



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT

AT KISUMU

CAUSE NO. 171 OF 2014

JOSEPHAT KITOTO WERE

CLAIMANT

v

NEW KENYA CO-OPERATIVE CREAMERIES LTD

RESPONDENT

JUDGMENT

1. Josephat Kitoto Were (the Claimant) sued the New Kenya Co-operative Creameries Ltd (the Respondent), alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Memorandum of Defence and Counterclaim (later amended), which prompted the Claimant to file a Reply and Response to the Counterclaim.
3. The Cause was heard on 29 October 2018, when the Claimant testified, and 28 January 2021 and 16 March 2021, when the Respondent's two witnesses testified.
4. The Claimant filed his submissions on 14 April 2021, and the Respondent filed its submissions on 13 May 2021.
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. The Respondent issued a show-cause letter dated 6 June 2013 to the Claimant, and he responded on 7 June 2013. The show-cause stated the allegation against the Claimant as *issuing stocks without using bin cards*.
7. The notice was followed by the Claimant's suspension through a letter dated 21 June 2013 (to facilitate investigations).
8. On 24 June 2013, the Respondent invited the Claimant to appear for an oral hearing on 27 June 2013, but the Claimant did not attend the hearing. The Respondent rescheduled the hearing to 18 July 2013.
9. The Claimant attended the hearing, after which the Respondent notified him of the termination of his employment through a letter dated 31 May 2013 (typing error as the body of the letter made reference to events in June 2013).
10. Section 41 of the Employment Act, 2007 requires the employer to afford an employee an opportunity to make representations before making a decision to terminate the employment contract.
11. The Court is satisfied that the Respondent afforded the Claimant time to make written and oral representations before the termination of the contract, and thus it was in compliance with the statutory requirements on procedural fairness.

Substantive fairness

12. In terms of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove that the reasons for terminating the Claimant's contract were valid and fair.

13. To discharge the burden, the Respondent called two witnesses.
14. The Respondent's second witness, the Finance Manager, testified that the department noted an increasing trend of stock variances in May 2013 at the Kisumu depot. Therefore, a surprise audit was conducted.
15. The audit established that the Claimant had stopped using bin cards.
16. The Claimant indicated in his written response to the show-cause that initially he used bin cards (manual system), but upon the posting of a new Depot Manager in October 2012, the said Manager advised him to stop using the bin cards as the Manager would use/rely on the system and that he resumed using the bin cards after the Manager instructed him through a Memo dated 15 May 2013.
17. The Claimant was a Stores Clerk. He did not deny that the Respondent's policies required the use of bin cards. He, however, asserted that a new Depot Manager stated that he would rely on the stock system rather than manual updates through bin cards.
18. The said assertion was not formalised in writing by the Depot Manager. If the instructions were verbal, they could not have overridden the Respondent's written policies.
19. The Claimant ignored written instructions at his peril by failing to use bin cards as required by the policies, thus leading to a variance.
20. The Court finds that the Respondent had valid and fair reasons to terminate the Claimant's contract.
21. Compensation and pay in lieu of notice are thus not available remedies.

Breach of contract

Annual leave and leave allowance

22. The Respondent contended that the Claimant was paid these heads of claims.
23. The Claimant did not interrogate the Respondent's witnesses on these heads of claim(s), and the Court finds the same were paid.

June and July 2013 salary

24. The documents produced by the Claimant show that he was paid June 2013 salary.

Counterclaim

25. The Respondent counterclaimed for Kshs 3,800,000/- being the loss occasioned by the Claimant's negligent conduct. Particulars of the loss were outlined in the audit report, which was produced in Court.
26. The Claimant did not cross-examine the Respondent's witnesses on the counterclaim or audit report.
27. The Court will therefore allow the counterclaim.

Conclusion and orders

28. The Court finds the Cause advanced by the Claimant without merit. It is dismissed.
29. The Counterclaim is allowed in the sum of Kshs 3,800,000/-.
30. Each party to bear its own costs.
31. The Court regrets that this judgment could not be delivered on the scheduled date due to other official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant D.O.E. Anyul & Co. Advocates

For Respondent Onyinkwa & Co. Advocates

Court Assistant Chrispo Aura