



**Bett v East Africa Portland Cement Company (Cause 1562 of 2014)
[2023] KEELRC 1358 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1358 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1562 OF 2014**

SC RUTTO, J

JUNE 2, 2023

BETWEEN

ALEXANDER BETT CLAIMANT

AND

EAST AFRICA PORTLAND CEMENT COMPANY RESPONDENT

JUDGMENT

1. The suit was commenced through a Memorandum of Claim dated 29th August, 2014 in which the claimant avers that he was employed by the respondent as a stores clerk with effect from 2003. He avers that he was interdicted on 12th April, 2013 on grounds that he was complicit in the loss of 904 bags of cement valued at Kshs 662,970.00 and a float of Kshs 40,000.00. Following a disciplinary process, which the claimant has termed as irregular, he was dismissed from employment through a letter dated 27th May, 2013. The claimant has termed the said dismissal as unlawful and malicious hence seeks against the respondent inter alia, an order of reinstatement and in the alternative, compensatory damages as well as a written apology.
2. Opposing the claim, the respondent avers that it had a valid reason for the claimant's dismissal and that he was given adequate opportunity to defend himself against the charges raised, both in writing and orally. Consequently, the respondent has asked the Court to find that the claimant's dismissal from employment was lawful and fair and dismiss the suit with costs.
3. The matter proceeded for hearing on 21st January, 2023 during which both sides called oral evidence.

Claimant's Case

4. The claimant testified as CW1 and at the start of the hearing, sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his claim as exhibits before Court.



5. It was the claimant's testimony that on 6th April, 2013, he wound up his duties for the day at the respondent's depot at Meru, checked the premises and made sure that the same were locked appropriately as was the routine. On 7th April, 2013, he reported to work as usual and on arrival at the respondent's premises, he noticed that the padlocks had been tampered with. On further inspection, he discovered that the cement stacks had been disarranged and blocks of cement had been removed from the wall between the depot and the adjacent room, which had previously been occupied by the respondent's motorcycles. He also realized that the depot operating balance/float drawers had been vandalized and Kshs 40,000/- was missing. He reported the incident to the depot supervisor by the name Mr. Githinji as well as the Regional Sales Executive. He also reported the incident to Meru Police Station and recorded a statement to that effect.
6. After reporting the incident to the police, he purchased two new padlocks and secured the respondent's premises. On 8th April 2013, an Auditor was sent from the respondent's head office to take stock of the burglary incident. He avers that he did not take part in the said audit despite being the respondent's depot clerk, having knowledge of the pre and post incident information that would obviously have been informative. He believes that his exclusion from the audit was to lay down a foundation for the procedural unfairness that followed and eventual unlawful termination of his employment.
7. On 12th April 2013, he received an interdiction letter which alleged that he was complicit in the loss of 904 bags of cement valued at Kshs. 662,970/= and float of Kshs. 40,000/=. He contends that he was not provided with any evidence, documentary or otherwise that the respondent relied on to enable him defend himself.
8. The interdiction letter required him to show cause why he should not be summarily dismissed from the respondent's service for gross misconduct. In compliance and despite the obvious difficulty of not having been supplied with the evidence (if any) in the respondent's possession, he prepared a detailed response to the allegations to the best of his ability in the circumstances.
9. On 13th May, 2013 through a letter dated 9th May, 2013, the respondent directed him to appear before its disciplinary committee on 14th May, 2013. This was less than a day's notice and he had no time to prepare.
10. On 14th May, 2013, he presented himself before the respondent's Disciplinary Committee panel accompanied by the Chairperson of his union and a few union members. The claimant contended that the respondent's Disciplinary Committee panel was not properly constituted as the respondent's head of Human Resources and Administration was to chair the meeting.
11. Mr. Kawinzi who was the chairman of the union brought this and other issues to the respondent's disciplinary committee and when it became apparent that their concerns were not going to be addressed by the said panel, he directed him and the other union representatives present to walk out of the meeting as it was irregular and out rightly unfair. Immediately they walked out of the room, there were police officers waiting outside hence he was arrested and taken to Athi River Police Station.
12. He contends that this action by the respondent clearly demonstrates its ill motive all through and the invitation to the irregularly convened Disciplinary Hearing was a mere ploy to lure him into the police drag net and have him arrested within the respondent's premises.
13. On 15th May, 2013, he was taken to Meru Police Station and detained until 16th May, 2013 when he was charged before the Chief Magistrates Court in Meru in Criminal Case No.466 of 2013. He was acquitted by the Court on 22nd March, 2018. He terms the criminal proceedings as nothing more than the respondent's attempt to sanctify its clearly unfair and unlawful actions.



14. It was his further evidence that the respondent in furtherance of its unlawful intentions, summarily dismissed him based on a secret/undisclosed evidence known only to it.

Respondent's case

15. The respondent called oral evidence through Mr. Haron Kisemei and Mr. Clive Kinoti who testified as RW1 and RW2 respectively. Mr. Kisemei was the first to go. He identified himself as the respondent's Employee Relations and Administration Manager and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
16. It was RW1's testimony that on 7th April, 2013 the claimant while serving as the depot clerk in Meru, reported that there had been theft of 904 bags of cement and Kshs.40,000 petty cash. He indicated that he had visited the depot on Sunday, 7th April, 2013 at around 10.00 a.m. and reported the incident to the police.
17. Following the claimant's report, a special review was done to confirm the quantum of loss and to obtain collaborative support of the circumstances under which the theft was reported to have occurred. The review was restricted to the period from the date of the last stock count to the date the theft was reported to have occurred. After investigations, it was recommended that disciplinary action be taken against the claimant for giving wrong information to the company.
18. On 12th April, 2013, the claimant was interdicted from duty pending further investigations. In the letter of interdiction, he was informed that he had failed to account for 904 bags of cement, worth Kshs.662,970 and a float of Ksh.40,000 which was in his possession by virtue of his duty. He was further requested to show cause why disciplinary action not be taken against him for gross misconduct. On 17th April, 2013, the claimant responded to the interdiction letter.
19. The respondent's security manager who was also informed about the incident indicated in his statement that on 8th April, 2013, he had gone to the Meru Depot accompanied by Mr. Meja from the audit department. He also indicated that a physical examination of the depot showed no traces of breaking in both at the outer entry point and in the office where the float of Kshs 40,000.00 had been kept.
20. It was his evidence that a physical stock take indicated a stock of 1295 bags of cement while the bin card balance reflected a total of 2,199 bags making a difference of 904 bags. They also visited the police to confirm the report of the incident and found statements recorded by the depot supervisor Mr. Githinji, the claimant and Mr. Muguna the security guard.
21. According to Mr. Githinji's statement, he had left the depot on 5th April 2013 and everything was intact. However, on Sunday 7th April 2013 at around 12 noon, the claimant called him and informed him that 902 bags of cement and Kshs. 40,000 cash had been stolen. Thereafter, he left Naivasha for the Meru depot. The next day, he went to the station to record his statement.
22. The respondent's security guard Mr. Muguna also recorded a statement with the police in which he indicated that he was on duty on 6th April 2013 from 6 p.m. and everything was intact. He further indicated that the claimant had returned to the depot at around 8 p.m. to wait for someone who was coming with cargo. After staying for about 30 minutes, the claimant left stating that the person he had been waiting for was stuck at the nearby roadblock.
23. Mr. Muguna further stated that after about an hour, someone came with a lorry looking for the claimant. The person called the claimant, who told him to wait for about 30 minutes. After a short



- period, another man came and spoke with the lorry driver. The man then gave the lorry driver a receipt then left. The claimant returned to the depot and opened the office where they stayed with the lorry driver for about 15 minutes and then left the premises together.
24. On 9th May, 2013 the claimant was invited to attend a disciplinary hearing scheduled for 14th May, 2013. The claimant attended the disciplinary hearing on 14th May, 2013 accompanied by seven union representatives. The Security Manager, the Internal Auditor, the Cement Loader at Meru Depot and the Depot Supervisor were also invited to clarify the facts of the case.
 25. When the claimant was invited to make his oral submissions, one of the union representatives, Mr. Kawinzi accused the respondent of mishandling the process in that his office had not been informed of the case and since the said case had been reported, the police should handle it to completion. He further stated that he and his team had nothing to discuss with management and refused to sign the attendance register saying that everything was illegal.
 26. Efforts by the Committee chairman and other committee members to explain the management's position were made but the claimant and his union representatives declined to cooperate, used disrespectful abusive language to the committee members and walked out. Following this, the meeting proceeded without the claimant and his representatives.
 27. After considering the facts of the case, the Committee found that the claimant had failed to account for the 954 bags of cement and Kshs. 40,000. His allegations that the depot had been broken into were also found to be false and the committee recommended that the claimant be dismissed from employment.
 28. On his part, RW2 who identified himself as a Senior Internal Auditor stated that following the claimant's report to the police with regards to the theft of cement, a special review was done to confirm the quantum of loss and to obtain collaborative support of the circumstances under which the theft was reported to have occurred.
 29. One of the key issues revealed by the special review was that the physical stock on 8th April 2013 was 1295 bags compared to a bin card balance of 2,199 bags of PPC cement. This inferred that 904 bags of cement were unaccounted for. It was further noted that 1,020 bags of cement had been received on 4th April 2013 but not booked on the bin card as received. Out of these, 310 bags had been issued and not posted on the bin card.
 30. The audit further revealed that 660 bags of cement had not been received in the depot as alleged by the claimant and recorded in the bin card. Instead, only delivery notes had been taken to the depot to be stamped as received. Cumulatively, the total number of bags of cement unaccounted for were 954, valued at Kshs. 701,190.00.
 31. It was his evidence that the audit also revealed that the claimant had done some transactions at the depot before reporting the incident to the police. These included posting, printing of receipts, raising of delivery notes and invoicing customers both in the system and manually.
 32. Finally, the investigations revealed that the claimant had been at the depot on the night of 6th April, 2013 and some people had come looking for him at the early part of the night. It was further observed that theft of 954 bags of cement requires at least five 10 tonnes trucks and this would have attracted attention on the busy Meru Maua Road given the manner and speed of executing the theft. It was further noted that it would have taken the whole night for the cement to be loaded.
 33. Further, a stock take indicated a physical stock of 1295 bags of cement while the bin card balance reflected a total of 2199 bags making a difference of 904 bags. Further stock takes and observations report revealed that there was manipulation of records at the depot with a bad motive of defrauding the



respondent's company. The report further doubted the alleged theft of 902 bags and float amounting to Kshs. 40,000 on grounds that;

- a. There was no trace of damage to the door or any part of the walls or roof used to access inside the depot or move cement outside the depot;
 - b. The depot office is located inside the depot with a lockable door which had not been broken into;
 - c. Petty cash is kept at the depot clerk account and is only withdrawn when paying the loaders and any other depot expenses. There was no evidence or reason to believe that there were any payments to be made on 7th April, 2013, a non-working day;
 - d. Loaders at the depot are casual labourers and are paid their dues at the close of business on a daily basis. This nullifies any reason as to why such an amount of money was kept at the depot especially since it was cash; and
 - e. The claimant did not have a cash withdrawal receipt showing that the money was actually withdrawn from the Bank account and the reasons for such withdrawal.
34. After investigations, it was recommended that disciplinary action be taken against the claimant for giving wrong information to the company.

Submissions

35. The claimant submitted that the procedure leading upto and constituting the disciplinary committee fell short of the provisions of Section 41 of the [Employment Act](#). He argued that the dismissal was unfair and illegal as the respondent failed to provide him with any evidence, documentary or otherwise that it had in support of the allegations against him to enable him defend himself. He further submitted that the respondent gave him a short notice of the disciplinary hearing. It was his further submission that he was dismissed based on unfounded allegations that were discriminatory and grossly unfair to him, including information based on unverified stories from witnesses who were not called before Court. In support of these arguments, the claimant placed reliance on the case of [Pius Machafu Isindu v Lavington Security Guards Limited](#) (2017) eKLR.
36. The claimant further argued that in a disciplinary case where the criminal element exists in the opinion of the employer, the employer has an election to conduct the investigations using the internal administrative systems or to report to the relevant criminal justice agency and in which event the agency's findings would be binding. In support of this argument, the claimant cited the case of [Patrick Njuguna Kariuki v Del monte \(K\) Limited](#) and [Matthew Kipchumba Koskei v Baringo Teachers SACCO](#).
37. On the respondent's part, it was submitted that it incurred a loss of substantial amount of cement and financial loss and that it had a valid and fair reason related to the claimant's conduct justifying his summary dismissal from employment. The respondent further submitted that the loss of cement was of a large amount and it could not go undetected if it is true that the claimant being in charge of updating records for cement received and sold, was diligent in his duties.
38. It was the respondent's further submission that the claimant has not proven on a balance of probability that his summary dismissal was not for a valid reason. To fortify its argument, the respondent placed reliance on several authorities including [Paul Billy Nyagilo v East African Portland Cement Co. Ltd](#) (2017) eKLR, [Albert Mutekhele Maunda v Postal Corporation Kenya](#) (2019) eKLR and [Thomas Barkasiam Miningwo v Egerton University](#) (2015) eKLR.



39. With regards to fair procedure, the respondent submitted that the claimant's summary dismissal was preceded by a fair procedure that meets the requisite threshold. It was further submitted by the respondent that there is a noticeable absence of any documentary evidence indicating that the claimant took any steps to challenge or appeal the decision.

Analysis and Determination

40. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court, together with the rival submissions and the following issues stand out for determination: -
- i. Whether the respondent had a fair and valid reason to terminate the employment of the claimant?
 - ii. Was the claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the claimant entitled to the reliefs sought?

Valid and fair reason?

41. The starting point in determining this question is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further along the *Act*, Section 45 (2) (a) and (b) provides that a termination of employment 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-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
42. What this means is that it is not enough for an employer to spell out the reasons for termination. The said reasons ought to be fair and valid and the burden rests on the employer to prove as much.
43. Turning to the case herein, it is apparent from the claimant's letter of dismissal that he was summarily dismissed on grounds that he failed to account for 954 bags of cement worth Kshs 701,190/= and a float of Kshs 40,000/=.
44. It is common ground that the claimant had reported a theft incident at Meru Police Station. According to him, he locked and secured the respondent's premises on Saturday 6th April, 2013. When he went to work, the following day, 7th April, 2013, at 10:00 am, he discovered that the locks were missing and upon entering the depot, he realized that the cement stacks had been disarranged and that some blocks had been removed from the wall in between the depot and the next room which was previously occupied by a company selling motor cycles. He further noticed that the balance of the depot float amounting to Kshs 40,000/= was missing.
45. In its defence, the respondent stated that following the report by the claimant, it undertook investigations and from the physical examination, there was no trace of breaking in both at the outer entry point and the office inside the building where cash of Kshs 40,000 was allegedly stolen.
46. The respondent further stated that it conducted a physical stock taking exercise as at 8th April, 2013 and the total number of the bags of cements was 1295 while the balance as per the bin card reflected a total of 2199 bags making a difference of 904 bags. Casting further blame on the claimant, the respondent



stated that 1020 bags had been received on 4th April, 2013 but were not booked on the bin card as received. The respondent further stated that 310 bags of cement had been issued but not posted and that 660 bags had been received and not recorded in the bin card.

47. In disputing the claim of theft by the claimant, the respondent stated that had the bags of cement been stolen on the night of 6th April, 2013, as alleged by the claimant, it would have required at least five 10 tonnes trucks and would have attracted attention on the busy Meru Maua road given the manner and speed of executing the theft. The respondent further contended that it would take the whole night to load the cement.
48. From the record, the claimant did not controvert the averments by the respondent with regards to the loss of the cement through a Reply to the Memorandum of Defence. From the record, the only explanation advanced by the claimant with regards to the missing bags of cement, was the alleged theft he reported to the police on 7th April, 2013.
49. What the claimant was essentially stating was that the bags of cement were stolen on the night of 6th April, 2013. However, he did not discount the respondent's version that the same was practically impossible given the manner and speed of executing the theft.
50. Further, the claimant did not rebut the claim that some bags of cement had been received on 4th April, 2013 but were not booked on the bin card and that some had been issued but not posted on the bin card.
51. The respondent further exhibited an invoice and customer receipts dated 7th April, 2013 in respect of transactions undertaken by the claimant on the very day he alleges to have discovered that a theft had occurred at the respondent's depot. If indeed, the claimant had found that the depot had been broken into and goods stolen, why did he sit down to undertake some transactions? Going by his version, the depot was a crime scene and prudence required that he leaves the place intact as he awaits investigations by the police.
52. Further there is a delivery note on record dated the said 7th April, 2013, indicating the time of delivery as 11:37:44. This means that the claimant was still receiving stock despite noting the alleged theft. Why would he carry on normally despite the theft? This is further noting that this was a Sunday hence he was not required to be at work. Coupled with that, he stated that he noted the theft around at around 11:00 am and immediately reported to the police where he recorded his statement at around 12:00 noon. Hence, what time did he have to undertake the transactions as he did?
53. What can be deduced from the foregoing is that the claimant's version of events does not add up and is merely meant to cover for the shortfall in the number of the bags of cement that he had failed to account for.
54. It goes without saying that being in charge of the respondent's depot which was holding a substantial amount of cement, the claimant's position was that of utmost trust and honesty.
55. Therefore, failure to account for a substantial number of bags of cement certainly dented the trust the respondent had in the claimant, hence it had a valid and fair reason to take disciplinary action against him.
56. From the way I see it, a reasonable employer in the respondent's shoes would have let go of the claimant if faced with similar circumstances as the trust bestowed on him had been eroded.



57. On this issue, I apply the determination by Lord Denning in the case of *British Leyland UK Ltd. v Swift* [1981] IRLR 91 thus: -

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”

58. It is on account of the foregoing that I find and hold that the reasons for the claimant’s dismissal were valid and fair.

Procedural Fairness?

59. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the *Act*. Further, Section 41 (1) of the *Act* makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.

60. It is not in dispute that the claimant was interdicted on 12th April, 2013. Through the same letter, he was required to respond to the allegations set out therein within 7 days. From the record, the claimant responded to the letter of interdiction giving his side of the story. The record bears that he was invited to appear for a disciplinary hearing on 14th May, 2013 through a letter dated 9th May, 2013. The claimant attended the disciplinary proceedings in the company of the chairman of his union and other union representatives. From the record, the chairman of the union addressed the meeting and raised several issues being; his office was not aware of the disciplinary case against the claimant; the notice was short and the claimant should have been given 7 days to appear and the matter was being handled by the police. Thereafter, the union officials together with the claimant walked out hence the proceedings were finalised in their absence.

61. The claimant’s contention is that the respondent concluded the disciplinary proceedings in his absence. Notably, the claimant states in his own witness statement that the chairman of the union directed him together with other union representatives present, to walk out of the meeting as it was irregular and outrightly unfair.

62. Therefore, by the claimant’s own admission, he opted to walk out of the disciplinary hearing following the directions of his union chair. Consequently, he squandered the opportunity given to him to present his defence.

63. On this score, I will apply the determination in the case of *Jackson Butiya v Eastern Produce Limited* (Industrial Court Cause No. 335 of 2011) where the Court held that:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal



grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

64. Further, the issues raised by the claimant may have as well been raised in writing to the Committee prior to the hearing. In the event the claimant was of the view that he required the evidence the respondent had against him and more time to prepare for the disciplinary hearing, nothing stopped him from informing the respondent as much.
65. With regards to the composition of the disciplinary panel, the Collective Bargaining Agreement (CBA) exhibited by the claimant does not have a provision to that effect as it is apparent that the same is incomplete.
66. If I may add, what is important to note in this case is that the claimant was notified of the allegations against him in a language he understood, given an opportunity to respond and appear in person before the respondent’s disciplinary committee, but in the end, he opted out of the process out of his own will.
67. With regards to the criminal proceedings commenced against the claimant over the loss of the cement, my view is that the same was a different process altogether albeit arising from the same set of circumstances. On this issue, my thinking accords with the determination arrived at by the Court of Appeal in the case of *Bett Francis Barngetuny & another v Teachers Service Commission & another* [2015] eKLR, thus: -
- “Disciplinary proceedings by an employer cannot be equated to criminal proceedings before a court of law. The degree of proof required is certainly different and the objectives of these two types of proceedings are distinct from each other.”
68. In addition, the Court of Appeal has in a number of cases decided that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. See *Geoffrey Kiragu Njogu v. Public Service Commission & 2 others* [2015] eKLR and *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR.
69. That said and all things considered, I am satisfied that the respondent complied with the requirements of Section 41 of the *Act* and the spirit of the said provision was fulfilled.
70. In total sum, I find that the claimant’s dismissal was not unfair and unlawful.
71. As the Court has found that the claimant’s dismissal was not unfair and unlawful, the claim for salary arrears and compensatory damages, fall.

Orders

72. In the final analysis, I dismiss the claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Muriungi for the Claimant

Ms. Wagasa for the Respondent



Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

