

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E6506 OF 2020

THOMAS ONONO

OKUYUMBA.....CLAIMANT

VERSUS

UNGA LIMITED....

.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit through a Memorandum of Claim dated 25th November, 2020, alleging unlawful/unfair termination and non-payment of terminal dues. He seeks the following reliefs as against the Respondent:
 - i. A declaration that his termination was unlawful.
 - ii. Two months' pay in lieu of notice
 - iii. Leave not taken (16 days)
 - iv. Damages for wrongful dismissal
 - v. House Allowance
 - vi. Service Pay
 - vii. Unpaid Salary (2 days in October 2020)
 - viii. Interest on 2 - 7 above.
 - ix. Certificate of service
 - x. Costs of the suit.

2. The Respondent filed a Memorandum of Reply to the Claim dated 3rd October, 2020, denying the Claimant's claim.
3. The matter was first heard on 1st March, 2024 before Hon. Justice James Rika. The Claimant testified in support of his case and adopted his witness statement dated 25th November, 2020, and produced his list and bundle of documents as exhibits in the matter, and were marked as Claimant's exhibits Nos. 1-8.
4. The Respondent's case was heard on 14th November, 2024 when the Respondent's witnesses Ms. Lydia Wairima Wanjiru and Ms. Doris Kivuti testified in support of the Respondent's case. They too adopted their witness statements and produced the Respondent's list and bundle of documents as exhibits in the matter.
5. Both parties filed submissions.

The Claimant's Case

6. The Claimant's case is that he was at all material times, an employee of the Respondent, having been engaged as a Quality Assurance Officer pursuant to an employment contract dated 1st November 2016.
7. It is his case that during the subsistence of his employment, he diligently and faithfully discharged his duties in accordance with the terms of his contract and without any record of disciplinary action. He avers that on or about 25th

August 2020, he received a telephone call from Mr. Allan Waigwa, the Respondent's Lab Coordinator, inquiring about the results of Jogoo maize flour produced on 21st August 2020 in relation to aflatoxin levels.

8. The Claimant states that the Lab Coordinator informed him that his analyst had obtained an aflatoxin result of 38ppb, which exceeded the permissible limit of 10ppb, and that he shared with him results from his own team showing levels within the specification, with the highest reading being 4.9ppb.
9. It is his case that he and the Lab Coordinator mutually agreed to retest the same sample through another analyst within the Respondent's facility, which yielded a result of 6ppb, which was still within the required limit. He avers that a joint test was subsequently conducted between the Central Laboratory and the Site Laboratory, producing varying but compliant results, all within the allowable limit of not more than 10ppb.
10. The Claimant states that he presented the findings to the Quality Assurance Manager, demonstrating that all results complied with the established specifications, but even so, he was on 28th August 2020, issued with a show cause letter to explain the varying results, and was later required to appear before two analysts, namely Titus Kithela and Stephen Kiyondi, for further explanation.

11.The Claimant avers that later on 2nd October 2020, he was served with a Summary Dismissal Letter, terminating his employment with immediate effect. He avers that his demands for reinstatement and/or compensation, have been ignored by the Respondent.

12.On cross-examination, the Claimant told court that his role was to ensure that materials coming in and products going out met quality standards. He further confirmed that the Quality Assistants tested the subject materials (maize) and shared the results with him, and that he was the one that authorized the release of the materials for production.

13.He told the court that a second lab did tests on the flour and found that aflatoxins levels were high. He confirmed that investigations followed which resulted in his suspension and subsequent disciplinary action, and which led to his summary dismissal.

14.It is his case that he was dismissed on the ground that he failed in his quality control role. He states that he shared daily reports with two employees above him and they did not raise any issues.

15.The Claimant prays that the court allows his claim.

The Respondent's Case

16.The Respondent states that the Claimant was its employee from 1st November 2016 to 2nd October 2020, where he was

employed as a Quality Assurance Officer under a formal letter of appointment.

17. The Respondent avers that the Claimant was issued with a Job Description (JD) and the Quality Assurance Program for Aflatoxin Analysis (QAPAA), set out his duties to include ensuring compliance with the Respondent's Food Safety Policy.

18. The Respondent states that contrary to the Claimant's assertion that he performed his duties diligently, he failed to adhere to the QAPAA procedures, particularly during the receipt and testing of raw materials. It states further, that this failure led to maize with Aflatoxin levels exceeding acceptable limits being received and processed, exposing the Respondent to food safety risks and reputational damage.

19. The Respondent states that upon testing a sample of Jogoo maize flour (Batch No. UL) on 25th August 2020, a result of 38ppb Aflatoxin was obtained, which was significantly above the 10ppb limit. It avers that further testing of twelve additional samples from the warehouse confirmed consistently high Aflatoxin levels.

20. It avers that it was further established that proper sampling protocols were not followed, as only five samples were tested instead of the required eight, and that the Claimant failed to detect or report this lapse in process control, which

failures caused a business loss of approximately KShs.7 million.

21. The Respondent states that following these findings, the Claimant was issued with a show cause letter and subsequently invited to a disciplinary hearing that was held on 2nd September 2020, which he attended. It states further, that after due consideration of the Claimant's response and the disciplinary proceedings, it summarily dismissed the Claimant on grounds of gross negligence and failure to perform his duties in accordance with lawful instructions, and in line with Section 44(1) of the Employment Act, 2007.
22. The Respondent maintains that the dismissal was fair, lawful, and procedurally compliant, having adhered to Sections 41, 43, 44, and 45 of the Employment Act. It states further, that the Claimant was paid his terminal dues and was offered a Certificate of Service, which he has not collected.
23. On cross-exam, the Respondent's witness RW1, who was also the Claimant's supervisor, told the court that the first disciplinary hearing which the Claimant attended, did not recommend his dismissal, but that the decision to dismiss him was reached in a second meeting which the Claimant did not attend. It is her evidence that she did not know why the Claimant was not invited to that meeting of 24th September, 2020.

24.It is RW1's evidence that the investigation report that implicated the Claimant was not filed in court and was also not produced in any of the disciplinary meetings, but that it was only referred to.

25.On her part, RW2, the Respondent's Human Resources Manager told court that the disciplinary meeting of 2nd September, 2020 recommended that further investigations be carried out, and did not recommend the Claimant's dismissal.

26.The Respondent prays that the Honourable Court finds the termination justified and lawful, and accordingly dismisses the Claimant's claim in its entirety with costs.

The Claimant's Submissions

27.It is the Claimant's submission that he was unfairly dismissed from employment contrary to Section 45 of the Employment Act. He submits further that in the second disciplinary Committee hearing which was held on the 24th September, 2020 the said meeting was held in the absence of the Claimant.

28.The Claimant submits that the Respondent failed to discharge the burden of proof to demonstrate that his termination was reasonable, on the basis that in the 2nd disciplinary hearing where the Claimant was summarily dismissed there was no disclosure of the charges levelled against him.

29.The Claimant finally submits that he is entitled to the reliefs sought.

The Respondent's Submissions

30.It is the Respondent's submission that it duly complied with Sections 41, 43, 44 and 45 of the Employment Act as applicable to the Cause herein, together with other applicable provisions of law.

31.The Respondent submits further, that its termination of the Claimant's employment was fair and lawful within the meaning of the applicable provisions of the Employment Act, and other labour law.

32.It submits that it is and has always been ready and willing to issue the Certificate of Service to the Claimant, but he has not made any effort to collect the same from the Respondent's office.

Analysis and Determination

33.I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues that fall for determination are:-

- i. Whether the Claimant was wrongfully dismissed
- ii. Whether he is deserving of the remedies sought.
- iii. Who bears the costs of the suit?

Whether the Claimant was wrongfully dismissed

34. That the Claimant was summarily dismissed from the service of the Respondent is not in doubt. The question is whether the Respondent adhered with both procedural fairness and substantive justification in dismissing the Claimant.

35. The Claimant's position is that he was unfairly dismissed on the basis that he was invited to attend a disciplinary hearing on 2nd September, 2020, which hearing did not result in a recommendation for his dismissal. He avers that he was dismissed pursuant to a resolution reached in a disciplinary hearing that was held on 24th September, 2020, and which he was not invited to attend.

36. The Respondent on its part maintains that it terminated the Claimant's contract on grounds of negligence by not performing his duties pursuant to lawful, proper commands and/or directions issued to him by the Respondent.

37. The Employment Act, 2007, demands that an employer shall not terminate the services of an employee unfairly. By this provision, the Act obligates an employer to initiate various fair procedure mechanisms of discipline in the work place to ensure fairness. Failure by an employer to adhere to the stringent requirements of the law in respect of a termination/dismissal, amounts to unfair termination/wrongful dismissal.

38. Section 41 of the Employment Act, provides thus on procedural fairness:-

“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.”

39. The record confirms that the Claimant was issued a show cause notice dated 28th August, 2020 spelling out the charges against him. It is also not disputed that he responded to the said show case vide his letter of 31st August, 2020, and was subsequently invited to a disciplinary hearing, and under the invite, he was advised to attend the hearing with a representative of his choice.

40. Although the Claimant faults the Respondent's process on the basis that he did not attend the meeting of 24th September, 2020 where the decision to terminate his employment was reached, it is evident that the Claimant made his representation during the hearing of 2nd September, 2020 despite the short notice, and his input was not necessary in the subsequent meeting going by the resolutions capture in the minutes of that meeting.

41. The Respondent's process cannot therefore be faulted solely on the basis that a decision to dismiss the Claimant was reached in a meeting that he did not attend, having already made his representation.

42. It is however clear that the letter inviting the Claimant for the hearing is dated 1st September, 2020 and he was expected to attend the hearing the following day on 2nd September, 2020 at 9a.m. In the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** the court had this to say on disciplinary timelines:-

“This Court held that for a disciplinary process to pass the fairness test set out in Section 41 of the Employment Act, the charges made against the employee must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.

38. In handling the Claimant's case, the Respondent failed to avail her adequate time to prepare her defence and for this

reason, the Court finds the dismissal unfair for want of due process.”

43. In the same breath, the Claimant herein, was not allowed any time at all to prepare for the disciplinary hearing. The less than a day's notice was inordinately short for any meaningful preparation for the hearing.

44. In the circumstances, I find and hold that the disciplinary process violated Section 41 and Section 44 of the Employment Act, 2007, and which renders the Claimant's dismissal procedurally unfair, and so I hold.

45. On whether the Respondent had fair and justified grounds to dismiss the Claimant, Sections 43, 45 and 47(5) of the Employment Act, demand that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the grounds are justified. Reasons for termination have generally been held to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee.

46. The disciplinary committee's finding was that the Claimant's failure to do his duties as a supervisor, resulted in lapses in the Respondent's processes, and hence their recommendation for further investigations was to find out whether there was fraud in their system. The committee's

decision was that a final decision would be made once the issue of possible fraud and further sampling was finalized.

47. In the minutes of the disciplinary hearing, it is evident that the Claimant acknowledged overlooking the testing of samples for aflatoxins and further admitted that there could have been fraud in the Respondent's testing system that allowed receiving of maize that had aflatoxins.

48. From the record, it is confirmed that the Respondent took disciplinary action against the Claimant and two other quality assurance assistants who served under him, which goes to confirm the seriousness of the issue subject of the dismissal.

49. The Claimant held the position of Food Safety Leader and his failure to supervise the people under him, exposed the Respondent to food safety risks and reputational damage and the larger public to unsafe food.

50. In the end, I reach the finding that the Claimant's dismissal though procedurally unfair, was based on valid and justified grounds.

Whether the Claimant deserves the Remedies sought

51. The Claimant's claim is for a declaration that the termination was unlawful, two months' pay in lieu of notice, leave not taken (16 days), damages for wrongful dismissal, house Allowance, service Pay, unpaid Salary (2 days in

October 2020), interest, Certificate of service and costs of the suit.

52. The Respondent has placed before court the Claimant's last pay slip (October, 2020) as well as a computation of unutilized leave days (22) as prove that the Claimant was paid at dismissal his dues in respect of these terminal benefits. The Claimant's claims in this respect are therefore unsupported and they fail.

53. On the prayer for damages for the unfair termination, the court found the Claimant's dismissal unlawful and unfair on account of procedure, which entitles him to compensation in accordance with Sections 49 and 50 of the Employment Act, 2007.

54. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act. The Supreme Court in ***Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR*** noted as follows:-

“When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”

55. Having found the dismissal substantively fair, and only faulted the procedure adopted on account of the short notice, I deem an award of two months' salary sufficient

compensation for the unfair termination, and which is hereby awarded.

56. The finding that the Claimant's dismissal was unfair, also entitles him to notice pay which the Respondent did not show to have paid. The Claimant's contract provides a 60 days' notice period, hence the claim for two months' salary in lieu of notice is found to have merit.

57. The pay slips produced in evidence show that the Claimant was in a contributory pension scheme, and contributions were also made in respect of NSSF. The claim for service pay therefore is without basis and is dismissed.

58. It is also confirmed that the Claimant earned a consolidated salary, making the claim for house allowance untenable.

59. In whole, judgment is entered for the Claimant as against the Respondent as follows: -

- a) A declaration that the Claimant's dismissal was procedurally unfair.
- b) That the Respondent shall pay the Claimant two (2) Months' salary as compensation for the unfair termination at Kshs,226,984/-
- c) Two months' salary in lieu of notice at Kshs,226,984/-
- d) The Claimant be issued with a certificate of service within 14 days of this judgment.
- e) The Respondent shall bear the costs of the suit.

60. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER,
2025.**

**C. N. BAARI
JUDGE**

Appearance:

Mr. Wangalwa present for the Claimant

Mr. Kibanya present for the Respondent

Ms. Esther S- C/A