



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 14 OF 2019

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

- VERSUS -

CARGILL KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd October, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 12.03.2013 against the respondent and on behalf of its members (also referred to as grievants) Charles Njuguna and Josephat Lipuku. The claimant prayed for judgment against the respondent for:

- a. Reinstatement of the grievants.
- b. Payment for entire period within which they were dismissed.
- c. Payment of all leave days due to the grievants as at the time of reinstatement.
- d. Pay each grievant leave travel allowance.

In alternative the claimant prayed as follows. For Charles Njuguna:

- a. Pay in lieu of 7 days of leave.
- b. Pay salary for 12 months.
- c. Pay overtime for 12 hours.
- d. Pay all benefits for the entire period of service per CBA.
- e. Pay damages for unlawful, illegal and unfair dismissal.
- f. Costs and interests of the cause.
- g. Any other relief the Honourable Court deems fit to grant.

For Josephat Lipuku for:

- a. Payment of all benefits for the entire period worked from 2006.
- b. Pay salary for a period of 12 months.
- c. Pay in lieu of annual leave for the period 2006 to 2014.

- d. Compensation for NSSF contributions for the period not covered by the respondent from 2006 to October 2010.
- e. Pay damages for unlawful, illegal and unfair dismissal.
- f. Costs and interests of the cause.
- g. Any other relief the Honourable Court deems fit to grant.

The respondent filed the memorandum of response on 15.04.2019 through M/S Mutua Waweru & Company Advocates. The respondent prayed that the cause be dismissed with costs. The grievants testified to support their respective claims. The respondents' witnesses were Juma Matekwa (RW1), a guard at the material time; Tom Okwoyo, the investigating Officer (RW2); and the respondent's Tea Business Manager, Raphael Mwadime (RW3).

The parties have concluded a recognition agreement and a collective bargaining agreement (CBA). The grievants are unionisable employees of the respondent and members of the claimant trade union.

To answer the **1st issue** for determination, by pleadings and evidence there is no dispute that the respondent had employed the grievants at all material time. Charles Njuguna was initially employed on 10.06.2013 as a warehouse clerk on a one-year term contract. His second contract was for 01.06.2014 to 31.05.2015. He was permanently employed by the respondent on 01.06.2015. He was appointed on several occasions as the acting warehouse coordinator as a recognition of his promising good performance. By the letter dated 12.02.2014 he was given a salary increment thus basic pay of Kshs. 19, 172.00 and a house allowance of Kshs. 5, 014.00 making **Kshs. 24, 186.00** gross pay per month.

Josphat Lipuku was initially engaged on casual basis from 2006 to 2013. He worked continuously at a daily rate of Kshs. 288.00 per day with a yearly increment of Kshs. 20.00. He worked 6 days a week and was paid at the end of each day. He performed manual jobs as a casual employee. On 01.12.2013 he was issued with a three months' contract running from 28.12.2014 and thereafter reverted back to casual employment from 01.03.2014 to 30.06.2014. He signed a second contract running from 01.07.2014 to 30.06.2015. His service was converted to permanent employment by the letter of appointment signed on 07.07.2015 but effective 01.07.2015 in the position of Forklift Driver in the respondent's Tea Business Department. His consolidated monthly salary was Kshs. 15, 187.00 and the letter further stated that he would be paid a monthly house allowance of Kshs. 5, 014.00 subject to the company not providing housing for him – and the Court reckons his monthly gross salary as **Kshs.20, 201.00** if housing was not provided.

To answer the **2nd issue** for determination the Court finds that the grievants' employment was terminated by the respondent. Each received a letter of summary dismissal dated 15.05.2018.

Charles Njuguna was dismissed on account of being involved in the unprocedural removal (theft) of approximately twelve (12) bags of tea from Warehouse 1 on 21.03.2018 without documentation or authority contrary to the laid down warehouse procedures. The letter stated that the disciplinary hearing committee had found him culpable of failing or neglecting to prepare any documentation for the tea leaving the warehouse or to stop the unlawful loading of the tea and not reporting the incident to his line manager – amounting to breach of the respondent's procedure on warehousing as found in clause (iv) of the respondent's QMS Warehouse procedure touching on local deliveries. The letter further stated that the claimant had been found to have signed off that the tea leaving the warehouse on the material night was in order yet that was not the case – amounting failure to fulfil his role requirements per clause 3.2 of the respondent's QMS Warehouse procedure. The letter stated that his integrity was therefore questionable and pointed to involvement in the theft of the tea. The letter stated thus, **“The above conduct is contrary to our Guiding Principles 2 (We conduct our business with Integrity) and 6 (We protect Cargill's information, assets and interests) and as a result, the Company has lost confidence in you.”** The dismissal was effective 15.05.2018.

Josphat Lipuku also received the letter of summary dismissal dated 15.05.2018. He was also dismissed on account of being involved in the unprocedural removal (theft) of approximately twelve (12) bags of tea from Warehouse 1 on 21.03.2018 without documentation or authority contrary to the laid down warehouse procedures. The letter stated that on 21.03.2018 he removed some tea from the warehouse with his forklift and loaded it on a canter No. KBV 715X without authority or any documentation as laid down in company procedures in breach of in clause (iv) and 3.4 of the respondent's QMS Warehouse procedure touching on local deliveries. Further, he had breached the guiding principles 2 and 6 and thus his integrity was questionable and the respondent had lost confidence in him. The letter stated that he was therefore reasonably suspected of being involved in the theft of 12 bags of tea on 21.03.2018 and was accordingly being dismissed per clause 19(b) of the terms and conditions of his employment and section 44(4) (g) of the Employment Act, 2007.

The dismissal letters stated that the grievants would be paid all final dues and be issued a certificate of service per section 51 of the Act after returning all company property and paying any outstanding debt owed to the respondent.

To answer the **3rd issue** for determination, the Court returns that the grievants were accorded due or fair procedure prior to the dismissal as envisaged in section 41 of the Employment Act, 2007. The pleadings and evidence for the parties show that each claimant received a letter to show cause dated 06.04.2018, each replied in writing, each was invited to a disciplinary hearing in presence of the union representative, each was informed of a right to appeal through the letter of summary dismissal, each appealed and the respondent heard them but appears to have upheld the summary dismissal. The summary dismissal is therefore found not to have been unfair in procedure.

The claimant filed a trade dispute as per the Labour Relations Act, 2007. The appointed statutory conciliator was one Gladys Mutahi. By her letter dated 29.01.2019, the conciliator found and observed as follows:

- a. The two grievants worked for the respondent and had a clean record of service.

- b. The two were present in the ware house during the incidence of the theft of the 12 bags of teas.
- c. The management carried out investigations which were carried out by an independent investigator, a security manager from Nakuru in regard to the theft of the tea and the two grievants found culpable.
- d. The incident was reported to the authority and they were issued with an OB No. and investigations are still ongoing by the time of the conciliator's observations.
- e. The grievants were taken through disciplinary process in accordance with the law.
- f. The complaints (grievants) were not interrogated during the investigations.
- g. There were no CCTV cameras in the warehouse during the time of the said incidence.
- h. The management had prepared the final terminal dues for the two grievants but they had claimed to have same pending leave days which they had not been compensated.

The conciliator took the opinion that the management had unfairly terminated the services of the two grievants because the management submitted that the matter was still under investigation by the authority. The conciliator then recommended thus, **"It is therefore my recommendation that management honours the demands for the Union by payment of their terminal dues and compensation of 12 months for unfairly terminating their services."** The respondent rejected the recommendation hence the present suit.

The 4th issue for determination is whether the respondent had justifying and valid reasons for termination as per section 47(5) of the Act and whether as at the time of termination the reasons for termination have been established to have existed as per section 43 of the Employment Act, 2007. As submitted for the respondent, the claimant's case as per paragraph 22 of the memorandum of claim is that the respondent dismissed the grievants summarily and the same was malicious and unfair as no evidence to the allegations was produced. The Court has carefully considered the evidence. The grievants denied involvement in the theft or loss of the tea as was alleged. Josphat Lipuku (CW1) testified that his work was to load and off load tea using the forklift. On the material date he was at work between 4.00pm and 11.00pm. He testified that he did not load KBV 751X. Charles Njuguna (CW2) testified that on 21.03.2018 he was on second shift and worked from 4.00pm to 11.00pm. He further testified thus, **"In the following day, I was called to office. It was said I oversaw loading of undocumented tea. I was not concerned with local deliveries, but shipping. I saw no incident on the night of 21st March, 2018. I could not report any incident. I was not shown any evidence of the incident."** The Court finds that the grievants similarly and consistently denied the allegations in their replies to the letters to show cause, at the disciplinary hearing and at the administrative appeal hearing.

Under sections 43 and 47(5) of the Act the respondent bears the burden of establishing that as at termination, the reasons for termination existed, were valid or genuine, and, the burden of justifying the grounds for termination, accordingly. RW1 was the guard, upon whose statement, it is submitted that the respondent initiated the disciplinary proceedings. Indeed, the investigator RW2 testified thus, **"...Guards reported the theft. One guard was Juma Matekwa and Douglas Giteya. I do not know Charles and Josphat. I went to scene after report."** Of the guards in issue, only RW1 testified. The Court considers that the testimony and statement by RW1 would therefore constitute the primary evidence on whether the grievants were culpable as alleged or not. The Court has carefully considered the statement by RW1 as exhibited for the respondent. He states that he was a new guard at the premises and he was understudying another guard known as Douglas Giteya. His statement further states as follows. At 2130 Hours they completed locking of the containers and thereafter he was standing at the entrance with Douglas Giteya when a truck No. KBU 715X being a canter drove in reverse and parked next to a lamp next to the entrance. Further, after the truck stopped a forklift immediately drove out carrying a pallet of about ten stacks of tea and loaded to the waiting truck. He then asked Douglas for the loading sheet but Douglas did not respond and RW1 then decided to stop the forklift but the forklift driver was ready to get RW1 injured so that RW1 refrained from stopping it. The forklift left and immediately another forklift drove in and loaded other more sacks. The truck drove away and escaped and RW1 advised Douglas to call the site inspector. RW1 explained what had happened and the warehouse supervisor was informed. The statement then states that the guard (meaning Douglas) was asked to give the names of the operators but he alleged that he did not know them by name. RW1's statement concludes that Douglas was then removed and taken to the security firm's Nyalii office for interrogation and that RW1 strongly believed that Douglas was aware of the deal but he behaved as though he was not aware. The statement was dated 22.03.2018.

Douglas Giteya did not testify in Court or before the disciplinary committee but his statement is on record as dated 22.03.2018. The Court considers that his evidence has not been tested by way of examination and cross-examination and the statement bears low or no probative value and, as is as well not credible, especially that RW1 took the view that Douglas was uncooperative and he must have been involved.

The investigator RW2 in his report concluded thus, **"From the evidence adduced above, it is clear that a truck Reg. No. KBV 715X was loaded tea from warehouse one without a gate pass. It was highly suspected that the tea was stolen because the vehicle ran away when our guard intervened to be issued with a gate pass."**

It is suspected that all the staffs that were in charge of the Warehouse aware of the deal. The forklift mentioned could not have the courage to remove the tea without the consent of their seniors. It was also suspected that the staffs were luring the guards into these vices because sweepings do not have records."

RW2 then recommended in the investigation report thus:

- a. Disciplinary action should be taken against the suspected staffs so that they can serve as a lesson to other staff.
- b. All sweepings should be stored at the same place for accountability purposes.

c. CCTV cameras be installed to be reviewed in case a similar incident is reported.

The Court finds that the evidence was that the grievants were on duty on the material night. CW2 testified that there were three warehouse clerks and he was responsible for shipment and he never saw the truck in issue on the material night. CW1 testified that there were seven forklift operators and at the disciplinary hearing he pointed out that Tsuma, Mohammed and Ogolla had been allocated loading of teas. RW1 was new and the Court finds that he could not recognise the grievants at all, and in particular, the forklift operators involved in the suspicious loading of truck No. KBU 715X. The Court further finds that there was no evidence of recognition or identification of the forklift operators. RW3 testified that he relied on evidence by security guards on record to show the two employees were involved in the theft. The Court finds that the disciplinary committee hearing failed to interrogate all forklift operators and warehouse clerks on duty on the material night and show how in the circumstances the grievants herein could have been the culprits. The Court has also considered the undisputed long and clean record of service by the grievants despite similar instances as alleged by the respondent and reported by the independent investigator. The Court returns that the claimant has established that the respondent, as at the time of the termination, had no valid or genuine reason to justify the summary dismissals.

While making that finding, the Court has considered the testimony by RW1 in re-examination thus, **“I saw Josphat Lipuku driving tea bags. Lipuku was driving. He did not have a gate pass. He wanted to crush me as he drove. Ogolla was forklift driver. Ogolla is not party to this case. Ogolla is the one who loaded the tea bags on canter. When I asked for gate pass the two took off. That is what happened.”** And also in cross-examination thus, **“I worked as security guard for respondent. I went to the place in February 2018 as duly deployed. On 22.03.2018 I was on duty. Clerk was Charles Njuguna. Josphat Lipuku was the driver. I knew both of them.”** The Court finds that the testimony in Court is at serious variance with RW1’s statement on record that as at the night of the suspicious loading, he did not recognise the forklift operators and wanted Douglas, the other guard, to name them. The Court considers that such contradictory evidence cannot be trusted.

Thus, the Court returns that the termination was unfair in substance for want of valid and genuine reasons as at the time of the summary dismissal.

The Court has also considered the recommendations made by RW2, the investigator. The Court returns that the employer’s operational deficiencies should not be visited upon the employee in circumstances whereby the employee appears to have done his best within the prevailing operational policies and requirements. In the instant case the respondent had not installed the CCTV cameras and appears not to have instituted measures on handling and disposal of tea sweepings at the warehouses. CW2, Charles Njuguna cannot be faulted when he stated that he had done his work and there was no evidence of undocumented tea that left the warehouse. The Court follows its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus,

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”

The 5th issue is whether the claimant is entitled to remedies as prayed for. The Court has considered section 49 of the Act. The grievants desired to continue in employment. They had served for a considerably long period of time with a clean record but under varying contracts some of which had lapsed and parties thereby released accordingly. The Court has considered that the deficiencies in the respondent’s operational system, policies and requirements as identified by the investigator and which seriously prejudiced the grievants’ position. The respondent otherwise accorded the grievants due process. In the circumstances and to balance justice for parties each is awarded 6 months’ gross salaries being **Kshs. 145, 116.00** for Charles Njuguna and **Kshs. 121, 206.00** for Josphat Lipuku. The respondent will pay 50 % of the costs of the suit being a trade dispute and looking at parties’ margins of success.

As submitted for the respondent the claimant provided no evidence for the other claims and prayers. The same are declined as unjustified. The Court further considers that the claims were in the nature of liquidated or specific damages whose particulars were not pleaded and specifically proved. Further, the NSSF claims for 2006 to 2010 were time barred under section 90 of the Act and in any event, ought to have been pursued per the relevant statutory provisions.

The Court finds that the remedy for reinstatement was not available as the statutory 3 years of limitation under section 12 (3) (vii) of the Employment and Labour Relations Court Act have since lapsed. Further no exceptional circumstances to warrant the remedy were urged.

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

1. Payment to Charles Njuguna **Kshs. 145, 116.00** and to Josphat Lipuku **121, 206.00** by 01.12.2021 and failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
2. The respondent to pay 50% of the claimant’s costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND OCTOBER, 2021

BYRAM ONGAYA

JUDGE