



**Kothary v Rai Cement Company Limited (Employment and Labour Relations Cause E022 of 2022) [2024] KEELRC 1149 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1149 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E022 OF 2022**

**HS WASILWA, J**

**MAY 2, 2024**

**BETWEEN**

**RAHUL RAMESH KOTHARY ..... CLAIMANT**

**AND**

**RAI CEMENT COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this suit by a memorandum of claim dated 20<sup>th</sup> December, 2022, alleging to have been unfairly terminated and seeking compensation for the unfair termination. The claimant sought for the following reliefs; -
  - a. A declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair in the circumstances, the claimant is entitled to compensation as prayed for herein above.
  - b. The sum of Kenya Shilling Ten Million, Nine Hundred and Thirty-Four Thousand, Five Hundred (Kshs. 10,934,500.)
  - c. Certificate of service.
  - d. To be allowed access to the claimant's previous residential place at the company's premises to collect his personal belongings.
  - e. Costs of this suit and interest at Court rates.
  - f. Any other further and better relief the Honourable Court may deem just and fit to grant.



## Claimant's case

2. The claimant pleads that he was employed by the Respondent as regional sales manager and deployed to Muhoroni branch from 18<sup>th</sup> April, 2018 and worked in the said place until his termination. At the time of termination, the claimant was earning a gross salary of Kshs 73,000.
3. He states that on 10<sup>th</sup> September, 2021, the Respondent had him arrested and prosecuted for offense of stealing by servant contrary to section 281 of the Penal Code under Criminal case number E3448 of 2021 , which he was acquitted under Section 215 of the Criminal Procedure Code.
4. He also avers that the termination was not done in accordance with sections 41, 43 and 45 of the *Employment Act*.
5. That at the time of termination, he was the sole bread winner of his family and due to the abrupt termination, he is unable to fend for his family.
6. He particularised the claim and stated that the Respondent owes him one-month salary in lieu of notice, severance/gratuity pay for the 3 years worked, compensation for unfair termination, general damages for character damage/reputation and general damages for malicious prosecution and employment related defamation all amounting to Kshs 10,934,500.
7. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 20/12/2022 and produced documents filed on even date as his exhibit 1-13 respectively. He testified that his role at Rai Cement limited was to get orders from customers in the region, because he is the regional sales manager. He stated that he was arrested from the company on allegations of theft by servant and after hearing, he was acquitted of the said charges under section 215 of the CPC. However, that even after acquittal, he was not called back to work. He also stated that the Respondent last paid his NSSF in August, 2021.
8. Upon cross examination by Oseyo Advocate, the witness testified that he used to receive orders from clients and those received via email was to be reduced to writing and dispatched the following day. He testified that the sales person was the one that were in touch with the client. He admitted that he was charged in respect to orders, he had made. He denied diverting the 80,000 bags of cement lost. He also admitted that he had previously been charged for similar offense in Nairobi but the charges were withdrawn. He admitted to writing the letter of 13/8/2021 admitting to some mistake and added that the mistake was regularized later.
9. Upon further cross examination, the claimant testified that the cheques and invoices at page 28 were recovered from him, albeit forcefully. He also stated that he had to sign the same because he was intimidated. He elaborated that the cheques were in the name of the Respondent but had been forwarded to him to return to the customer to issue fresh cheques.
10. He testified that his last day at work was 10<sup>th</sup> September, 2021 and taken to police custody as such, he could not contact the Respondent until his discharge. He stated that some of his properties are at the Respondent's premises. He also stated that he did not receive any letter terminating his services. He also stated that he knew his services were terminated when his salary was stopped and upon going back to the company he was not allowed access.
11. On re-examination, he told this Court that the complainants in the criminal case, were the Respondent's employees. He reiterated that he was not served with any termination letter and also that he was not allowed entry into the Respondent's company after being arrested.



## Respondent's case

12. The Respondent entered appearance through the firm of Sheth & Wathigo Advocates on 29<sup>th</sup> December, 2022 and filed a defence to claim on 25<sup>th</sup> January, 2023 denying the entire claim and stated that the claimant was never diligent in his work as a sales person because during his tenure, he lost 18540 bags of cements worth Kshs 13,199,040.
13. He stated that just because the claimant was acquitted of the criminal charges levelled against him, does not absolve him of the loss, he occasioned on the Respondent.
14. The Respondent avers that the claimant was arrested due to genuine belief that he had engaged in criminal acts and while he was prosecuting the criminal case, he did not report to work for more than one year as such he was not terminated but was unable to perform his duties due to the criminal charges.
15. He maintained that the claimant absconded/ deserted work without informing the Respondent without informing the Respondent. Hence he was not terminated, therefore, he should not be compensated.
16. The Respondent stated that the claimant is the author of his misfortune and therefore cannot blame his adversity on the Respondent.
17. The Respondent called 12 witnesses in support of its case. The first witness was Nitesh Kumar Singh, the Transport and Logistics manager who testified as RW-1. He adopted his witness statement of 13/9/2021 and testified that his main duty is to receive invoices and delivery notes from the accounts office and issue to different trucks with customer's names and contact. That he also issues gate passes and weighbridge tickets that are left at the gate to confirm the truck is authorized. He stated that on several occasions, he received unsigned and unstamped delivery notes from the claimant which caused the Respondent to lose some money.
18. On cross-examination by Orlando Advocate, the witness testified that the company lost some money as a result of the claimant's carelessness. He admitted that the claimant was not found guilty of the charges against him.
19. The second witness was Agarwal Abhishek , who testified as RW-2 and adopted his witness statement of 13/3/2023. He testified that he is the Respondent's accountant and that upon deliveries and non-payment, he called all the customers listed in the various invoices such as Mr. Handraj who is trading as Handraj Enterprises Limited, who stated that he had never received any cement from the Respondent, Victoria Engineering company also denied receiving any cement. On inquiry, they concluded that there was theft of cement and submitted a report to the management. On further follow up, they realized that the loss emanated from the corporate client, whom the claimant was responsible over their Orders.
20. He testified that the claimant was held culpable because, he was the one that was to ensure the orders he brought to the company were delivered, received and the delivery note stamped and then follow up on payment of the goods delivered. He testified that there are customers that were brought by the claimant and cement delivered to them but upon calling the clients they denied receiving the cement, as a such the blame was on him.
21. He told this Court that the total loss by the company was in the sum of Kshs 13,199,040. He testified that the claimant last showed up in the company in September, 2021. He denied forcing the claimant to sign anything at all and maintained that the claimant was responsible in following up payment of all goods delivered following orders received by him.



22. Upon cross examination, the witness testified that at the time of the loss, there were four sales men in the company but that the claimant was the only one handling corporate clients. He also confirmed to this Court that the claimant was not the one in charge of transport and logistics of the goods delivered by the company.
23. On re-examination, he testified that the claimant was the one that was tasked to ensure the cement was delivered. That he was the main contact person.
24. The third witness was Felix Kipchumba Koyo, the Respondent's personnel manager who adopted his witness statement of 10/3/2023. He testified that during criminal hearing, the witnesses from the company showed the court 8 invoices which were never received by the company. He testified that the ones with a tick sign showed they were acknowledged by the company while those, with 'X' sign were not received but diverted to a site in Busia. All these were handled by the claimant. He testified further that there are corporate orders prepared by the claimant at page 62 which does not have proof of delivery and thus were not paid for. He testified that all these failure of deliveries were not brought to the attention of the company when the claimant was supposed to alert the company of any delivery that did not reach the destination. Further that due to this, the Respondent lost 13 Million.
25. The witness herein produced the Respondent's documents as Exhibit 1-37 respectively. He added that the claimant's last day at work was 10/9/2021 and only heard from him when he wrote to them seeking to pull out of the pension scheme. He stated that they did not write to him any termination letter. He testified that in their view, the claimant left employment on his own volition. The witness herein stated that they will issue a certificate of service, when the claimant clears with the company. He denied ever denying the claimant's entry to the company.
26. Upon cross examination by Orlando Advocate, the witness testified that though the claimant was acquitted of the charges, he had absconded duty. He elaborated that upon being arrested the witness was not in custody but out on bail. He testified that the claimant did not go back to work after the arrest, neither did they call him back to work. He admitted that a certificate of service was not issued to him.
27. The Fourth Witness was Wilber Omondi Murage, who testified as RW-4 and stated that he is an Accountant at the Respondent's employ. He adopted his witness statement of 18/9/2021 and on cross examination he testified that there were invoices that were not received by them. That they realized that at the point of reconciliation that there were incorrect invoices.
28. Meshark Alexander, testified as RW-6 and adopted his witness statement of 25/2/2023 and stated that he is an employee of the Respondent and a truck driver. He confirmed that he is the one that delivered 640 bags of cement to Lukoris center outskirts of Busia. He testified that the order had been made by the claimant, which they realized later that it was not paid for. On cross examination, he testified that he had delivery note to deliver the cement and upon delivery, the note was signed and he returned back to the claimant
29. The 7<sup>th</sup> witness was Nicholas Odhiambo Mbadi, who testified as RW-7 and adopted his witness statement dated 13/3/2023 and stated that he is a driver at the Respondent's employment. That on 21/6/2021 he was given an order by the claimant to delivered 640 bags of cement to Victoria Engineering in Busia and took another order on 23/6/2021 to China Henan as directed by Rahul, the claimant herein.
30. Upon cross examination, he testified that he was assigned the work by Nitesh, the logistics officer. He stated that the delivery book was signed by the customers upon delivery of the cement.



31. Benard Kipngeno Langat, testified as RW-8 and adopted his witness statement of 13/3/2023 and testified that he is a driver and that on several occasions he was given orders by the claimant to deliver to customers and later learnt that the said cement was not paid for. He also stated that he testified in the criminal case against the claimant.
32. Upon cross examination he testified that the orders were given by the claimant to deliver to Victoria Engineering in Busia.
33. Harrison Ouko, testified as RW-9 and also adopted his witness statement of 13/3/2023 and reiterated the averment of his colleagues by stating that he is also a driver and that on 1/7/2021 he was given an order by the claimant to deliver to a customer in Busia and direction given to him by the claimant. He further confirmed that he testified for the state against the claimant in the criminal case.
34. On cross examination, he testified that he took 640 bags of cement and delivered to Etray Company in Busia, where the claimant had directed him to and the delivery note duly signed.
35. Vincent Omondi testified as RW-10 and adopted his witness statement of 13/3/2023. He testified that he is a driver at the Respondent's company and that on 12/6/2021 and 6/8/2021 he was given order to deliver to Eljaj company in Busia which he delivered as per the directions given by the claimant. Upon cross examination, he testified that he delivered the cement as directed by the claimant and the order was always in a sealed envelope. He also confirmed testified against the claimant in the criminal case.
36. Michael Ochiel, testified as RW-11 and adopted his witness statement and added that he is a driver at the Respondent and that on 3/5/2021 he was given an order in a sealed envelope to deliver to Victoria Engineering and China Henan, which he delivered as directed.
37. Upon cross examination, he testified that he took 640 bags of cement in his truck KBD 226. He stated that the directions were given verbally by the claimant and the order was usually given in a sealed envelope. He testified further that he gave his testimony in the criminal case against the claimant.
38. The last witness was Simon Kipkoech Cheruiyot, who testified as RW-12 and adopted his witness statement of 13/3/2023 and added that he was given order to take to Hanray Enterprise and the direction given verbally by the claimant.
39. On cross examination, he testified that though the order was directed to Hanray Enterprise, the order did not have any telephone number of the customer but that he was directed accordingly by the claimant and he delivered the bags of cements, which were received and delivery note signed.

### **Rejoinder**

40. In the response to defence, the claimant reiterated the contents of the claim and added that he was arrested as a result of the Respondent's criminal complaint against him in the course of his employment, as such he cannot be referred as a voluntary absconder.
41. The claimant also stated that the Respondent never followed up the claimant to either reinstate his employment or to procedurally terminate him after his acquittal in the criminal case.

### **Claimant's Submissions.**

42. The Claimant submitted firstly on his employment relationship with the Respondent and argued that it is self-evident that the claimant was an employee of the respondent from 18<sup>th</sup> April 2018 as evidence by the NSSF statement, insurance card, bank statements from Diamond Trust Bank and KRA returns.



43. On whether the termination of the claimant was unlawful, it was submitted that section 45(1) and (2) of the *employment Act* is very clear on the processes to be followed by an employer desiring to terminate an employment relationship. Section 47(5) of the *employment Act* on the other hand provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
44. Accordingly, that in this case the claimant has established that he did not leave the Respondent's employ on his volition rather that the respondent's instigated the arrest and criminal proceedings that kept him away from work. In this he stated that most of the Respondent's witnesses confirmed to have testified as witnesses in the criminal case number CMCR E3448 of 2021, where he was locked in prison until the case was fully heard and then acquitted for lack of evidence.
45. He argued that the malicious prosecution against the claimant on baseless allegations is clear indication that the presence of the claimant at the respondent's premises as an employee was not welcomed. He added that the employer cannot subject his employee to such mental torture and inhumane treatment on mere suspicion and unproved allegations. That these inhumane conditions exposed the claimant to permanent health conditions, Financial Crisis and loss of livelihood as his salary stopped and medical cover suspended.
46. On procedure, it was submitted that the claimant was not issued with Notice or afforded an opportunity to be heard as envisaged under section 41 of the *Employment Act*, 2007 before his termination and therefore the claimant's rights were blatantly disregarded. In support of this, they relied on the case of *Walter Anuro=Vs=Teachers Service Commission [2013] Eklr* where the court observed thus:
- “For a termination of employment to pass the fairness test, there must be both substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in affecting the termination.”
47. The claimant also relied on the case of *Mary Chemweno Kiptui =Vs Kenya Pipeline Company Ltd [2014]Eklr* where the court held:-
- “section 41 of *Employment Act* is couched in mandatory terms where an employer fails to follow these mandatory provisions whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where an such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair.”
48. To further buttress its argument, he relied on the case of *Janet Nyandiko v Kenya Commercial Bank Limited [2017] Eklr* where the court summarized those procedures as follows:
- “section 45 of the act makes provision inter alia no employer shall terminate the employment of an employee unfairly. In terms of the said section a termination of an employee is deemed to be unfair if the employer failed to prove that the reason for the termination was valid that the reason for the termination was a fair reason and that the same was related to the



employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.”

49. On that basis, it was argued that before an employee is terminated, the employer must ensure the employee is subjected to procedural and substantive justification, which was not done in this case, as such the termination of the claimant's services was unfair and unlawful. Furthermore, that the respondent has not discharged their burden of justifying the alleged self-termination of the claimant. Hence the termination was unfair and the claimant should be awarded the reliefs sought in the claim.
50. On costs, it was argued that costs follow event as provided for in section 27 of the [Civil Procedure Act](#) and reiterated by the Court in the case of *Jasbir Singh Rai & 3 Others v Tariochan Singh Rai and 4 Others* [2014] eKLR.

### **Respondent's submissions**

51. The Respondent Submitted on two issues; whether the Claimant's employment was terminated unfairly and whether the Claimant is entitled to the reliefs sought.
52. On the first issue, it was submitted that it is not in dispute that the claimant was employed as a salesman at the respondent company, neither is it disputed that the claimant conducted businesses with corporate clients. He argued that it is through the transactions that were conducted through the claimant that the respondent company lost millions of shillings. This loss was confirmed by the claimant who wrote a letter confirming that he had initially misappropriated the respondent's funds. Further that the misappropriation led the claimant to being charged in a criminal case through which the respondent company lost KShs. 13,199,040.00 as a result of the business transactions he had entered into with clients/ persons only he knew of.
53. The Respondent described how the loss occurred and stated that the claimant would make the orders and hand them to the respondent company, who assigned the said order to different trucks, who delivered to the said customers but the cement delivered was never paid for, leading to the massive financial loss. He argued that this loss is evidenced by Exhibit 6, an inventory of the documents that were obtained from the claimant's house, which ordinarily should have been in the possession of the respondent company and in particular at the finance department.
54. He argued further that this loss was further confirmed by the claimant that confessed in Exhibit 5, a letter by the claimant, that he had conducted a malpractice that led to the respondent losing some amount of money on two (2) occasions. Nevertheless, that the respondent still kept him in employment. That the claimant continued working for the respondent company and sometime in the year 2021 the claimant was arraigned in court for the loss of millions of monies that the respondent had lost through transactions that had been carried out between the claimant and the claimant's clients.
55. The Respondent submitted that though the claimant was out of work during the period the criminal case was heard, it did not proceed to dismiss the claimant's employment due to the claimant's absence from work but merely stopped payment of salary because he was no longer rendering any services to the Respondent. However, that the claimant was expected to resume work immediately the criminal case was over.
56. On the reason for termination, the Respondent submitted that its witnesses maintained that the respondent company lost millions of shillings which has not been recovered to date following the transactions that were made by the claimant herein while he was a Salesperson at the respondent company. A fact which was admitted by the claimant. He elaborated that various truck drivers who work with the respondent company confirmed that they made deliveries to the clients that the claimant



herein had directed them to drop the clients/ persons and the money could not be traced as payments for the said products were never made. Further that it was the duty of the claimant to ensure that his clients paid for the products/ cement they had purchased through him, the same was never done and so the money was never paid to the respondent.

57. The Respondent stated that the claimant confirmed during hearing to have obtained orders from his clients as it was his responsibility. He also confirmed that it was his duty to hand over the orders to the respondent and further that the products were always dispatched as per the orders he had made to the respondent company. He then confirmed that he had written the letter dated 13/08/2021 to the company regarding some irregularity that had happened when he made orders that were erroneous. Further that due to these irregularities, the respondent Kshs. 13,199,040.00, that formed the basis of him being charged with the offence of “Stealing by Servant Contrary to Section 281 of the Penal Code’ in court file No. Kericho E3448 of 2021. That the claimant admitted that he was found in possession of payment cheques and even invoices among other documents that were meant to have been submitted to the respondent’s accounts office and which laid basis of the criminal case against him. Additionally, that the claimant had been charged for a similar offense of stealing by servant in Makadara Criminal case number 68 of 2016 in respect of loss of Kshs. 5,356,575.00, wherein the Respondent allowed the claimant to continue working while the criminal case was going on.
58. On termination, the Respondent submitted that they never initiated any termination proceedings, instead that the claimant himself wrote to them on 27<sup>th</sup> January, 2023 seeking to have a form from Old Mutual pension scheme filled by the respondent for purposes of him exiting the said scheme which the respondent company had registered him into and was remitting premiums towards the same. Additionally, that the Claimant sought to collect his personal documents and belongings from the respondent company, a clear indication that the claimant voluntarily exited the Respondent’s employ and was never terminated as alleged.
59. To support this argument, the Respondent relied on the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR*, in which the claimant’s claim was dismissed since he failed to resume work after the criminal charges against him had been dropped. While arriving at that decision the learned Judge stated that;-
- “The respondent’s case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47 (5) of the *Employment Act*, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such”
60. On whether the claimant is entitled to the reliefs sought, it was submitted that the claimant has failed to prove the case of unfair termination from employment and therefore he is not deserving of the reliefs sought.
61. In conclusion, the Respondent prayed for the cause herein to be dismissed with costs to them.
62. I have examined all the evidence and submissions of the parties herein. I set out the following as the issues for this court’s determination.
1. Whether the claimant was dismissed or absconded duty.
  2. If he was terminated whether the termination was fair and justified.
  3. Whether the claimant is entitled to the remedies sought.



## Issue No. 1

63. The claimant has submitted that he was unfairly terminated by the respondents after he was arrested and charged in court under Criminal Case No. E3448 of 2021 in which he was discharged under section 215 of the CPC.
64. He however indicated that his last day at work was 10<sup>th</sup> September, 2021 when he was arrested and taken to police custody and so he couldn't contact the respondent until after he was discharged.
65. He also admitted that he didn't receive any letter terminating his services. He indicated that he knew his services were terminated when his salary was stopped and upon going back to the company, he was not allowed access.
66. The respondents on their part deny terminating the claimant but aver that the claimant absconded duty and was not terminated.
67. The claimant explained that his salary was stopped and so he presumed he had been terminated. The question then is whether stoppage of salary is a termination. My take on this is that the employer has a duty to pay salary and wages of an employee. Section 17 of the *employment Act* 2007 states as follows:-  
Section 17.
  - (l) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya:-
    - a. in cash;
    - b. into an account at a bank, or building society, designated by the employee;
    - c. by cheque, postal order or money order in favour of the employee; or
    - d. in the absence of an employee, to a person other than the employee, if the person is duly authorized by the employee in writing to receive the wages on the employees behalf.
  2. An employer shall pay wages to an employee on a working day, and during working hours, at or near to the place of employment or at such other place as may be agreed between the employer and the employee.
  3. An employer shall not pay wages to an employee in any place where intoxicating liquor is sold or readily available for supply, except in the case of employees employed to work in that place.
  4. No person shall give or promise to any person any advance of money or any valuable-consideration upon a condition expressed or implied that the person or any dependant of that person shall enter upon any employment.
  5. If, in a contract of service or collective agreement, provision is made for the payment of any allowance in kind to an employee with the employees consent the payment may with such consent be made only if, the allowance—
    - (a) is for the personal use and benefit of the employee; and
    - (b) does not consist of or include any intoxicating .spirit or noxious drug.



6. Notwithstanding the provisions of any law for the time being in force, whenever an attachment has been issued against the property of an employer in execution of a decree against him, the proceeds realized in pursuance of that execution shall not be paid by the court to a decree-holder until a decree obtained against the employer in respect of the wages of employees has been satisfied to the extent of a sum not exceeding six months' wages of those employees.
7. Nothing in subsection (6) shall prevent an employee from recovering any balance due after such satisfaction, by ordinary process of law.
8. Subsection (6) shall not apply if the attachment is issued against an employer undergoing insolvency as defined under Part VIII in which case the provisions under that Part shall apply.
9. If an employer advances to an employee a sum in excess of the amount of one month's wages of the employee or, in the case of an employee employed under a written contract of service, a sum in excess of the amount of two months' wages of that employee, the excess shall not be recoverable in a court of law.
10. A person who—
  - a. subject to section 19, willfully fails to make payment of or to tender the wages earned by or payable to an employee in accordance with subsection (1) ;or
  - b. contravenes any of the provisions of subsections (2), (3), (4) and (5) commits an offence and shall on conviction be liable to fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
11. No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which •the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.”

68. This section is couched in mandatory term and put an obligation upon the employer to pay wages and also creates an offence for non payment of wages.

69. It is true that the claimant herein had been arrested and charged. However, the act of stopping to pay his salary or wages was an act that was not explained to him and a breach of the employer's obligation to pay salary. This non payment of salary or wages when due can be counted as a termination or dismissal.

70. It is therefore my finding that the claimant didn't abscond duty but was terminated by the respondent.

## **Issue No. 2**

71. The claimant averred that he was terminated for no apparent reason and without a proper hearing. The claimant averred that he was accused of theft by servant which charges he was acquitted from. The claimant testified that his role at Rai Cement Ltd was to get orders from customers in the region as he was a Regional Sales Manager. He avers that after his arrest he was charged before court and was placed in police custody for 8 months as he could not afford bail or bond. He was found not guilty and acquitted under Section 215 of CPC on 21<sup>st</sup> September, 2022.



78. The respondents called 12 witnesses; an accountant, transport and logistical manager, Human Resource Officer, a client company representative and 8 drivers. The 1<sup>st</sup> witness the accountant testified that the claimant was the sales person but he didn't check out the customers.
79. The second witness testified that they found out that many customers had not paid for the cement supplied and no payment had been received by their customers. They checked through all accounts found that Victoria cement had not received any cement. They submitted a report to management and got many other customers who had not received their cement.
80. The witness submitted that orders received from clients but the companies denied receiving their cement. When RW2 was cross examined, he indicated that the respondent had 4 salesmen and the claimant was handling corporate clients. The witness however said that the claimant was not responsible for transport and logistics in the company. The RW3 the respondents Human Resource Manager on the other hand indicated that the claimant last came to work on 10<sup>th</sup> September, 2021 and he never communicated to them again. They denied terminating his services nor denying him entry at work. They also admitted to not issuing him with a Certificate of Service.
81. The rest of the witnesses were drivers who testified that they delivered cement to certain companies. The orders had been made by Rahul. The witnesses indicated that they had delivery notes on where cement was to be delivered and they did and the recipients signed the delivery notes. The delivery notes were never produced in court as exhibits.
82. The witnesses further indicated that one Nitesh the logistics in charge was the one who assigned them the work and gave them the delivery notes.
83. My analysis of this evidence show that indeed there were orders made for delivery of cement to certain companies by the claimant. Various drivers were assigned the work of delivering the said cement to various company. The logistics on delivery was made by one Nitesh. He also issued the drivers with delivery notes which were signed and returned to the company. No delivery notes have however been submitted to court to show where the cement in question was delivered.
84. Whereas the claimant as a Salesman had a responsibility to follow up on payments for deliveries made he cannot be accused of stealing and be terminated on that ground.
85. The respondents admitted that they didn't issue the claimant with a termination letter. It is also apparent that he was not taken through any disciplinary process before the termination. The claimant indicated he was terminated because his salary was stopped a matter I have discussed above.
86. Section 41 of the *Employment Act* 2007 envisages as follows:-  
Section 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.”
87. Section 45 (2) of the *Employment Act* 2007, states as follows: -  
Section 45. (2) A termination of employment by an employer is unfair if the employer fails to prove—  
(a) that the reason for the termination is valid;  
(b) that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility; or



- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

88. In the absence of any disciplinary hearing and in the absence of established validity of reasons leading to the claimant's dismissal, I find his dismissal unfair and unjustified.

**Issue No. 3-remedies**

89. The claimant sought a raft of remedies from the respondent. Given the circumstances of the termination and the fact that the claimant was the respondents sales manager having the duty to ensure payments for supplies which he failed to do. I award him 3 months' salary as compensation for the unfair termination being 73,000/- x3 =231,000. I also award him 1-month salary in lieu of notice= 73,000/=

Total= 302,000/=

Less statutory deductions.

The claimant should also be issued with a Certificate of Service. The respondent will pay cost of this suit.

**JUDGEMENT DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**HELLEN WASILWA**

**JUDGE.**

**In the presence of:-**

**Okeyo for Respondent – Present**

**Ondieki for Claimant – Absent**

**Court Assistant - Fred**

