



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 17 OF 2015

WILLIAM ODUOR ORUKO.....CLAIMANT

v

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

JUDGMENT

1. William Oduor Oruko (the Claimant) sued the National Cereals and Produce Board (the Respondent) and he stated the Issue in Dispute as:

Unlawful summary dismissal, unfair termination and withholding of Claimants dues.

2. The Respondent filed a Response and Counterclaim on 13 March 2015, and this prompted the Claimant to file and serve a Response to the Counterclaim and Reply to the Response on 14 April 2015.

3. The Cause was heard on 15 July 2019, 26 February 2020 and 5 October 2021.

4. The Claimant and 2 witnesses presented by the Respondent testified.

5. The Claimant filed his submissions on 15 October 2021, while the Respondent filed its submissions on 2 December 2021.

6. The Court has considered the pleadings, evidence and submissions.

Whether the Claimant was an employee of the Respondent

7. Although identified as an Issue for adjudication by the Claimant, the Respondent did not deny that the Claimant was its employee and therefore nothing turns on this question.

Unfair termination of employment

Procedural fairness

8. The Claimant contended that he was not subjected to a fair hearing because he was not given an opportunity to be heard or to defend himself. He also contended that he was not allowed to call witnesses.

9. The Claimant further asserted that his accusers were also the judges of the allegations against him.

10. Sections 35(1) and 41 of the Employment Act, 2007 form the bedrock on the elements of procedural fairness.

11. Before initiating the disciplinary process against the Claimant, the Respondent had conducted audits on 14 May 2013, 20 June 2013, 27 June 2013, 24 July 2013 and 27 July 2013 which established variances in the stores.

12. The Claimant was thereafter invited to attend a Regional Staff Advisory Committee and he appeared before the Committee on 19 August 2013 and 20 August 2013.

13. During the appearances, the Claimant requested for time to verify several records and consider the way forward and he was given a week.

14. However, instead of verifying the records, the Claimant consulted an advocate who wrote to the Respondent on 26 August 2013, asserting that any shortages were due to errors or assumptions.

15. The Claimant did not appear before the Committee on 28 August 2012 as had been agreed.

16. The Claimant was then suspended through a letter dated 8 October 2013 to facilitate further investigations. The letter outlined the reasons for the suspension and requested the Claimant to show-cause within 2 weeks.

17. The Claimant responded on 18 October 2013, and on 19 November 2013 and 20 November 2013 the Regional Staff Advisory Committee met and recommended that the Claimant bear 2/3 of the shortage and that he be warned for other offences.

18. The Central Staff Advisory Committee then met on 18 March 2014 and recommended that the Claimant be dismissed.

19. The Court is satisfied that the Respondent complied with the ingredients of procedural fairness as contemplated by the Employment Act, 2007 and that the Claimant did not prove that the complainants acted as judges to his detriment.

Substantive fairness

20. The reason for the dismissal of the Claimant which the Respondent was expected to prove was negligence in the performance of duties leading to loss of stock (76 and further 108 bags of maize).

21. To discharge the burden, the Respondent called 2 witnesses including an auditor. The witnesses produced copies of audit reports and other records.

22. The Respondent's auditor produced records to show that the Claimant, a Stores Clerk had raised a stock card and stock adjustment form No. 0488134 in respect to the excess of 76 bags of maize without submitting the same to his Manager for authorisation as required.

23. During cross-examination, the Claimant also admitted that there were variances on the stocks.

24. Although defending himself by stating that he informed his supervisors of the variance, the Court notes that the explanations only came after audit queries had been raised.

25. The Claimant also admitted loss of 108 bags during cross-examination and explained it away on *wrong stacking* due to inadequate light in the store and an error by the Purchasing Clerk.

26. The Claimant did not disclose the name of the Clerk.

27. The Court is satisfied that the Respondent had and established valid and fair reasons to dismiss the Claimant.

Compensation and salary in lieu of notice

28. On the basis of the conclusions above, the Claimant is not entitled to compensation or salary in lieu of notice.

Provident fund benefits and Staff savings

29. The Claimant's provident funds were computed and used to offset his liabilities to the Respondent and the Court cannot award the same again.

Staff savings

30. The Claimant prayed for Kshs 113,112/- being staff savings from March to December 2013, purportedly as provided for in the terms and conditions of service.

31. A copy of the terms of service was not produced in Court and without such evidential foundation, the Court is unable to find in favour of the Claimant.

Counterclaim

32. The Respondent counterclaimed against the Claimant for Kshs 415,226/- being 2/3 loss of 76 bags of maize and 2/3 loss of 108 bags of maize.

33. The Respondent's second witness produced records to back up the claims of the loss. The Claimant did not interrogate the witness on the records to make the Court doubt their veracity, and the Court will therefore allow the Counterclaim.

Conclusions and Orders

34. The Cause is found without merit and is dismissed with no order on costs.

35. The Counterclaim is allowed in the sum of Kshs 415,226/- together with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF JANUARY 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mwamu & Co. Advocates

For Respondent Lutta & Co. Advocates

Court Assistant Chrispo Aura