



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 236 OF 2016**

**PHANICE NALIKA.....CLAIMANT**

**VERSUS**

**NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed this claim on 12<sup>th</sup> August, 2016 through the Firm of Chepkwony & Co. Advocates. She seeks payment of a total of Kshs. 24, 285,504/- being three months' salary in lieu of notice, service pay, refund of Provident Fund contribution, overtime, Acting allowance, unpaid wages, loss of earnings and 12 months' salary as compensation for unfair termination.
2. The Respondent filed a response to the claim on 19<sup>th</sup> September, 2016 and later on 28<sup>th</sup> July, 2018, an amended response to the claim. The Respondent wholly denies the Claimant's claim and further states that the Claimant's dismissal was warranted, justified, procedurally fair and made in accordance with the law.
3. The Claimant filed a response to the amended response to her claim on 10<sup>th</sup> February, 2021.
4. During the hearing, the Claimant testified in support of her case. She adopted her witness statement dated 5<sup>th</sup> August, 2016 and produced her list of documents of even date and a further list of documents dated 2<sup>nd</sup> February, 2018.
5. The Respondent presented a Mr. Ambrose Njoroge Mutua, its Acting Head of Audit and a Mr. Charles Kisilu, a Senior Human Resource Officer to testify on its behalf. The Respondents' witnesses adopted their witness statements and produced their list of documents.
6. The Claimant filed submissions. The Respondent did not.

**The Claimant's Case**

7. The Claimant's case is that she was employed by the Respondent on 31<sup>st</sup> May, 2006 where she served until the year 2013.
8. The Claimant states that she earned a monthly gross salary of Kshs. 14,124 at the time of employment. She further states that her salary was later adjusted to Kshs. 71,260 by the time of her dismissal for the good work she had done.
9. It is the Claimant's case that in June, 2013, the Respondent carried out a stock take exercise which was followed by a post-stock check audit. It is her case that the two exercises, revealed a shortage of fertilizer stock which resulted in her suspension, criminal charges and subsequently, the dismissal subject of this case.
10. The Claimant states that she was arraigned at Keroka Law Courts in Criminal Case No. 953 of 2013, which case was heard and concluded, resulting in her acquittal on 30<sup>th</sup> March, 2016.
11. The Claimant avers that upon her acquittal, she wrote to the Respondent seeking to be reinstated as the basis upon which she was dismissed was the criminal charges. It is her case that her letter herein, did not elicit a response.
12. The Claimant states that she was invited to appear before the Respondent's staff advisory in December, 2017. She avers that she appeared before the committee where she was questioned in relation to the lost fertilizer. She further states that she responded to the questions put to her by the committee.

13. The Claimant states that she attended the committee alone and that the committee resolved that she be dismissed. She states that she was thereafter issued with a letter of dismissal.

14. The Claimant states that she was not paid any money during her suspension period.

15. On cross-examination the Claimant stated that she was an acting Depot Manager as at 15<sup>th</sup> July, 2012. It is her further testimony that she had a supervisory role in the management of the Respondent's depot at Nyasiongo.

16. The Claimant confirmed that the Respondent lost fertilizer during her time as depot manager. She states that she reported the loss after the post stock check that was conducted by the Respondent's audit team. She further confirmed that she did not report the losses before the Respondent carried out the audit.

17. The Claimant further confirmed on cross-examination, that she was aware that a customer paid for fertilizer in cash, instead of depositing the money directly in the Respondent's bank account as was the procedure.

18. The Claimant further confirmed that there was an advisory committee meeting and that the letter suspending her, was written in line with the Respondent's procedures.

19. The Claimant confirmed that the value of the fertilizer the Respondent lost was Ksh. 6,947,373/-. She states that the court, while acquitting her in the criminal trial, stated that she may have been negligent in her duty.

20. On re-examination, the Claimant stated that fertilizer sold on urgency basis, was paid for in cash and further that the payment was made to the Respondent's cashier.

21. The Claimant's prayer is that the court orders that she be paid her salaries from the time of suspension until her termination.

### **The Respondent's Case**

22. The Respondent's case is that it employed the Claimant in the year 2004 as a casual employee and that she rose through the ranks to the position of depot manager, a position she held from July, 2012 until the time of her suspension in 2013.

23. The Respondent's further case is that it lost a total of 2,973 bags of fertilizer on account of direct misfeasance of the Claimant as the acting depot manager at their Nyasiongo depot. The Respondent states that in line with Section 35.5 of the National Cereals and Produce Board terms of service, coupled with the magnitude of the loss, the Claimant's salary was frozen.

24. The Respondent states that on 23<sup>rd</sup> September, 2015 it wrote to the Claimant requiring her to show cause why disciplinary action should not be taken against her on account of the findings of the audit report.

25. The Respondent states that the Claimant did not respond to the show and instead, wrote them a letter dated 28<sup>th</sup> April, 2016, asking to be reinstated to her position following her acquittal. The Respondent avers that it wrote the Claimant a second show cause letter on 22<sup>nd</sup> November, 2016.

26. The Respondent's case is that the Claimant did not substantively respond to their second show cause letter, but pegged her innocence on the outcome of the criminal case, where the court had by this time acquitted her.

27. The Respondent states that the Claimant appeared before its advisory discipline committee on 20<sup>th</sup> November, 2016, and that the advisory committee deliberated on her issue on 6<sup>th</sup> December, 2017 and concluded that she failed to exercise due care in the performance of her duties and recommended that she be summarily dismissed.

28. The Respondent avers that the Claimant was dismissed vide a letter dated 11<sup>th</sup> January, 2018 which dismissal was effective 5<sup>th</sup> September, 2013, being the date she was suspended.

29. The Respondent's case is that the Claimant was suspended from duty owing to her willful neglect of duty. Particularly, the Respondent states that the Claimant failed to supervise the operations of the depot with care and diligence, she failed to supervise the actions of the staff under her command, she failed to safeguard and prevent the loss of her employer's property and that she failed to countercheck records and the actual property under her custody.

30. The Respondent states that it followed the laid down procedures and the law, in respect of remuneration in regard to leave, overtime and public holidays and that the Claimant has no cause of action against it in this regard.

### **The Claimant's Submissions**

31. It is submitted for the Claimant that no disciplinary hearing took place in respect of her case and that the Respondent did not provide minutes as proof of this hearing. It is further submitted that this violated the requirements of Section 41 of the Employment Act on procedural fairness. She sought to rely on the holding in the case of **James Mogaka v KCB Kenya Limited (2021) eKLR** to support this position.

32. The Claimant submitted that there was no justification for her dismissal as the Respondent's disciplinary committee had earlier recommended her reinstatement, only to backtrack based on the fact that the Claimant had filed a case before court. It is submitted that in arriving at the decision to dismiss, the committee considered irrelevant factors hence the dismissal was malicious and meant to punish the Claimant for having sued the Respondent.

### **Analysis and Determination**

33. The issues for determination in this matter are:

- i. Whether the Claimant was wrongfully and unfairly dismissed
- ii. Whether the Claimant is entitled to the reliefs sought
- iii. Who bears the costs of the suit

### **Whether the Claimant was wrongfully and unfairly dismissed**

34. A determination of fairness or lack thereof in a case of dismissal such as this, is depended on the twin issues of procedure and substantive justification.

35. On substantive justification, the employer has a legal and evidential burden of proof of reasons for dismissal, where an employee alleges that her dismissal was made without justification.

36. Sections 43, 45(2) and 47(5) of the Employment Act, are the legal basis upon which an employer is required to prove the reasons for dismissal. To prove reasons, Section 43 requires that the employer proves the validity or correctness of the reasons for dismissal. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the court held as follows in respect of substantive justification:

***“... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”***

37. Section 43(2) defines the meaning of reasons for dismissal as matters the employer at the time of dismissal genuinely believed to exist and which caused the employer to terminate the services of the employee.

38. The Claimant admitted having supervisory responsibility over the Respondent's property stored at the Nyasiongo depot. She confirmed that there were fertilizer shortages which she did not communicate to her superiors and only did so upon the Respondent conducting the audit. In essence, she communicated to her employer losses it already knew about. This was nothing but an attempt at covering her back, albeit belatedly.

39. On the question of substantive justification, my opinion is that the Respondent had every reason to dismiss the Claimant. Given the facts and the circumstances of this case, the court finds and holds that the Respondent acted lawfully and in a reasonable manner. (See **Paul Waigiri Muriuki v Nairobi Water & Sewerage Co. Ltd ELRC Cause No. 1955 of 2011**)

40. On the issue of procedural fairness, the Respondent asserted that it took the Claimant through a disciplinary process conducted by its advisory committee. The Claimant also admitted being given a hearing, though not asked to attend the hearing with a representative of her choice as required under Section 41 of the Employment Act.

41. The Fair Administrative Actions Act, entitles everyone to a fair administrative action. Section 4 (1) describes fair administrative action thus:

***“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”***

42. The Respondent's disciplinary process was anything but expeditious. The first show cause letter was issued on 23<sup>rd</sup> September, 2015. Nothing happened until 28<sup>th</sup> November, 2016, one year later, when the Respondent issued its second show cause letter as the Claimant did not respond to the first.

43. The disciplinary hearing took place on 30<sup>th</sup> November, 2016 and the advisory committee met to deliberate on the Claimant's issue on 6<sup>th</sup> December, 2017. Yet another one year had gone down between the time the Claimant was heard and the time the recommendation was made. As if that was not lengthy enough, the decision was finally arrived at on 11<sup>th</sup> January, 2018; 4 years and 2 months' later.

44. A disciplinary process that takes close 4 years, is inefficient, unreasonable, unlawful and unfair on all fronts.

45. I find and hold that though the dismissal of the Claimant was found to be substantively justified, the procedure adopted by the Respondent was flawed by virtue of the time taken to arrive at a conclusive decision, thus rendering the termination unfair.

### **Whether the Claimant is entitled to the reliefs sought**

46. The Claimant's claim is for payment of a total of Kshs. 24, 285,504/- being three months' salary in lieu of notice, service pay, refund of Provident Fund contribution, overtime, Acting allowance, unpaid wages, loss of earnings and 12 months' salary as compensation for unfair termination.

**Three months' salary in lieu of notice**

47. Payment in lieu of notice is a statutory requirement. The Claimant was evidently not issued any notice and no prove has been rendered in this court of payment in lieu thereof. The Respondent's Terms and Conditions of Service Policy at clause 35.1 provides as follows:

***“The employee' employment may be terminated by either party giving three months' notice or three months' salary in lieu of notice.”***

48. I find the Claimant's claim for three months' salary in lieu of notice justified, and is hereby awarded three months' salary in lieu of notice in accordance with the Respondent's Terms and Conditions of Service Policy.

**Service Pay, Refund of Provident Fund Contribution, Overtime, Acting Allowance, Unpaid Wages,**

49. The Claimant's pay advise/pay slip, are prove that she contributed to the Respondent's Staff Provident Fund. An employee is entitled to their retirement benefits, irrespective of the reasons for separation. The court orders that the Claimant is paid both her contribution and the employer's contribution to the Provident Fund in line with the Retirement Benefits Act. The claim for service is untenable, the Claimant having been a member of a contributory Provident Fund, and the Court having ordered that she be paid a pension from that fund.

50. The evidence before court indicate that the Claimant was appointed an Acting Depot Manager, which appointment entitles her to an acting allowance. The Pay slips produced, show that the Claimant was paid an acting allowance and she did not prove that there were balances owed to her in this respect. The claim is dismissed.

51. No evidence has been adduced in respect of the claims of overtime, and unpaid wages. The claims fail and are dismissed.

**12 Months' salary as compensation for unfair termination.**

52. In the case of **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**, the Court held that in determining whether to make an award of compensation the court is to consider the 13 factors set out under section 49 (4) of the Employment Act.

53. The court has found that the dismissal of the Claimant is substantively justified. The dismissal has however been found to be unfair on account of procedure.

54. The court takes into consideration the fact that the Claimant largely contributed to her dismissal.

55. The court is alive to the fact that the Respondent is a public institution that has suffered plunder in the nature of the subject matter of this case. Although the Claimant was acquitted of criminal liability, the court notes that the burden of prove in criminal liability is much higher that it is in civil matters such as this. The Claimant was the depot manager. The depot lost Kshs. 6,947,373/= under her watch. The people of Kenya depended on her to safeguard this all-important commodity. She did not.

56. Having found the dismissal unfair on account of procedure, I award the Claimant one month's salary in compensation for unfair dismissal.

57. In Conclusion, judgment is entered for the Claimant and against the Respondent, as follows: -

- i. 3 months salary in lieu of notice at Kshs.213,780/=
- ii. One Month's Salary as Compensation for wrongful and unfair termination at Kshs.71,260/=
- iii. Pension payable from the Respondent's staff Provident Fund in accordance with the RBA
- iv. Costs of the suit.

58. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Chepkwony Present for the Claimant

Mr. Muoki h/b for Mr. Kanjama for the Respondent

Christine Omollo- C/A