



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 962 OF 2016**

**RENSON NGOMA MTUNGU.....CLAIMANT**

**VERSUS**

**CARGILL KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> April, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.12.2016 through Munee Katu & Associates Company Advocates. The claimant's case is that he was engaged by the respondent on 01.12.2009 as a clerk and was terminated on 17.12.2013. He states that at termination his monthly gross wage was Kshs.22, 604.00 (Kshs. 17, 590.00 basic pay and Kshs. 5, 014.00 as house allowance). The claimant served on renewable contracts. On 01.06.2013 he was offered a term contract running up to 31.05.2014. He accepted the contract by signing on 01.06.2013. 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 failed to accurately document the packages of tea being transported from Warehouse 1 to Warehouse 6. The letter of termination stated that the truck transported to Warehouse 6 from Warehouse 1 100 packages of tea but Warehouse 6 documented 80 packages of tea which did not include Sokot invoice 1031. It stated that the claimant as the clerk at Warehouse 6 was in charge of ensuring that the tea received in Warehouse 6 was in good condition and the quantity of tea offloaded was as specified in the delivery note. The letter stated that the claimant had failed on that responsibility. It further stated that the claimant had admitted at the disciplinary hearing that he failed to verify the tea received against the delivery note as it was offloaded from the truck No. KUE 145. The termination letter stated that the claimant's conduct violated the respondent's standard operating procedures involving the following of people to sign the Inward Tally when receiving tea, including, driver of the truck, the warehouse clerk, security guard and fork lift driver. The letter stated that on the material occasion, the driver did not sign the Inward Tally form and it was signed on his behalf which was a violation of the laid out standard procedure. The letter stated that 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 17<sup>th</sup> December 2014.**" The letter stated that the claimant would be paid all his final dues and a certificate of service in accordance with section 51 of the Employment Act, 2007 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's case is that he sought to be paid the balance of his term contract (18.12.2013 to 31.05.2014) but the respondent denied and did not pay. The claimant's advocate issued the demand notice on 02.12.2016 but the respondent did not reply. Thus the claimant filed the present suit on 16.12.2016 through M/S Munee Katu & Associates Company Advocates. He prayed for judgment against the respondent for:

- a) Salary for the remaining period of his contract from 18.12.2013 to 31.05.2014 (Kshs. 22, 604,00 x5) + Kshs.9, 795.00 thus Kshs.122, 815.00.
- b) Maximum compensation for unfair termination of employment 12 months' salary Kshs. 271, 248.00.
- c) Certificate of service showing that at termination the claimant worked as an assistant supervisor.
- d) Total claim Kshs. 394, 063.00.
- e) 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 upon the grounds stated in the letter. The respondent denied that the claimant was entitled to the payment for balance of the fixed term contract. The respondent denied receiving the letter dated 02.12.2016 from the claimant's counsel. The respondent pleaded that the claimant admitted at

the disciplinary hearing that he had failed to verify the tea consignment received from the truck against the delivery note and failed to ensure that the truck driver signed the Inward Tally as required. Further the claimant was charged with an offence relating to the loss of the said tea pallet being Mombasa Chief Magistrate 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 says the claimant was accorded a right of appeal but he did not appeal and he was paid all his terminal dues. 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 **1<sup>st</sup> 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 **2<sup>nd</sup> 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 **3<sup>rd</sup> 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.

The **4<sup>th</sup> 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 vested upon the respondent per sections 43 and 47 (5) of the Act. RW testified that the minutes filed to show the record of disciplinary hearing were not signed at all and as exhibited in Court. The respondent relied on the minutes to urge that the claimant admitted the allegations as alleged. The Court finds that the draft minutes as exhibited have low probative value. Despite that finding on probative value of the exhibited minutes about the proceedings of the disciplinary hearing, the Court has examined the document.

The purported minutes show that the claimant explained as follows. On 28.10.2013 he received 80 packages from KUE 145 as per delivery notes. He did not have chance to go out and investigate because he was transferring polybags. He allocated two forklift drivers to do the offloading (Abel and Suleiman) and created an inward tally where everyone signed. It is stated in the minutes that the claimant did not go out to inspect or verify the contents of the truck as he was busy transferring polybags. Further, on 30.10.2013, Kyalo came to Warehouse 6 searching for the missing tea and the tea was missing. The next day, Samuel (Clerk of Warehouse 1) came and took away the Askaris' receiving book and the claimant did not ask Samuel why he was taking the book away whereas only the Operations Manager could take the book away. The minutes show that the claimant failed to report the incident to his superiors. It is also stated that the claimant indicated that he had enough staff and he was not overwhelmed as to require further staff. The Court has delved into the purported record of the disciplinary hearing to show that by that record, in any event, at no time did the claimant admit the allegations as were leveled and as pleaded and urged for the respondent.

Turning back to the evidence before the Court, the claimant denied the allegations as were levelled. RW testified that in a delivery like the one in the allegations against the claimant, documents were usually prepared and signed by the claimant, the driver and supervisor. RW further testified that he did not know if such documents were on record in the suit. The Court observes that the documentation relating the alleged loss was in fact not exhibited at all. In the circumstances, the Court returns that the respondent has failed to establish that the reasons for termination actually existed as at the time of termination and as alleged for the respondent. In making that finding the Court further finds that while the claimant was suspended to pave way for investigations into the allegations, the respondent has not mentioned or exhibited the investigation report in that regard and it is difficult to find that as at termination, the alleged investigations had taken place and established the claimant's culpability.

To answer the **5<sup>th</sup> issue** for determination the Court therefore 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 **6<sup>th</sup> 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. But for the termination, the claimant had 5 months of service to go. He had a clean record of service through the several fixed term contracts since 01.12.2009 to 17.12.2013. He desired to continue in employment. The aggravating factor is that the respondent subjected the claimant to an otherwise unjustified criminal proceeding under which the claimant hired an advocate, incurred expenses, and expended time in court attendance. To balance justice for the parties, the claimant will be awarded six months' salaries in compensation making **Kshs. 135,624. 00.**

2) The Court finds that the claimant has not provided a justification for the payment of salaries for the balance or unexpired contractual term. The Court considers that the claimant did not pray for reinstatement as an anchor for such pay. As submitted for the respondent, the claimant had an opportunity to mitigate his circumstances and the Court finds that the claimant has not shown by evidence how the termination or other reason attributable to the respondent may have diminished the claimant's capacity to engage in alternative employment. The Court finds that the claim and prayer for pay for the unexpired period will collapse.

3) The claimant did not establish that as at termination he was an Assistant Supervisor and the Court returns that he will receive a

certificate of service per section 51 for the entire period served as a clerk.

4) 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. 135,624. 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 deliver the certificate of service, 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 30<sup>th</sup> April, 2021.**

**BYRAM ONGAYA**

**JUDGE**