



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 84 OF 2017**

**AMIRI AKWABE WERE.....CLAIMANT**

**v**

**BUTALI SUGAR MILLS LTD..... RESPONDENT**

**JUDGMENT**

1. Amiri Akwabe Were (the Claimant) instituted these legal proceedings against Butali Sugar Mills Ltd (the Respondent) on 28 February 2017, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Responses to the Statement of Claim on 7 July 2017, which prompted the Claimant to file a Reply to the Response on 27 July 2017.
3. The Cause was heard on 19 February 2018, when the Claimant testified and on 10 May 2021, when the Human Resources Manager with the Respondent testified.
4. The Claimant filed his submissions on 7 June 2021, while the Respondent had incorporated its submissions in the Response to the Statement of Claim.
5. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

**Procedural fairness**

6. The Respondent issued to the Claimant a show-cause notice dated 14 August 2015. According to the show cause, the allegation against the Claimant was that he had given to a fellow employee dismantled parts of a grinding machine that had been reported missing.
7. The Claimant was requested to respond to the allegation.
8. The Claimant responded on 17 August 2015, after which he was invited to and attended an oral hearing on 24 August 2015. The Union of which the Claimant was a member was also informed of the hearing.
9. The Court is therefore satisfied that the Respondent complied with the procedural fairness requirements as contemplated by sections 35(1) and 41 of the Employment Act, 2007.

**Substantive fairness**

10. Sections 43 and 45 of the Employment Act, 2007 place an obligation on the employer to prove the validity and fairness of the reasons for terminating an employment contract.
11. The Respondent received a report of a missing grinding machine on 20 June 2015. Three days later, a named employee was noticed carrying an item in a polythene bag.
12. The item turned out to be a dismantled grinding machine. When questioned, the employee revealed that the Claimant had given him the dismantled grinding machine at the weighbridge area to keep for him.
13. In his statement, the employee stated that the Claimant had also given him his (Claimant's) locker keys and requested him to lock up the

machine in his (Claimant's locker).

14. The Claimant confirmed the narration in response to the show-cause and also during his disciplinary hearing but explained that he could not have reported finding the grinder immediately because he was going for lunch.

15. The Claimant also stated that immediately he reported back from lunch, he was informed by the employee he had given the grinder to keep to go and see his Supervisor, who interrogated him about the grinder.

16. The Disciplinary Committee heard from the Claimant and recommended either separation or a warning because he did not have an adverse disciplinary record.

17. The Respondent's Human Resources Manager and Administrative Manager opted to take the separation recommendation, and they issued a summary dismissal letter.

18. The Claimant's evidence that he saw the grinder while going out for lunch and that he gave it to a colleague to keep was not discounted. Upon returning from lunch, the Claimant was confronted by the Supervisor.

19. The Claimant's fault appears to be that he did not promptly report finding the grinder.

20. In the view of the Court, the Claimant did not have sufficient time to report the finding of the grinder, and there was no evidence that he was privy to the information that the grinder had got lost 3 days earlier.

21. The Court, therefore, finds that the sanction of dismissal was not commensurate with the facts and circumstances established. The summary dismissal was not for a fair reason.

#### **Compensation and pay in lieu of notice**

22. The Claimant served the Respondent for about 4-years, and in consideration of the length of service, the Court will award the equivalent of 1-month salary as compensation (gross salary in July 2015 was Kshs 37,105/-).

23. The Court will also allow a 1-month salary in lieu of notice (basic salary was Kshs 23,751/-).

#### **Accrued leave**

24. The Respondent offered the Claimant outstanding leave, and nothing turns on this head of the claim.

#### **Service pay**

25. The copy of the payslip produced in Court by the Claimant indicates he contributed to the National Social Security Fund. By dint of section 35(5) & (6) of the Employment Act, 2007, he is not eligible for service pay.

#### **Conclusion and Orders**

26. The Court finds and declares that the summary dismissal of the Claimant was not fair, and he is awarded:

- |                            |                      |
|----------------------------|----------------------|
| (i) Compensation           | Kshs 37,105/-        |
| (ii) Pay in lieu of notice | Kshs 23,751/-        |
| (iii) TOTAL                | <b>Kshs 60,856/-</b> |

27. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

#### **Appearances**

For Claimant Mwakio Kirwa & Co. Advocates

For Respondent Mr Ouma instructed by Federation of Kenya Employers

