



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 6 OF 2013**

**(Formerly Nairobi Cause No. 465 of 2012)**

**JOHN KIRUI TORONGEI.....CLAIMANT**

**-VERSUS-**

**NATIONAL CEREALS & PRODUCE BOARD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> June, 2013)

**JUDGMENT**

The claimant **John Kirui Torongei** filed the memorandum of claim dated 19.03.2012 through M/S Chepkwony & Company Advocates praying for judgment against the respondent for:

- a. **A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.**
- b. **Payment of a sum of Kshs. 1,695,750/= as claimed in paragraph 9 of the memorandum of claim.**
- c. **Costs and interests.**
- d. **Any other relief the honourable court may deem fit to grant.**

The respondent filed the statement of response on 20.11.2012 through Lutta & Company Advocates praying that the claimant's claim be dismissed with costs and the claimant to pay the stock loss to the respondent.

The case was heard on 23.05.2013 when the claimant gave evidence to support his case and George Abila, the respondent's Assistant Human Resource Manager gave evidence to support the respondent's case.

The claimant was employed by the respondent as an assistant silo manager and promoted to silo manager. The employment was with effect from 7.10.1999 to 15.07.1999 when the contract of employment was terminated.

By the letter dated 6.10.2009, the claimant was suspended from employment with immediate effect on account of reports indicating that he authorized falsified invoice dispatch advice of fertilizer and which was posted into the stocks records purportedly to conceal physical shortages before the annual stock take exercise of 29.06.2009. The suspension letter also stated that the claimant had authorized double posted

customer dispatch advice which was posted into the stock records to conceal shortages of 12 bags and occasioned the respondent to suffer a total loss of Kshs.2,227,440/=. The suspension letter asked the claimant to show cause within 72 hours of the receipt of the letter as to why disciplinary action should not be taken against him and failing which, it would be presumed that he had no explanation to offer and the matter would be resolved without any further reference to him.

The claimant testified that in July 2009, he was transferred from the Eldoret to Bungoma Silo. Before proceeding on transfer and as per his written response to the suspension letter attached on the memorandum of claim, there had been a stock taking handover in which the recorded balances of stocks tallied with the physical balances. A second stock taking exercise that was undertaken showed tallying of the physical stocks and the recorded stocks. During the investigations, reports were made against the claimant at the Eldoret Police Station. The investigations took 14 weeks because he made 14 weekly visits that were mandatory, travelling from Bungoma work station to the Eldoret Police Station. The claimant testified that he had to personally meet the expenses of the travelling in the exercise that was otherwise official and the respondent was expected to meet the expenses.

The outcome of the investigations was that the claimant was innocent as no criminal charges were preferred against him. Nevertheless, he was suspended and later terminated after a hearing at the respondent's Nairobi head office. The suspension letter dated 15.07.2010 addressed to the claimant stated as follows:

**“RE: TERMINATION**

**Refer to our letter dated 6<sup>th</sup> October, 2009 and the interview you attended before the staff advisory committee at Head Office on 21<sup>st</sup> April,2010.**

**This is to inform you that the Management has deliberated on your written and oral defense and has come to the conclusion that as a result of your poor work performance, the Board lost 800 bags of fertilizer and other stock losses all valued at Kshs.2,197,440.00.**

**The Management has therefore decided to terminate you from the Board's services with effect from 6<sup>th</sup> October 2009 for negligence of duty.**

**Consequently you will be paid your benefits that you are entitled to in accordance with the terms and conditions of service.**

**However, please note that payments of the above dues will be subject to your completing the clearance certificate which is hereby enclosed.**

**This letter is issued in duplicate, sign a copy and return it to this office as soon as possible.**

**Signed**

**F. Muchina**

**HUMAN RESOURCE MANAGER”**

After the termination, the claimant was paid Kshs.326,961.77. He testified that all deductions were fair except Kshs.69,427.50 being unfair deduction of fertilizer charges yet the transporter had lost the fertilizer and was therefore liable and not the claimant. The claimant did not claim and pray to recover that deduction.

The claimant testified that the three months termination notice or payment in lieu of the notice was prescribed in the letter of appointment. He further stated that his termination was unfair because the reasons for termination were not true. The police investigations had found that he was innocent because his signature had been forged by a clerk called Justus Momanyi to steal the fertilizer. The clerk was

subsequently arrested and criminal charges preferred against him. The claimant's evidence was that his immediate supervisor called Koinange conspired with the clerk but was retained in service. The claimant referred to the letter dated 21.12.2009 addressed to the respondent's Regional Manager at Eldoret attached to the memorandum of claim. The letter stated as follows:

**“RE: STOCK LOSS AT ELDORET SILOS STORE VIDE INVOICES NO. B 208528 AND 194439**

**We lodged our investigations vide this reported matter where by the SILO MANAGER MR. JOHN KIRUI TORONGEI and the store clerk JUSTUS MOMANYI MIYOGGE were our main suspects.**

**We further perused the questionable invoices No. B 208525 and No. B 194439 and also forwarded them to the document examiner to confirm hand writings plus signatures and as per the experts report it was confirmed that MR. JUSTUS MOMANYI MIYOGGE had forged the signature of the SILO MANAGER, MR. JOHN KIRUI TORONGEI. Therefore, we are intending to charge the store clerk before court with the offences to be preferred against him. Assist other office bearers' suspects in order to continue with their jobs for we do not have evidence to charge them.**

**When the investigations are complete, we will communicate to your office.**

**Signed**

**ONESMUS KYALO,**

**For: DCIO ELDORET”**

It is notable that the letter by the police exculpating the claimant is dated 21.12.2009 and it came long before staff advisory meeting of 21<sup>st</sup> April, 2010 and the subsequent termination letter of 15.07.2010. The staff committee proceedings are No. 2 on the respondent's list of documents. The perusal of the proceedings does not show that the committee took into account the letter by the police exculpating the claimant. The claimant denied that while he worked for the respondent, there was loss of fertilizer as alleged in the memorandum of response and he was not liable as claimed by the respondent. He denied that he had not been asked to answer any charges for loss of 51 bags of CAN fertilizer as per allegations in the letter of 5.08.2009 at folio 19 of the respondent's list and copies of documents.

The respondent's witness testified that 51 bags of a fertilizer called CAN was off loaded to the stores but a physical loss was reported hence the claim against the claimant in the memorandum of response and as documented at folio 19 of the respondent's list and copies of documents. The witness further testified that the claimant was dismissed for delegating to his assistant the duty of signing the stock sheet which showed the weekly and annual position of the stocks. It was the evidence of the witness that the claimant had no such authority to delegate to his assistant as per the relevant circular on stock taking. With the leave of the court and the consent of the parties, the respondent was to attach on the submissions the relevant circular.

The court has considered the circular dated 5.06.2009 attached on the respondent's submissions. It relates to the annual stock take for 2008-2009 financial years. It declares that the exercise must be taken seriously by all staff. The instructions are to be implemented by “**checking officers**”, a phrase which is not defined in the circular. At 4.0, the Silo Managers were to ensure that all pending documents for cash and stock transactions were posted in the respective cash books and stock records and closed the week ending 26.06.2009. Paragraph 4.3 of the circular provides that it was the responsibility of the Silo Manager to personally ensure that stock record sheets, computer print-outs, and stack cards were up-to-date and fully reconciled, and that closing balances were accurate in all material respect. Further, the Managers were required to sign all certificates and render appropriate explanations on all discrepancies noted during the exercise. The witness confirmed that at the staff advisory committee meeting, they did not deal with the case of 51 bags of CAN fertilizer as it had been concluded. The committee only dealt with the case of 810 bags as per the minutes of the proceedings filed in court.

The claimant's written submissions were filed on 07.06.2013 and the respondent's written submissions were filed on 13.06.2013. The court has considered the pleadings, the evidence and the submissions and makes the following findings:

1. The first issue for determination is whether the termination of employment in this case was unlawful and therefore unfair. The claimant was issued with a notice of the allegations against him through the suspension letter on record dated 6.10.2009. The allegations as leveled in the suspension letter were about reports indicating that the claimant had authorized falsified invoice dispatch advice of fertilizer and which was posted into the stocks records purportedly to conceal physical shortages before the annual stock take exercise of 29.06.2009. The suspension letter also stated that the claimant had authorized double posted customer dispatch advice which was posted into the stock records to conceal shortages of 12 bags and occasioned the respondent to suffer a total loss of Kshs.2,227,440/=. In the meantime, the respondent decided to report the matter to the police for investigation. The police investigations exculpated the claimant.

As regards disciplinary cases in the employment relationship and where in the opinion of the employer there exist a criminal element, this court set out the guiding applicable principles in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO, Industrial Cause No. 37 of 2013 at Nakuru**. At page 13 to 14 of the judgment, the court stated as follows:

**“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:**

- a. **Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.**
- b. **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
- c. **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**
- d. **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.”**

In the present case, the respondent decided not to conclude the administrative disciplinary case and made a criminal complaint to the police. The court finds that the respondent was generally bound with the outcome of the criminal process and at the end of the criminal process, the claimant was exculpated or found innocent and the respondent was bound and could not initiate, continue and impose a punishment on account of the grounds similar to or substantially similar to those the claimant had been exculpated or found innocent in the criminal investigation process as carried out by the police. The court finds that the police investigative findings were conclusive in exculpating the claimant of the allegations in the suspension letter.

The second limb of the accusations as it emerged from the minutes of the staff advisory committee are that the claimant took advantage of the inexperienced officers and assigned them duties that were to be performed by the experienced officers. Secondly, it was found by the committee that the claimant delegated duties, namely signing of the stock taking records, which under the cited circular, ought to have been signed by the claimant personally.

The allegations may appear valid. However, the court finds that the claimant was never served with the notice of such allegations and invited to defend himself towards self exculpation. In the opinion of the court, the claimant would invariably have availed himself channels of defence such as whether the circular was ever conveyed to his attention, whether indeed he contravened the circular, whether the officers he assigned duty were inexperienced as alleged and many such other issues that in the opinion of the court will remain unresolved because the claimant was never invited to give his account by way of notice and a hearing as envisaged in section 41 of the Employment Act, 2007.

The court holds that while considering a disciplinary case, the employer is not at liberty at the hearing stage to deviate from the allegations of misconduct or poor performance or ill health as may have been alleged in the notice delivered to the employee before the hearing stage. In the instant case, the staff advisory committee wandered away in a drift from the legitimate inquiry as it had been commenced in the suspension letter and the committee disregarded the objective findings of the police investigations as the committee created its own fresh line of considerations and findings never put to the claimant at the initial stage. In the court's opinion, the committee walked outside its jurisdiction or exceeded its jurisdiction or was irrelevant in arriving at its decision; it lost the vector of navigating the case that confronted the claimant and that was to constitute the subject of its findings.

As far as the reasons for termination in the suspension letter contributed to negligence as a ground for dismissal, the court holds that the police investigative findings that were binding upon the respondent conclusively exculpated the respondent so that the allegations did not constitute genuine reasons for termination as envisaged in section 43 of the Employment Act, 2007. As far as the allegations the staff advisory committee created in the course of its deliberations are concerned, the court finds that the due process of notice and hearing was not invoked as provided for in section 41 of the Act. Accordingly, the court finds that the termination was unfair as the initial reasons were not valid and the subsequent reasons were not subjected to the due process of justice.

2. The second issue for determination is whether the claimant is liable to the respondent for loss of 51 bags of a fertilizer called CAN and on the basis of the letter dated 5.08.2009 being No. 4 on the respondent's list of documents. The respondent's witness confirmed that the claimant was not subjected to any inquiry, notice and a hearing to establish the claims and liability. The court finds that the claim will fail for want of proper administrative disciplinary procedure establishing the claimant's culpability. There is another reason why the respondent's claim is suspect. Upon the termination, the claimant paid the respondent some final dues less the claimant's liability to the respondent. The respondent's witness did not explain why the respondent did not recover the alleged claimant's liability with respect to the lost CAN fertilizers. The court finds that the claim for the loss associated to the 51 bags of fertilizer is a mere afterthought and is not justified.
3. The next issue for determination is whether the claimant is entitled to the remedies as prayed for in the memorandum of claim. The court makes the following findings:
  - a. The claimant prayed for fees he paid while he was undertaking his master's studies at Moi University. It was his testimony that at termination and at the hearing, he had not concluded the studies. The respondent's witness testified that the policy was to pay the study bonus upon successful completion of the studies. The court considers such policy as reasonable and finds that the claimant having not completed the studies or graduated, he is not entitled to the payment for fees or study bonus as prayed for.
  - b. The claimant has prayed for three months pay in lieu of three months termination notice. The claimant admitted that he had already been paid for the three months in lieu of the notice as set out

in the statement of final dues attached on the statement of response and the court finds that the claimant is not entitled as prayed.

- c. The claimant has prayed for Kshs.46,195/= being monthly pay withheld for each of the 10 months he was on suspension. The respondent's witness testified that during suspension, an employee is not entitled to receive any salary. Clause 33.3 of the staff policies provides as follows:

**“If employee commits or is suspected to have committed a criminal offence against the Board or to the substantial detriment of its property, the Board may suspend the Employee from duty while it makes such inquiries into circumstances as it deems fit. During the period of such suspension and until the decision of the Board is communicated to the Employee, he/she shall not be entitled to receive any salary; but the Board may at its discretion pay to the Employee an alimentary allowance for such period, in such amount and on such terms as it may determine. If the Employee is reinstated, he/she shall receive the balance of his salary (after deduction of the alimentary allowance, if any) to which he/she would otherwise have been entitled; but upon dismissal, he/she shall not be entitled to receive any payment in excess of the said alimentary allowance.”**

On this issue of payment during the period of suspension, the court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, Industrial Cause No. 44 of 2011, pages 36 and 37** in which the court stated thus:

**“The respondent terminated the claimant’s service by the letter dated 20<sup>th</sup> December 2010 received on 30<sup>th</sup> December 2010 and with effect from 18<sup>th</sup> May 2010, the effective date of the suspension. The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case being the date the letter of termination was delivered, that is, 30<sup>th</sup> December 2010. In opposing this claim, counsel for the respondent has cited paragraph 6.2.4 of the respondent’s terms and conditions of service, 1999 which provides, thus, ‘An employee under suspension will not be entitled to any salary, but may, in case of hardship, and on request be granted an alimentary allowance in such amount and such terms as may be determined by the Managing Director.’**

The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is

**unconstitutional.”**

Further, the court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated as follows:

**“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”**

Accordingly, the court finds that the claimant is justified to make the prayer and is entitled to **Kshs.461,950/=** being the withheld pay for the ten months because the court has already found that the termination flowing from the suspension was unfair.

- d. The claimant has prayed for Kshs.85,000/= which he incurred for night out, bus fare from Bungoma to Eldoret, breakfast, and lunch when he had to report to Eldoret police station from his Bungoma duty station during the police investigations into the complaint as reported by the respondent. It is not disputed that the claimant made the fourteen trips to the police station as claimed. The respondent has opposed the claim because the claimant was on suspension at the time he made the trips, the respondent had to sanction the trips and the employee had to fill the prescribed forms to receive the payment. The court finds that the claimant continued in the employment of the respondent throughout the suspension period and the police investigations as the duty for the claimant was not only official but also in the best interests of the respondent. The court further finds that the respondent carried the obligation to facilitate the claimant to cooperate with the police during the investigations. In the circumstances, the court finds that the claimant is entitled to **Kshs.85,000/=** as prayed for.
- e. The claimant pleaded claims about redundancy, leave due and not given, severance pay and underpayment. The court finds that the claims were ungrounded, irrelevant and no material evidence was provided to support the claims. The court finds that the legislation on minimum wages did not apply to the claimant. The claims will therefore fail.

- f. Finally, the claimant has prayed for twelve months salaries compensation for the unfair termination. The court has already found that the termination was unfair. The court has found that the respondent disregarded the police findings and while dealing with the case in accordance with the due process of a notice and a hearing, the decision against the claimant was made on consideration of allegations for which the claimant was not given notice or chance for exculpation. Taking all the circumstances of the case into consideration, the court finds that the claimant will be reasonably compensated for the unfair termination through six months gross salaries being **Kshs.477,930/=** at a monthly rate of Kshs.79,655/=.

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

- a. **A declaration that the termination of the claimant's employment by the respondent was unfair.**
- b. **The respondent to pay the claimant a sum of Kshs.1,024,880/= by 1.08.2013 failing which interest to be payable on the sum from the date of this judgment till full payment.**
- c. **The respondent to pay the costs of the case.**

**Signed, dated and delivered in court at Nakuru this Friday, 21<sup>st</sup> June, 2013.**

**BYRAM ONGAYA**

**JUDGE**