



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1173 OF 2017**

**GERSHON MWONGELA MWAU.....CLAIMANT**

**VERSUS**

**EAST AFRICAN PORTLAND CEMENT LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide the statement of claim dated 21<sup>st</sup> June 2017. In the claim he averred that he was terminated unlawfully and that he was first employed by the Respondent on 30<sup>th</sup> March 2007 as a Trainee and that he was later hired as a Casual in August 2007 and worked as such until 30<sup>th</sup> June 2010 when he was offered a contractual employment as an Accounts Clerk. The Claimant averred that on 28<sup>th</sup> June 2013 he was promoted to Acting Stock Accountant and confirmed to the said position on 27<sup>th</sup> January 2014 earning a salary of Kshs. 111,000/- and house allowance of Kshs. 40,000/-. The Claimant averred that his duties as a Stock Accountant included: updating the General Ledger; stock-taking; preparation of annual and monthly stock valuation reports; being the lead and key person in audits; and costing of inventory. He averred that the Respondent's employees used to be allowed to fuel their personal vehicles within the company and the cost of fuel consumed would later be deducted from their pay slips or the employees would alternatively pay in cash. That an employee under this agreement was required to have a Staff Fuel Voucher with approval from the Human Resource Department in order to access fuel from the company. That if the said staff fuel vouchers ran out, the employees would be allowed to use a Company Voucher again with approval from the Human Resource Department and that the Respondent's Fuel Clerks were to post the employees' fuel transactions into the company system. That his role in updating the General Ledger entailed selecting the day's posted transactions grouped in batches and clicking an update button in the system which would then update all the transactions at the update button's discretion. That there was however instances when the system would experience delays in updating long after the Claimant had selected the update option, but which delays were out of his control. The Claimant averred that it was further not strange for the batches he had selected to be updated to appear as posted from the system but fail to reflect in the General Ledger because of the system experiencing delays. That it is for this reason that once such discrepancy was noted by auditors during the Respondent's external and internal audits the recommendation was to refer to a manual journal as opposed to the electronic system.

2. He further averred that on the issue in dispute in the suit, an auditor named Daniel Kiprono noted such a discrepancy where some transactions had not updated in the General Ledger but rejected his explanation and recommendation to refer to a manual journal. That the said auditor proceeded to forward his audit report with the discrepancy to the HR department which led to the Claimant receiving an interdiction letter dated 18<sup>th</sup> June 2014 accusing him of failure to update the general ledger and drawing fuel without authority. The Claimant averred that he was further required to show cause within 7 days to which he did through a detailed written response and that the Respondent singling him out as having fuelled his car using the company voucher is discriminatory because all employees were at liberty to do so. The Claimant averred that the said audit report only focused on fuel transactions involving him and maliciously targeted him and that if the said audit had extended to other stock items other than fuel, discrepancies would still have been noted as this was a common feature in the system. The Claimant further averred that he was however terminated from employment through a letter dated 4<sup>th</sup> November 2014 despite the evidence in his favour. The Claimant averred that the reason given in the termination letter being '*concealing vital information pertaining to personal vehicle fuelling at company to avoid recovery*' was different from reasons given for his interdiction. That as such had not been given the opportunity to respond to the allegation raised in the termination letter and that it was therefore malicious, unfair and unlawful for the Respondent to terminate his employment for such reason. The Claimant averred that he nevertheless did not conceal any information as alleged and no specifics of the alleged concealed information were given to him and that it is clear the Respondent lacked any reason to terminate his employment. The Claimant thus sought for

- i. A declaration that the termination of the Claimant's employment was unwarranted, unfair and unlawful.
- ii. Kshs. 4,228,000/- being the amount due to the Claimant for the remainder of his contract.
- iii. Kshs. 453,000/- being the gratuity due to the Claimant for the years served.

iv. Interest on b and c at court rates.

v. Costs of this suit.

AND IN THE ALTERNATIVE

vi. A declaration that the termination of the Claimant's employment was unwarranted, unfair and unlawful.

vii. Kshs. 1,812,000/- being twelve months pay as compensation for unfair and unlawful termination.

3. The Respondent filed a Memorandum of Defence dated 2<sup>nd</sup> May 2020 averring that it employed the Claimant as an Accounts Clerk on a 2 years contract from 1<sup>st</sup> July 2010 to 30<sup>th</sup> June 2012 and renewed his contract for a further 3 years before thereafter promoting him to Stocks Accountant with effect from the 1<sup>st</sup> February 2014. The Respondent averred that it carried out a Fuel Management Audit Review (for the period 1<sup>st</sup> July 2013 to 31<sup>st</sup> March 2014) at its Athi River Factory in which the Claimant participated and had review meetings with the auditors prior to the final report. The Respondent averred that the Audit Review Report revealed several variances in the fuel consumption transactions and it consequently issued the Claimant with a Show Cause Letter why disciplinary action should not be taken against him for gross misconduct and an Interdiction Letter citing the offences revealed by the said report. It averred that it invited him for a disciplinary hearing scheduled on 15<sup>th</sup> July 2014 which meeting the Claimant attended and admitted using the wrong fuel vouchers and signing the same for himself. That the Claimant further confirmed that the vouchers that had been undated in the general ledger and that although the JDE system had weaknesses hence creating variances, it could be updated manually of which he had not done by the time of the audit. That he further complained of too much workload and requested to be transferred. It is the Respondent's averment that the disciplinary committee found that the Claimant failed to update the general ledger only with regard to fuel drawn by him in a bid to evade deductions and made several recommendations including termination. That after termination, on 10<sup>th</sup> November 2014 the Claimant appealed against the decision to interdict and terminate his services and was invited for an appeal hearing which proceeded on the 7<sup>th</sup> April 2015. The Respondent averred that the Claimant gave detailed submissions on his appeal and the Appeal panel found that it was improbable for the system error to only single out the transactions relating to the Claimant who was in charge of updating the general ledger and hence upheld the decision to terminate his services. The Respondent averred that the Claimant was further informed of the decision on his Appeal by a letter dated 20<sup>th</sup> May 2015. The Respondent also filed a Witness Statement on 7<sup>th</sup> August 2020 from its Manager Employee Relations and Administration Mr. Joel Kemei. He states that the Respondent denies the reliefs and the alternative reliefs sought by the Claimant in his Statement of Claim and he prays that the Court finds in favour of the Respondent and further awards costs as the claim is without merit.

4. The Claimant then filed a Reply to Defence dated 5<sup>th</sup> February 2021 averring that the auditors did not ask him the specific queries listed in paragraph 4 of the Defence and that he was never at any point served with a copy of the audit report. He further averred that the Respondent did not inform him of his right to be accompanied by a person of his choice and that the disciplinary proceedings were a sham and the minutes do not reflect what transpired. Further, that the committee had a predetermined outcome as his defence was never considered and that he was coming across the said Minutes for the first time. He denies ever complaining about the workload or requesting for a transfer as alleged and prays that the Memorandum of Defence dated 2<sup>nd</sup> May 2020 be disregarded and Judgment be entered in favour of the Claimant as prayed for in the Statement of Claim.

5. The Claimant adopted his filed Witness Statement as evidence in support of his case and further produced his list and bundle of documents. He testified that he was not accompanied to the disciplinary hearing and that he was not given fair chance to defend himself. He asserted that the interdiction letter and termination letter had different reasons for termination and that termination of his employment was unfair. He admitted under cross-examination that he did the conciliation of items in the General Ledger on quarterly basis and that he was not involved in fuelling of cars whose transactions were posted by someone else. He further clarified that his responsibility came in updating the transactions into the General Ledger while it was the Clerks who were responsible for posting the transactions. He testified that the audit report does not meet requirements and is therefore false. He stated that the issues he raised during the disciplinary hearing were all not discussed in those minutes. He stated in re-examination that he was not told of the amount alleged to have been lost and that the show cause did not have any document attached.

6. The Respondent witness, Joel Kimej, testified that he was involved in the Claimant's disciplinary process and produced his Statement. He stated that each item is captured in the Item Ledgers and then the General Ledger is tied to the ledgers and that if an item is captured in the item ledger and not transposed to the General Ledger, it will not be recovered. That there were vouchers not posted for 798 litres translating to Kshs. 87,000/- or so and that they did not receive any information from ICT or Stores Manager on the non-recovery due to non-capture of the items on ledger. He stated that the Claimant only spoke of the delay by the system during the case but had never raised it earlier and that the Claimant was aware of the loss but did not mention his failure to update. That there was no evidence the Claimant was terminated for loss of fuel and states that his termination was for concealing vital information as he benefited at the expense of the company. Under cross-examination, he admitted that they had not filed one of the reports and stated that they confirmed that the system was not the problem. He stated that it is the Claimant who concealed information by giving fuel to staff and not transferring that ledger item to the General Ledger. He testified in re-examination that the system failure issue was raised when the audit was done and vouchers were also produced after audit and that since they were not available, they were not deducted from salary. He stated that the show cause letter only talked of concealing information and that the Claimant responded to the documents in the show cause which were also part of the audit report shared between the auditor and auditee. That marked the end of oral testimony and parties were to file written submissions.

7. The Claimant submitted that he was in a disadvantaged position, having to answer to allegations that were not supported by evidence as he did not have the benefit of seeing the evidence that the Respondent was relying on to support the allegations against him. That he was entitled to be supplied with the audit report, which formed the basis of the allegations against him, together with any other relevant document and that the failure by the Respondent to provide the documents rendered the process unfair. He cited that the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Lady Justice Ndolo held that the employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence and to call witnesses to buttress their defence. He submitted that the Respondent in this case failed to adhere to the mandatory requirement of Section 41 of the

Employment Act as he was not informed of his right to be accompanied to the disciplinary hearing and there was no other employee present when he appeared before the committee. He cited the case of **James Ondima Kabesa v Trojan International Limited [2017] eKLR** where the Court held that:

*"Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee's representations and the representations of the person who has accompanied the employee to the disciplinary hearing."*

8. The Claimant submitted that had he been informed, he would have called a witness from among the other employees to support the assertion that the Human Resource Manager could authorize staff members to fuel their personal cars using Company Vehicles Voucher, where the Staff Vouchers were not available. The Claimant submitted that the Respondent did not have any valid reasons to terminate his services and that while the Respondent attempted to claim that the different reasons set out in the interdiction letter and termination letter mean the same thing, a plain reading of the two statements in the two letters does not communicate the same thing. He urged the Court to be persuaded by the holding in the case of **James Ondima Kabesa v Trojan International Limited (supra)** where the Court held that:

*"...All these grounds, apart from the last ground, were not part of the discussion at the "disciplinary hearings" or the show cause letter. This means that the claimant's employment was terminated on grounds that he had not been required to defend himself against and which had therefore been proved. For these reasons I find that there were no valid grounds for termination."(emphasis his)*

9. The Claimant submitted that the Respondent did not also produce evidence to prove the charges of failure to update the general ledger and drawing fuel without authority against him and that he has attached a schedule (**Appendix 4**) at page 27 to 28 of the Claimant's Bundle showing other transaction which he had selected and clicked the update button, but which experienced a delay. He further submitted that the author of the audit report, Mr. Daniel Kiprono was not called to testify and that the Court was therefore never referred to any specific parts of the report where any discrepancies were noted, nor the explanation. That it would have been important for the Auditor to testify and to answer questions arising from the audit report and that he was therefore denied a chance to question the auditor on the contents of the report. He urges the Court to draw an adverse inference from the Respondent's failure to call the auditor as a witness considering their entire case against him was based on the audit report. That the Respondent witness testified before court without offering any proof of the reasons and that while he had been accused of contravening provisions of the Company Manual, the same or even an extract of it was not availed in court to enable the Court appreciate the quoted provisions and how the Claimant contravened them. Further, that the Respondent did not also produce documents as proof that it suffered any loss and that having failed to interrogate the Defence, it cannot claim that it genuinely believed the matters raised against the Claimant exist. The Claimant thus urges the Court to find that the Respondent has failed to meet its burden of proving reasons under Section 43(1) and his termination is therefore unfair under Section 45 of the Act. The Claimant also submitted that the Respondent did not produce evidence on the allegation of drawing fuel without authority and did not controvert his explanation and evidence on the same. That the Respondent did not point to any Company Policy or rule that the Claimant breached while on his part he produced at page 29 of the Claimant's bundle, a Schedule list of other employees who drew fuel using the Company Voucher instead of a Staff Voucher. He submitted that it therefore follows that the Claimant's termination was unfair and unlawful and is deserved of the reliefs stated on the Statement of Claim dated 21<sup>st</sup> June 2017, either in terms of the main prayers or the alternative.

10. The Respondent's submissions were to the effect that the termination of the Claimant's employment was lawful and fair as he failed to follow the Respondent's policies and procedure on update of data into the general ledger. That the Claimant confirmed from the submissions made at the hearing that he knew the procedures and processes but failed to address the issue of his failure to account for his vehicle fuel consumption, to update the data on the general ledger and to make deductions from his salary, which was his duty. The Respondent submitted that the Claimant was not only in breach of the terms and conditions of service but was dishonest in his dealings and was also not remorseful or willing to make restitution for the loss suffered by the Respondent. The Respondent submitted that it therefore had a valid reason to terminate the Claimant's services on grounds of misconduct as under Section 43(2) of the Employment Act and that it followed a lawful and fair procedure in reaching the decision to terminate the Claimant's services as per the provisions of Section 41 of the Employment Act. The Respondent submitted that under Section 44(4)(c) of the Employment Act, summary dismissal is justified when an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly. That the Respondent has proved that the reasons for termination were valid and fair and that the employment terminated in accordance with fair procedure as provided under Section 45(2)(b) and (c) of the Employment Act. The Respondent cited the case of **Industrial Alliance Life Insurance Company v Gilbert Cabiakman (indexed as: Cabiakman v Industrial Alliance Life Insurance Co. 2004 SCC 55)** at para 29 where the Court held that:

*"The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly toward the employer. The flexibility and malleability of an individual contract of employment enable the parties to provide in the contract that the employer has the power to suspend, and to establish the conditions on which it may do so."*

11. The Respondent submitted that the Claimant is therefore not entitled to any damages for wrongful unlawful termination having been lawfully terminated from employment in accordance with Sections 43, 44(3), 44(4)(c) and 45 of the Employment Act. The Respondent further submitted that the Claimant is not entitled to an award of payment until expiry of contract. The Respondent submitted that fair labour practices dictate that payment of salary must be in exchange of services rendered and that the Claimant's contract of employment provided for termination of the contract before the expiry of the term of contract under Clause 6 of his contract and that the prayer for payment until expiry of contract is therefore misconceived, ill-motivated with the Claimant seeking to unjustly enrich himself and that the same is not contemplated or provided for under Section 49(1) of the Employment Act. It submitted that the Claimant is not entitled to the claim for gratuity as set out under Clause 5 of the Claimant's contract of employment which provides that Gratuity is not payable if separation from the Respondent company is due to gross misconduct. The Claimant's termination was on grounds of gross misconduct. On the issue of reinstatement, the Respondent submitted that the Claimant was terminated on 4<sup>th</sup> November 2014 and he filed his claim at the close of 3 years on 22<sup>nd</sup> June 2017, which was 5 months to the limitation period of 3 years being 4<sup>th</sup> November 2017. That the prayer for reinstatement is therefore not tenable as Section 12(3)(vii) of the Employment and Labour Relations Court Act provides that an order for reinstatement of any employee shall be made by the Court within three years of dismissal, subject to such conditions as the Court thinks fit to impose under

circumstances contemplated under any written law. It further submitted that it is now over 5 years since the date of termination and persuades the Court to consider the provisions of Section 49(4)(b), (c) and (k) of the Act. It submitted that since he did not demand and issue a notice of intention to sue the Respondent while it has demonstrated his negligence, the Claimant is not entitled to costs of the suit nor the interests thereon.

12. The Claimant herein sued asserting the Respondent dismissed him without affording him the safeguards under Section 41. The Claimant did not prove that in the Respondent's letter summoning the Claimant for the disciplinary hearing there was no adherence to Section 41. I say this because the Claimant produced letters dated 19<sup>th</sup> April 2007, 30<sup>th</sup> June 2010, 28<sup>th</sup> July 2011, 28<sup>th</sup> June 2013, 27<sup>th</sup> January 2014, the interdiction letter dated 18<sup>th</sup> June 2014, the Claimant's response, his termination letter dated 4<sup>th</sup> November 2014 and the response to his appeal dated 20<sup>th</sup> May 2015. He did not attach the letter he alleges showed non-adherence to Section 41.

13. The Respondent produced the minutes of the disciplinary hearing conducted on 22<sup>nd</sup> and 24<sup>th</sup> July 2014 as well as the record of the meeting on 7<sup>th</sup> April 2015 where the Claimant's appeal was heard. The disciplinary hearing minutes record with clarity the proceedings undertaken and show the Claimant was asked to explain and gave his explanation to the panel. His written and oral submissions were considered before the decision was made to terminate his services. At the appeal, the Claimant also had the benefit of being given a parole hearing as opposed to the appeal being considered on the basis of documents filed. The Claimant was heard and at the disciplinary hearing had all the safeguards for a fair hearing bar one – the presence of a person of the Claimant's choice as a witness to the process. This being the only infraction, the hearing was not unfair or unlawful as there was substantive compliance with procedural fairness which did not detract from the just determination of his case. Being in the position he held, the Claimant was fairly senior and cannot be heard to complain he was unaware of the requirements of Section 41 of the Employment Act as he never raised the issue of non-adherence to Section 41 prior to the filing of this case. In the final analysis I dismiss his suit and order each party to bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2021**

**Nzioki wa Makau**

**JUDGE**