



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 29 OF 2020

JOSEPHAT MOSEREMANI MEKONGE.....CLAIMANT

VS

CARGILL KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Statement of Claim dated 9th July 2020 and filed in court on 10th July 2020, the Claimant seeks compensation for unlawful termination of employment plus terminal dues. The Respondent filed a Response on 17th September 2020 to which the Claimant responded on 17th September 2020.
2. At the trial, the Claimant testified on his own behalf and the Respondent called Juma Matekwa, Tom Okwoyo and Raphael Mwadime.

The Claimant's Case

3. The Claimant states that he was first employed by the Respondent on 1st March 2014, as a Warehouse Supervisor, earning a monthly salary of Kshs. 69,000. He adds that he was promoted to the position of Warehouse Coordinator in 2015 and his salary increased to Kshs. 72,000.
4. The Claimant's salary was further increased to Kshs. 90,000 in 2016, Kshs. 99,000 in 2018 and Kshs. 107,904 as at the time he left the Respondent's employment.
5. The Claimant states that on the evening of 21st March 2018 at around 9.00 pm, there was a commotion outside the Respondent's Warehouse Number 1 and on inquiry, he was notified by a Mr. Egesa of G4S Security that a theft had taken place.
6. The Claimant further states that upon learning of the theft, he immediately called a Mr. Ogona, who was in overall charge at the time, as he was in the Warehouse Manager's Office in charge of Logistics & Operations.
7. The Claimant claims that Egesa suggested that the matter should not be reported to the Respondent's management as it was mere speculation with no evidence. It was agreed that the report be made the next day.
8. The Claimant avers that before the report was made, he alongside Charles Njuguna, Josephat Opuku and Bernard Oguna were summoned to Joseph Otieno's office and instructed not to report to work.
9. The Claimant was served with a show cause letter on 16th April 2018 to which he responded and was invited to a disciplinary hearing on 17th April 2018. On 15th May 2018, the Claimant was served with a letter of summary dismissal. He lodged an appeal against the dismissal on 30th May 2018 but the dismissal was upheld.
10. The Claimant's case is that his dismissal was without justifiable cause. He therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 107,904.00
- b) Unpaid leave days for 2018.....107,904.00

- c) House allowance.....751,327.20
- d) 12 months' salary in compensation.....1,294,848.00
- e) Costs plus interest

The Respondent's Case

11. In its Memorandum of Response dated 13th August 2020 and filed in court on 14th August 2020, the Respondent states that it is involved in tea warehousing business and related activities.

12. The Respondent admits having employed the Claimant on 1st March 2014, in the position of Warehouse Supervisor. The Respondent adds that during his employment, the Claimant was promoted severally and his salary adjusted accordingly. The Respondent points out that this was done pursuant to a job evaluation exercise which led to re-organisation, resulting to change of the Claimant's job title from Warehouse Supervisor to Warehouse Co-ordinator.

13. The Respondent states that the Claimant's salary was increased to Kshs. 99,000 in 2017 and 107,904 in 2018.

14. The Respondent denies that the Claimant's employment was unlawfully terminated and states as follows:

a) The Claimant was working as a Warehouse Coordinator/Supervisor at Warehouse 1 in the Respondent's premises at all material times relevant to the claim herein;

b) As warehouse personnel, the Claimant was to undertake his duties in accordance with the Respondent's Quality System Procedure for Warehousing Department Reference Number QSP/WHSE/002 (Warehouse Procedure Manual);

c) The Claimant's job description was as provided under Clause 3.1 of the Warehousing Procedure Manual. Particularly and of relevance to this claim, the Claimant was in charge of all operations and staff of the Warehouse. The Claimant was also responsible for authorising and signing off any deliveries from the Warehouse;

d) On 21st March 2018 between 2130hrs and 2200hrs, 12 bags of tea were removed from the Respondent's Warehouse 1 by two forklift drivers and loaded onto Motor Vehicle Registration Number KBV 715X without any documentation or authority. One of the forklift drivers threatened to run over the security guards who were trying to stop them;

e) The Claimant was on duty on the said date and the incident was reported to him by the security guards but without any good reason, he disregarded the said report, insisting that no tea was missing from the Warehouse. The Claimant also failed to report the incident to the Warehouse Manager, as he was required to do;

f) The loss of tea was confirmed after the client to whom the tea was intended to be delivered complained of missing tea, necessitating the Respondent to issue to the said client a credit note dated 4th July 2018 to make good the shortfall;

g) The Respondent was under reasonable apprehension that the Claimant was either directly involved in the theft of the tea or acquiesced to its removal from the Warehouse, without due procedure and documentation;

h) As a result, the Respondent commenced disciplinary proceedings against the Claimant, culminating to termination of his employment.

15. Regarding the disciplinary procedure, the Respondent states that the Claimant was issued with a show cause letter dated 16th April 2014 by which he was required to submit a written response.

16. The Claimant submitted a written response to the show cause letter and by letter dated 12th April 2018, he was notified of a disciplinary hearing on 16th April 2018. The disciplinary hearing was later rescheduled to 17th April 2018, with the Claimant's concurrence.

17. After his dismissal on 15th May 2018, the Claimant lodged an appeal on 18th May 2018. By letter dated 23rd May 2018, the Claimant was notified of an appeal hearing scheduled for 30th May 2018. On 13th June 2018, the Claimant was notified that his dismissal had been upheld on appeal.

Findings and Determination

18. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

19. On 15th May 2018, the Respondent wrote to the Claimant as follows:

“Dear Josephat,

RE: SUMMARY DISMISSAL LETTER

Reference is made to the disciplinary hearing meeting you attended on Tuesday, 17th April 2018 during which your alleged involvement in the unprocedural removal of approximately twelve (12) bags of tea from Warehouse 1 on 21st March 2018 without documentation or authority contrary to the laid down warehouse procedures was discussed.

Below is a summary of the Disciplinary Hearing Committee’s findings:

- You failed/neglected to ensure that the requisite documentation was in place for the tea leaving the warehouse or to stop the unlawful loading of the tea; neither did you report the incident to your line manager. This is in breach of the Company’s procedure on warehousing as found in Clause (iv) of our QMS Warehouse procedure touching on Local Deliveries.*
- As the supervisor in charge of all warehouse operations, you signed off that the tea leaving the warehouse on that night was in order yet this was not the case. This not only constitutes a failure to fulfil your role requirements as stipulated in Clause 3.1 of the Company’s procedure on Warehousing as found in our QMS Warehouse Procedure; but bring the Company’s name into disrepute.*
- Your above blatant disregard of procedures brings your integrity into question and points to your possible involvement in the theft of the tea.*
- 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.*

in view of the above, this letter serves to confirm the Company’s decision to dismiss you from its employment effective from the date of this letter on account of our having reasonable and sufficient grounds to suspect you of having been involved in the theft of twelve (12) bags of tea on 21st March 2018. Your dismissal is in accordance with Clause 17 (b) of the Terms and Conditions of your employment contract and the Employment Act 2007, Section 44 (4) (g).

You will be paid all your final dues and issued with a Certificate of Service in accordance with Section 51 of the Employment Act 2007, after you return all Company property in your possession and subject to payment in full of any outstanding debt due to the Company.

You have the right to appeal against this decision. If you wish to appeal, this must be submitted in writing to the Warehouse Manager, within five (5) working days on receipt of this letter, clearly outlining the reasons for your appeal.

Yours sincerely,

(signed)

Linet Anyika

Human Resources Manager”

20. This letter cites the Claimant for involvement and complicity in the irregular removal of tea from the Respondent’s Warehouse No. 1, on 21st March 2018.

21. The parties’ accounts of the happenings of 21st March 2018 were somewhat conflicting but there were key commonalities notably; that there was indeed an incident, which was reported to the Claimant by the Respondent’s external security and that no report was made to the Warehouse Manager at the time.

22. Juma Matekwa (Respondent’s Witness No. 1), a security guard employed by SGA Security, was assigned at the Respondent’s premises on 21st March 2018. He testified that following removal of undocumented tea from Warehouse 1 by two forklift drivers, a report was made to the Claimant.

23. The Claimant himself told the Court that he was prevailed upon by the Respondent’s external security not to make an immediate report to the Warehouse Manager, because the report of theft was unsubstantiated and unsupported by evidence.

24. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee; and in inquiring whether the employer has discharged its mandate, all the Court is required to do is to satisfy itself that the employer acted reasonably.

25. The Court was referred to the decision in *Joshua Rodney Marimba v Kenya Revenue Authority [2019] eKLR* where O.N Makau J stated the following:

“Under Section 43 of the Employment Act, the reason for terminating the employee’s contract are those things which the employer honestly believed to exist at the time when the termination was done and which made him to decide to terminate the contract. “

26. The Claimant admitted that he failed to report the incident of 21st March 2018 to the Warehouse Manager, as he was required to do. His explanation for the failure that there was no hard evidence of theft did not exonerate him because he was not the investigating officer. All he was required to do was to escalate the matter to his immediate boss, which he did not do.

27. Applying the ‘reasonable responses test’ set by Section 43 of the Employment Act, I find and hold that the Respondent had a valid reason for terminating the Claimant’s employment.

28. That settled, the next question to ask is whether in terminating the employment, the Respondent observed due procedure. The Claimant was issued with a show cause letter on 6th April 2018 to which he responded. He was further invited to a disciplinary hearing which took place on 17th April 2018 and on 30th May 2018, he was heard on appeal. The Claimant confirmed that he was given adequate opportunity to explain himself and that he was accompanied at the disciplinary hearing.

29. The Court is therefore satisfied that the Respondent complied with the procedural fairness requirements of Section 41 of the Employment Act as well as Clause 14 of its Human Resource Policy.

30. In the end, I find and hold that the termination of the Claimant’s employment was substantively and procedurally fair and he is therefore not entitled to compensation.

Other Claims

31. The Claimant claims house allowance. However, according to his letter of appointment issued on 27th February 2014, he was to earn a gross pay, which would ordinarily be inclusive of house allowance. The claim for house allowance is therefore without basis and is disallowed.

32. The Respondent admitted owing the Claimant one (1) month’s salary in lieu of notice. I will therefore not say anything more on that limb.

33. The Claimant is also entitled to five (5) months’ prorata leave pay for 2018.

34. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 1 month’s salary in lieu of notice.....	Kshs. 106,920
b) Prorata leave pay for 2018.....	<u>42,768</u>
Total.....	<u>149,688</u>

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. Each party will bear their own costs.

37. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OCTOBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mrs. Nyange for the Claimant

Mr. Juma for the Respondent