



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**CAUSE. NO.6 OF 2020**

**JANE NALONJA RUTTO.....CLAIMANT**

**-VERSUS-**

**NEW KENYA COOPERATIVE CREAMERIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant filed this suit on 31<sup>st</sup> January, 2020, alleging that she was employed by the respondent from 26<sup>th</sup> April, 2004 until 22<sup>nd</sup> March, 2018 when she was wrongfully and unfairly dismissed. The reason for the termination was the allegations that an audit report carried out on the 1<sup>st</sup> August, 2017 revealed that on the 10<sup>th</sup> July, 2017 she loaded 900 cartons of Gold crown TFA and 400 cartons of Gold crown 200ml Els on motor vehicle registration number KBN 939T for delivery at Kisumu Sales Depot but the same was never delivered. It was further alleged the vehicle had no tracking system and was not polling.

2. It was also stated that the company lost Kshs 840,000 as a result of which she was asked to pay to the company. In defence she averred that the allegation of loss was never substantiated and that she was dismissed unprocedurally. Therefore, the suit seeks the following remedies:

- a) A declaration that the termination of claimant from service was unlawful, unfair, unprocedural and a fundamental violation of the rights of the claimant.**
- b) The terminal dues as tabulated herein below.**
- c) A maximum compensation as per section 49(c) of the Employment Act.**
- d) A certificate of service as per section 51 of employment Act.**
- e) Costs and interest of this suit.**
- f) Any other award as the Honourable Court deem fits to grant in the circumstances of this case.**

3. The respondent entered Appearance on the 20<sup>th</sup> February, 2020 and filed a response to the claim on 7<sup>th</sup> June, 2021 admitting that it employed the claimant in the year 2004 and terminated her services on 22<sup>nd</sup> March, 2018 for failing to perform her duties diligently as expected. It was contended that the claimant failed to follow due procedure when she allowed a consignment of 900 cartons of Gold crown TFA and 400 cartons of Gold crown 200 1 Es1 to be loaded in motor vehicle registration number KBN 937 T without any STO from the requesting depot. The vehicle was also said to have no tracking system and it was not polling. The consignment never reached its destination and the company suffered a loss of Kshs 840,000.

4. The Respondent further averred that due to claimant's negligence, it issued the claimant with a show cause letter on 12<sup>th</sup> September 2017 and suspended her on the 15<sup>th</sup> November, 2017 detailing the reasons upon which termination was being considered. She responded in writing and later she was invited to a disciplinary hearing where she defended herself. The Respondent further stated that the claimant failed to give satisfactory explanation on the loss leading to her termination from employment. Therefore, the respondent averred that the termination was fair and prayed for the suit to be dismissed with costs.

5. The suit proceeded to hearing on the 29<sup>th</sup> November, 2021 and 20<sup>th</sup> January 2022 when both parties gave evidence and thereafter filed written submissions.

## Claimant's Case

6. The claimant testified as CW-1 and basically adopted her witness statement and lists of documents dated 30.1.2020 which were marked as Ex-1 to 8 respectively.

7. In brief she testified that she was dismissed on allegation of dispatching milk in a vehicle without a tracking system. She avers that she was employed as a production supervisor and her main functions were to supervise production and loading of vehicle as per instructions from the Logistics Manager. She avers that it was not her duty to find out the status of the vehicle with regard to tracking as that was a preserve of the logistics managers.

8. She admitted that there was not Stock Transfer Order (STO) from the receiving depot but stated that during that time she was only acting on verbal instructions given by the Logistics Manager through the phone. She also admitted that milk got lost in transit and the driver together with the turn boy of the vehicle were arrested and charged in Sotik law court.

9. She further testified that she was served with a notice to show cause and thereafter she was invited to a disciplinary hearing. Her defence for the loss was that she was acting under instruction of the logistics manager in loading the vehicle and any defect in the vehicle was the fault of the logistics department. She added that three vehicles were dispatched on that day, one to Mombasa, another to Nanyuki and then one for Kisumu. They all reached their destinations except the one going to Kisumu.

10. She stated that the consignments that left with the vehicles were properly documented and they were allowed to exit the factory gate by the Factory Manager and the Security personnel after counterchecking Form 3D. Therefore, she contended that her department ought to be exonerated from the loss.

11. CW-1 testified that during disciplinary hearing, she blamed the logistic department for the failed tracking system in the vehicle and maintained that she obtained the instructions to load the vehicle from the logistic manager without STO from the receiving depots. She reiterated that the goods were released by form 3D which was verified by the factory manager and the security guard before the vehicle was allowed to leave the gate.

12. She also stated that she has never seen a copy of the audit report that allegedly implicated her and therefore she was denied fair hearing before termination. Finally, she testified that during termination she was not paid any terminal dues as alleged in the respondent's letter dated 28.5.2018.

13. Upon cross examination by **Musau Advocate**, the claimant testified that she worked for the Respondent for 22 years and that on the material day, she received instruction from the logistics manager to load 3 lorries with milk to be ferried to Kisumu, Mombasa and Nanyuki. She confirmed that she did not have any STO for all the vehicles loaded because the same was not in use at the time. She also affirmed that she did not call Kisumu station to confirm dispatch as that was not her role. She further stated that she was not in a capacity to confirm the tracking status of the vehicle but she only relied on the word of the logistic manager.

14. She also stated that she had 52 leave days which were yet to be taken and further contended that she was receiving Kshs 10,000 only per month during the suspension period and not half salary. She then confirmed that she had a loan of Kshs. 226,942 which was being recovered through salary deductions. She admitted that she never demanded to be issued with certificate of service.

15. On re-examination the witness testified that the tracking system in vehicle are fitted by mechanics and monitored by the logistic managers who are under a duty to confirm whether the tracking systems were polling before goods are loaded in the vehicles.

16. She then clarified that her loan was with Kenya creameries Sacco which contract was independent from her employment contract with the Respondent.

## Respondent's Case.

17. The Respondent's, Industrial relations Manager, **Michael Mukopi**, testified as **RW-1**. He adopted his witness statement of 7.6.2021 and produced the 8 documents in the list of documents dated 1.3.2021 as exhibits. He then testified that the claimant was dismissed for allocating milk products without following due procedure. He stated that the requesting sales depot issues a Stock Transfer Order (STO) to the sending depot which must be confirmed before the goods are loaded and ferried.

18. He testified that on the material day, the claimant allowed vehicle registration number KBN 939T to ferry 1300 cartons of milk without the specific STO. He further stated that the vehicle had no tracking system and it was not polling (could not be tracked). As a result, the goods were diverted to Eldama Ravine instead of the going to requesting depot at Kisumu and thereby occasioned a loss of Kshs 840,000 to the respondent.

19. He stated that the goods lost in transit were never recovered and the claimant was to blame for the loss because she did not have any instruction to release the said stock.

20. He further testified that the claimant was served with show cause letter dated 12<sup>th</sup> September, 2017 and thereafter subjected to a disciplinary hearing where she admitted that she failed to follow the set down procedure before releasing the goods. She further admitted to not checking the tracking system.

21. He testified that the claimant was being paid half salary during the time of suspension. He also stated that the claimant's terminal dues were calculated out of which Kshs. 226,942 was forwarded to the Sacco to clear his loan.

22. On cross examination by **Kirwa Advocate**, the witness admitted that the termination emanated from an audit report which report has not been produced before this Court. He testified that the logistics officers only released vehicle after receiving a request which in this case a request was received from the claimant. He affirmed that installation of tracking systems is done by the logistic department and the department ensures that the same are properly installed and working.

23. He further confirmed that the tracking is done from the headquarters of the Respondent. He reiterated that the 1300 cartons of milk which was lost was destined for Kisumu but diverted to Eldama Ravine. He received that information from security officers. He testified that he learned from a colleague that the driver of Lorry KBN and the Turnboy were arrested and charged in court. He stated the audit report was the evidence that the tracking system was not polling.

24. On further cross examination, the witness testified that the claimant was paid all her terminal dues which included, one-month salary in lieu of notice and 8 leave days not taken. He clarified that the initial appointment letter provided for 3 months' notice but the same was reviewed to one-month notice. He also testified that during the disciplinary hearing the claimant was not served with a copy of the audit report because an extract was indicated in the show cause and suspension letter. He then stated that the claimant appealed the decision and the same was considered. However, there were no new issues raised and therefore the appeal was dismissed.

25. On re-examination, he testified that the audit report was not the basis of termination rather the lost goods due to negligence on the part of the claimant. He also clarified that the claimant was paid for 52 leave days and not 8 days.

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

26. The claimant submitted that, for termination of employment to be considered lawful it must pass the fairness test. In support of its argument, they cited the case of **Walter Ogal Onuro V Teachers Service Commission [2013] eKLR**. It was then submitted that these procedures are anchored in the employment Act under section 43 and 45. Accordingly it was submitted that the Respondent failed to link the claimant to the negligence for the reason that the tracking system was not under the docket of the claimant and that it was the responsibility of the logistic department. It was further submitted that, the claimant being in no position to ascertain the effectiveness of the tracking system, cannot be blamed for the failed tracking system. With regard to the failure to fill the STO it was submitted that the procedure came into force on the 4<sup>th</sup> August, 2017 way after the alleged loss, therefore the Respondent cannot use the lack of STO as a reason to dismiss her.

27. Additionally, it was submitted that the Respondent is under a duty to give a valid reason for termination which it failed. Therefore, the reason for termination was not justified in the circumstances. The claimant then relied on the case of **Mary Chemweno Kirui V Kenya Pipeline Company Limited [2014] eKLR** where the Court held that ;-

***“...before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act.”***

28. On whether the termination, passed procedural test, it was submitted that section 41 of the Employment Act provides for the procedure to be followed before an employee is terminated. The said procedure was reiterated in the case of **Alphonse Machanga Mwachanya V Operations 680 Limited [2013] eKLR**. The claimant then submitted that the termination did not satisfy the procedure given in the above case because the show cause letter was not accompanied by a detailed offense and documents which the disciplinary committee was to rely upon including the audit report.

29. Further the claimant's request for the documents being used against were never given to her and therefore she was unable to mount a solid defence for herself which rendered the disciplinary hearing unfair. She further submitted that she was not allowed to ask any questions during the disciplinary hearing. In support of her arguments the claimant relied on the case of **Charles Kinyua and another V Meru central Dairy cooperative Union Limited [2015] EKLR** where the Court held that;-

***“Further the minutes for the disciplinary hearing of 9.11.2011 filed for the respondent clearly show that the claimants were merely informed the allegations as levelled against them without their being heard in self defence or at all and the meeting found them culpable as alleged without considering whether the alleged misconduct had been established. The general manager who was the complaint was an active participant at that hearing and the claimants were not heard at all. In the opinion of the court, such casual and biased proceedings cannot be relied upon to show that at the time of the termination the respondent had a reasonable basis to believe that the claimants had engaged in the misconduct as was alleged by the respondent.”***

30. In conclusion the claimant submitted that she was unfairly terminated and urged this Court to allow the claim as prayed.

### **Respondent's Submissions**

31. The Respondent on the other hand submitted that the termination of the claimant was based on sound reason and they followed the laid down procedure before termination. For emphasis relied on the case of **Walter Ogal Onuro V Teachers Service Commission, Supra**.

32. As regards the reason for the termination, it was submitted that the claimant approved the dispatch of goods without a Stock Transfer Order (STO) and allowed the goods to be loaded in a vehicle without proper tracking system leading to the loss of the goods. It was argued that, this procedure was mandatory and had been in use from time immemorial which the claimant having worked for the Respondent for 22 years ought to have acquainted herself with.

33. It was further submitted that the reason for the termination of the claimant's employment was indicted in the show cause letter and the suspension letter and as such it was not necessary for the claimant to be served with the entire audit report.

34. On procedural fairness, it was submitted that the claimant was served with show cause letter which she responded to and thereafter attended a disciplinary hearing where she failed to exonerate herself leading to the termination. In this the Respondent relied on the case of **Alphonse Machanga Mwachanya V Operations 680 Limited [2013] eKLR**.

35. It was then argued that the claimant was accorded a fair process to defend herself and their failure to exonerate herself cannot be blamed on the Respondent. The Respondent then urged this Court to dismiss the claim together with costs.

#### **Issues for determination and analysis**

36. Having carefully considered the pleadings, evidence and submissions, it is common ground that the claimant was employed by the respondent as a Production Manager at Sotik until 22<sup>nd</sup> March 2018 when he was dismissed for negligence of duty. The issues for determination are as follows: -

- a) Whether the reason for the termination was valid and fair.
- b) Whether fair procedure was followed before the termination.
- c) Whether the Claimant is entitled to the orders sought.

#### **Reason for Termination.**

37. **Section 45 (1) and (2) of the Employment Act** makes the following provisions regarding unfair termination of employment—

***“(1) No employer shall terminate the employment of an employee unfairly.***

***(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—***

***(i) related to the employee's 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.”***

38. Section 43 of the Act provides that:

***“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”***

39. The above provisions of the law have been reinforced by case law including the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** where the Court held that:

***“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”***

40. In the Court of Appeal case of **Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR** the Court of Appeal stated as follows;

***“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45)...among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”***

41. In the present case the termination letter dated 22<sup>nd</sup> March, 2018 gave the reason for termination as negligence of duty and abuse of

procedure by the claimants **under section 44(4) (c) of the Employment Act**. The particulars given were that the company lost milk worth kshs.840, 000 when the claimant released the consignment without any STO, to a vehicle which had no tracking system.

42. The Respondent argued that the loss of 1300 cartons from its Sotik factory was due to claimant's negligence when she released the milk without STO and failing to confirm that the tracking system on the vehicle transporting the consignment was polling. The claimant on the other hand maintains that the STO was introduced later after the loss of the milk and as such it cannot be applied retrospectively.

43. Further, she maintained that she had no capacity of checking whether a tracking system was properly fitted on the vehicle and contended that was done by the logistics department. In fact, Rw1 admitted in evidence that the tracking systems are fitted by an expert and managed by the logistic department at the respondent's Head Quarters.

44. It is a well settled principle of law that negligence arises where there is a duty of care or act in a particular manner. The accuser must show that the offender owed duty of care or to act in a particular manner but he failed to do so resulting into some real injury or loss. In this case, the claimant denies that an STO was a procedural requirement on 10<sup>th</sup> July 2017 when she dispatched the lost cargo. She contended that the STO was introduced on 4<sup>th</sup> August 2017. Hitherto, the dispatch was done on the basis of written or oral instructions from the logistics manager.

45. The respondent has not produced any documentary evidence to show that the STO was in use as at the 10<sup>th</sup> July 2017 like copy of a policy manual or copies of STOs already used by the claimant in the 22 years she worked in the company. Without such evidence the court can only agree with the claimant that the new procedure of STOs cannot be used retrospectively to justify her dismissal. In any event, the said STO could not guarantee that the goods would not be lost. Therefore, I find that the issue of STO is not a valid reason for dismissing.

46. The other ground given for terminating the claimant's services was the alleged failure to ensure that the tracking system was properly installed in the transit vehicle and polling. Both the claimant and RW-1 agreed that the installation of the tracking system were done by independent person and it's only the logistic department that had the capacity to ensure that the tracking system was working. The role which the claimant was bestowed with was to confirm with the logistic manager that the tracking system was polling.

47. The claimant alleged that she sent a text message, and logistic department allowed the vehicle to leave the factory. It's also clear from the testimonies of both the claimant and RW-1 that before goods are allowed to leave the factory, several managers were tasked with approvals. There is no denial that all the managers including the security personnel approved the departure of the vehicle from the factory based on the required dispatch documents especially Form 3D.

48. In view of the foregoing observation, it is clear that the loss of the goods was not due to lack of proper dispatch documents on the STO but the failed tracking system which the claimant was not in control of. Therefore, I also find that the issue of tracking system was not within the claimant's role and therefore it cannot be the basis of a valid reason for her dismissal from employment. It is also not a fair reason because it does not relate to her conduct, capacity and compatibility or the employer's operational requirement.

49. Having considered all foregoing matters, I find and hold the respondent has failed to prove that the termination of the claimant's employment contract was grounded on valid and fair reason as required by section 43 and 45 of the Employment Act.

### **Procedure**

50. **Section 41 of the Employment Act, 2007** has created a statutory obligation on an employer before terminating the services of an employee for misconduct, poor performance or physical incapacity. It states that:

***“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.”***

51. The above procedure is mandatory and the employer has no option. In order for an employer to meet the legal requirements of procedural fairness set out in section 41 above, he must prove by evidence that he:-

- a) Explained to the employee in a language the employee understands the reasons why it was considering the termination.
- b) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.
- c) Heard and considered any explanations by employee and/or his representative.
- d) Where the employer has more than 50 employees as required by section 12 of the Employment Act, that it has and complied with its own internal disciplinary rules.

52. In this case the claimant admitted to receiving a notice to show cause letter dated 12<sup>th</sup> September, 2017 which she responded to on the 14<sup>th</sup> September, 2017. By a letter dated 2<sup>nd</sup> January, 2018, she was invited for disciplinary hearing scheduled for 8<sup>th</sup> January, 2018 and she attended.

53. However, claimant took issue with the way the disciplinary hearing was conducted and argued that she was not served with the evidence

being used against before the hearing even after requesting for the copies of the same. RW-1 confirmed in his evidence that the requested documents, and especially the audit report, was never given to the claimant either before or during the disciplinary hearing.

54. Further that the claimant was not informed about her rights and given an opportunity to be accompanied by a representative or an employee of their choice. He was also not accorded individual hearing rather she was called in as a group of 6 employees and when they requested to be furnished with documentary evidence being used against them, they were sent away even before being heard. Whichever way one looks at the procedure followed, there is a degree of unfairness manifested.

55. This court is firm that, where an employer refers to some documentary evidence as the basis for contemplated disciplinary action against an employee, the natural and correct thing to do is to serve the employee with the said piece of evidence before or during the disciplinary hearing and especially when the employee requests for the same. If the employer withholds the evidence from the employee during the internal process and again fail to produce the same in court, like in this case, the only reasonable presumption would be that the document does not exist or if it does, it is prejudicial to the employer's case.

56. In the opinion of this court, the failure by the Respondent first to serve the claimant with the documents the disciplinary committee was relying upon, and secondly denying her an opportunity to defend herself compromised the entire disciplinary hearing making it a sham. The procedure adopted therefore fell short of the tenets of procedural fairness. I therefore find and hold that the respondent has failed to prove that the termination of the claimant's employment was in accordance with a fair procedure as required under section 45 (2) (c) of the Employment Act.

**Whether the Claimant is Entitled to the Reliefs Sought.**

57. In view of the finding above that the employer has failed to prove valid and fair reason for terminating the claimant's employment and that a fair procedure was followed, I make declaration that the termination was unfair within the meaning of section 45 of the Employment Act.

58. Flowing from the foregoing declaration, the court finds that the claimant is entitled to damages under section 49 of the Act which includes salary in lieu of notice and compensation for unfair termination. The appointment letters for the claimants provided for a termination notice period of three months but the claimant admitted in evidence that the notice period was later reduced to one month. The employer offered the claimant one-month salary in lieu of notice vide the Memo dated 28<sup>th</sup> May 2018 and the claimant did not protest. There is no evidence that the money offered was paid. Consequently, I award the claimant one-month salary in lieu of notice.

59. As regards compensation on for unfair termination, I have considered that the claimant served the respondent for a periods 22 years. The respondent has also failed to prove that she caused the termination through misconduct. She has also not been able to secure alternative job. Therefore, I award her 12 months' salary as compensation for unfair termination.

60. With regard to leave days, the claimant claimed 80 days of leave not taken. The Respondent has admitted in the internal memo dated 28<sup>th</sup> May, 2018 that the claimant had 52 leave days not taken. In absence of particulars and evidence to support the claim the 80 leave days sought, I will grant the undisputed 52 days, which shall be calculated as follows; - Kshs 113,797/30 x 52=Kshs. 197,248.

61. I further award the claimant salary arrears of Kshs 275,009.42 made up of Kshs. 28, 449.25 for November, 2017, Kshs 56,898.50 for each month from December,2017 to February 2018 equaling 170,695.50 and Kshs. 75,864.67 for 22 days of March, 2018.

62. In the end, judgment is entered for the claimant as against the Respondent in the following terms;

Notice	Kshs. 113,797
Salary arrears	Kshs. 275,009
Compensation for unfair termination	<u>Kshs. 1,365,564</u>
<b>Total</b>	<b>Kshs.1, 754,370</b>

63. The claimant is also granted the prayer for a Certificate of Service, costs of the suit plus interest at court rates from the date of this judgment. However, the sums awarded is subject to statutory deductions. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF APRIL, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall**

**be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**