



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 961 OF 2016

ABEL O. OBUOR.....CLAIMANT

- VERSUS -

CARGILL KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th April, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 16.12.2016 through M/S Muneo Katu & Associates Company Advocates. The claimant's case is that he was engaged by the respondent on 01.12.2009 as a fork-lift driver and was terminated on 17.12.2013. He states that at termination his monthly gross wage was Kshs. 29,064.00 (Kshs. 24, 050.00 basic pay and Kshs. 5, 014.00 as house allowance. On 17.12.2013 the claimant was issued with a letter terminating his employment instantly. The letter stated the reason of termination was that the claimant was involved in the theft of tea being transported from Warehouse 1 to Warehouse 6 on 28.10.2013 as reported by the security guard. The termination letter stated that in view of the claimant's involvement in the theft the respondent had lost faith and confidence in the claimant. The letter further stated, "... **Your actions warrant summary dismissal in accordance to section 44 (4) (c) however for purposes of good industrial relations your services with Cargill Kenya limited are here by terminated effective 17th December 2014.**" The letter stated that the claimant would be paid all his final dues and given a certificate of service in accordance with section 51 of the Employment Act, 2007 but after returning all respondent's property in his possession and paying any liabilities due to the respondent. The letter advised that the claimant was at liberty to appeal against the termination to the respondent's Managing Director and within 5 days of receipt of the termination letter. The claimant received the certificate of service dated 17.12.2013 certifying that he was employed by the respondent from 01.02.1990 to 17.12.2013.

The claimant's advocate issued the demand notice on 02.12.2016 but the respondent did not reply – and the respondent has denied ever receiving the letter. Thus the claimant filed the present suit on 16.12.2016 through M/S Muneo Katu & Company Advocates. He prayed for judgment against the respondent for:

- a) Maximum compensation for unfair termination of employment 12 months' salary Kshs. 348, 768.00 plus interest.
- b) Certificate of service showing his position during the whole period of his employment with the respondent.
- c) Costs and interest of the suit.

The respondent filed on 18.02.2019 the memorandum of response through M/s Mutua Waweru & Company Advocates. The respondent admitted that it employed the claimant and the claimant was terminated from employment by the letter dated 17.12.2013 (and a certificate of service issued the same date) upon the grounds stated in the letter. The respondent denied that the claimant was entitled to the claims and prayers as made for the claimant. The respondent denied receiving the letter dated 02.12.2016 from the claimant's counsel. Further the claimant was charged with an offence relating to the loss of the said tea pallet being Mombasa Chief Magistrate's Court Criminal Case No. 2712/13. Further, the claimant received the letter to show-cause dated 05.11.2013, the claimant replied, the claimant was suspended for two weeks to pave way for further investigations per the letter dated 13.11.2013, the suspension was extended by the letter dated 27.11.2013 and the same letter invited him to disciplinary hearing on 02.12.2013. By letter dated 28.11.2013 the disciplinary hearing was rescheduled to 03.12.2013 by the respondent's letter dated 29.11.2013, and the disciplinary hearing proceeded on 03.12.2013. The respondent reviewed the case and the contract of service between the parties was terminated by the letter dated 17.12.2013. The respondent states that the claimant was accorded a right of appeal. The respondent prays that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Raphael Mwadime, the respondent's Tea Business Manager. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court finds that the parties were in a contract of service and that fact is not in dispute. The terms of service are as stated in the claimant's memorandum of claim.

To answer the 2nd issue for determination the Court returns that the parties are in agreement that the contract of service was terminated by the respondent's letter dated 17.12.2013.

To answer the 3rd issue for determination the Court finds that the respondent accorded the claimant due procedure of a notice and a hearing per section 41 of the Employment Act, 2007. The respondent informed the claimant the allegations, the claimant replied, the claimant attended a disciplinary hearing together with the shop steward, and the respondent decided the case. The Court reckons the procedural milestones as accorded and returns that the procedure was fair. It is submitted for the claimant that the procedure amounted to double punishment because the claimant had already been charged in the pending criminal case. It is submitted for the claimant that section 88(3) of the Employment Act, 2007 provides that no employer or employee shall be punished twice for the same offence. The Court has considered section 88 of the Act and returns that it relates to the criminal offences established under the Act and not the administrative disciplinary punishments imposed by the employer. The Court further considers that the rule against double jeopardy obviously bars an employer from imposing double or more punishments with respect to the same event of misconduct or poor performance but, that was not the case in the instant case. The Court finds that in imposing the termination in the instant case, the respondent had invoked due process.

The 4th issue for determination is whether the reason for termination was valid as per sections 43 and 45 of the Employment Act, 2007. The burden to prove the reasons or grounds of termination is upon the respondent per section 43 and 47 (5) of the Act. The reason for termination was that the security guard had reported to the respondent that the claimant had been involved in the alleged theft in issue. The purported minutes of the disciplinary hearing do not show that the claimant was involved in the theft. The security guard who is alleged to have made the report implicating the claimant was not identified by name, and, never testified before the disciplinary panel and the Court. The claimant has exhibited the judgment delivered on 01.11.2018 (Hon. Kagoni E.M, SRM) in Criminal Case No. 2712 of 2013, Republic –Versus- Benson Mtungu Ngoma and 2 Others at Mombasa in which the claimant herein was the 2nd accused person. The trial Court found that the three accused persons were not guilty of the offence of stealing by servant contrary to section 281 of the Penal Code and acquitted them under section 215 of the Criminal Procedure Code. Accordingly, the Court returns that in view of the material on record, the respondent has failed to establish that as at the time of termination, the reasons or grounds of termination of the claimant were genuine, valid or justified. The Court finds that the termination was unfair on merits.

Thus, to answer the 5th issue for determination, the Court returns that the termination of the claimant's employment was unfair for want of a valid reason as per sections 43 and 45 of the Employment Act, 2005.

The 6th issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1) The Court has considered the factors for award of compensation in section 49 of the Act. The claimant was entitled to a notice of one month prior to termination but the termination was abrupt. The claimant had served the respondent for a long period of time from 01.02.1990 to 17.12.2013 and with a clean record. The aggravating factor is that the respondent subjected the claimant to criminal proceedings and which in the Court's opinion amounted to unjustified humiliation of a such long serving employee. The Court considers that the criminal proceedings equally subjected the claimant to substantial costs in hiring an advocate to defend him and creating time and resources to attend Court. The claimant expected to continue in the respondent's employment. The Court finds that there is no evidence that the claimant contributed to his termination. In the circumstances the Court finds that the claimant has established a case for maximum compensation at 12 months' gross salaries making **Kshs.348, 768.00** as prayed for.

2) The Court finds that the claimant is entitled to a certificate of service containing all the matters set out in section 51 (2) of the Employment Act, 2007 and the certificate will be reissued accordingly. The Court finds that the certificate of service on record does not provide for all the matters in section 51 of the Act.

3) The claimant has substantially succeeded and will be paid costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The payment of **Kshs.348, 768.00 (less PAYE)** by 01.07.2021 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

b) The respondent to reissue and deliver the certificate of service, as per section 51 of the Act, to the claimant within 30 days from the date of this judgment.

c) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 30TH APRIL, 2021.

BYRAM ONGAYA

JUDGE