Even in the event he behaved in a manner that was disruptive at the meeting with the Director, the sanction of a dismissal was too harsh in the circumstances of the case. there are other appropriate measures that could have been taken in his case.

31.That said, I must note that during the hearing of this case, I found the grievants conduct most wanting that is worth comment. He was loud, did not listen to his Union representative as he led him in evidence as he was keen to state his case as he thought it best and was keen to let all and sundry know that he was dismissed due to his union activities while at the respondent employ and that the treatment that he received was not appropriate of a man who had served with diligence and as a union official. The grievant came out as a confrontational person, not keen to listen and particularly keen to state that as a union representative he has special status. Far from it, this behaviour and demonstration only served to his detriment as despite the respondent failing to clearly demonstrate the nature of abusive or insulting words used by the grievant at the meeting with the managing director, it was clear that the grievant is a person capable of conducting himself in a manner that is disruptive and in utter disregard to others.

32.The above notwithstanding, the grievant has his rights, rights that cannot be faulted however you see him. Even though the grievant was issued with a NTSC and made a response there is no record to indicate that there was a disciplinary hearing before his termination. The Respondent did not plead that it gave the Claimant the opportunity to make any representations nor is there evidence that it extended to the Claimant the opportunity to make representations in the presence of his union or with a persons of his own choice and therefore there is no other conclusion I can reach except that the termination of the

Claimant was procedurally unfair. The rules of natural justice were not observed. This was a termination of the grievant unlike in case of dismissal and hence the provisions of section 41 of the Employment Act should have been observed by the respondent. These provisions are mandatory and this court is bound by the force of these provisions.

33.On the remedies, the claimant is seeking for the reinstatement of the grievant. Under section 50 of the Employment Act, 2007, the court is required to be guided with the provisions of section 49 in determining an order for reinstatement or re-engagement. In the present case the grievant has expressed the wish to be reinstated. It was submitted for the respondent that, they are a technical institute where they require high discipline and that the grievant will be a bad influence to other staff. However this submission is not supported by any evidence. The court is conscious of the provisions of subsection 49 (4) (d) of the Act, where the court should take into account the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

34.Taking into account the other provisions of section 49 of the Act, the court finds that the grievant may have in one way or the other contributed to the termination; the court observations of him in court support this preposition, he has however served the respondent for a record 24 years without any break and given all his youthful service to the respondent; he was 57 years old at the time of the hearing and he expected to remain in employment unless lawfully terminated; the high unemployment rates are judicially noticeable and at his current age the grievant would not favourably compete the younger professionals who have the benefit of contemporary knowledge and skills; and the respondent was aware that he is diabetic and requires constant medical attention. This will be taken into account. To reinstate the grievant, would be to take him back to a hostile environment where his supervisors have already formed an opinion that he is of disruptive behaviour. This will not be an appropriate remedy in the circumstances of this case.

In will therefore enter judgement for the claimant in the following terms;

a. **A declaration that the termination of the grievant was procedurally unfair;**
b. **The claimant is awarded 12 months' salary in compensation;**
c. **The award will be inclusive of the due house and outpatient allowances for 12 months; and**
d. **Each party will bear their own costs.**

Dated at Nairobi this 22nd day of November 2013

M. MBARU

Judge

In the presence of

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