



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**APPEAL NO.E001 OF 2020**

**CARGILL KENYA LIMITED.....APPELLANT**

**VERSUS**

**WILSON ONYWOKI NYAKERUMA.....RESPONDENT**

**JUDGEMENT**

1. The Appellant herein being dissatisfied with the judgment and decree of Hon. Limo B. Benjamin (SRM) delivered on 29<sup>th</sup> April, 2020 in Nakuru Chief Magistrates Court under cause number CM-ELR No. 88 of 2018 preferred this Appeal by way of Memorandum of Appeal dated 9<sup>th</sup> October, 2020, and filed through the firm of Mutua Waweru and Company Advocates. It comes out as follows;

1) **THAT the learned trial magistrate erred in law and in fact in making the finding that the Respondent's dismissal was unfair for having not been issued with a notice of termination which finding was against the weight of evidence on record and the law applicable in instances of summary dismissal.**

2) **THAT the learned trial magistrate erred in law and in fact in making the finding that the Respondent's dismissal was unfair for having not been preceded with a hearing as envisaged under the provisions of section 41 of the Employment Act, 2007 which finding was against the weight of evidence on record.**

3) **THAT the learned trial magistrate erred in law and in fact in making the finding that the disciplinary process culminating to the Respondent's dismissal was unfair for reasons that the Appellant's witness who was his accuser was a member of the disciplinary committee which finding was against the weight of evidence on record.**

4) **THAT the learned trial magistrate erred in law and in fact in making a finding that the Respondent's termination was unfair on the basis that the relationship between the Appellant and the Respondent was not shaky to warrant termination of the Respondent's employment which finding has no basis in law and was against the weight of evidence on record.**

5) **THAT the learned trial magistrate erred in law in making a finding that the Respondent's dismissal was unfair for reasons that his suspension was not preceded with any warnings which finding has no basis in law.**

6) **THAT the learned trial magistrate erred in law and in fact in dismissing the Appellant's defence for lack of merit and substance which finding was without any reasoned justification and was against the weight of evidence on record.**

7) **THAT the learned trial magistrate erred in law in failing to consider and make a finding as to whether there was a valid reason for the Appellant to terminate the Respondent's employment which failure was contrary to the applicable law and occasioned the erroneous decision.**

8) **THAT the learned trial magistrate erred in law and in fact in failing to take into consideration the Appellant's pleaded case in its Memorandum of Response, its evidence on record and submissions filed on its behalf thereby arriving at an erroneous decision.**

9) **THAT learned trial magistrate erred in law and in fact in awarding the Respondent 12 months gross salary as compensation for unfair termination which award was excessive in the circumstances.**

10) **THAT the learned trial magistrate erred in law and in fact in making an award for housing allowance without analyzing**

**the evidence on record and parties' submissions on the issue which finding was against the applicable law and the weight of evidence on record.**

**11) That the learned trial magistrate erred in law and in fact in making an award of damages under the provisions of Article 23(3) of the Constitution yet he did not have the jurisdiction to make such an award.**

It prays for Orders That;

**a) The appeal be allowed.**

**b) That the judgment delivered on 29.4.2020 by the Hon. Limo B Benjamin Senior magistrate. In Nakuru CM-ELR cause No. 88 of 2018 Wilson Onywoki Nyankeruma Vs Cargill Kenya Limited be and is hereby set aside.**

**c) That the Respondent's case Nakuru CM-ELR cause No. 88 of 2018 Wilson Onywoki Nyankeruma Vs Cargill Kenya Limited be dismissed with costs to the Appellant.**

**d) That the cost of this Appeal be awarded to the Appellant.**

### **Brief facts**

2. The Respondent/ claimant in the lower court matter was employed by Lesiolo Grain Handlers Limited as a quality analyst with effect from 1<sup>st</sup> June, 2010. Lesiolo was later acquired by the Appellant herein in the year 2014 and the Respondent was taken up by the Respondent in the same position under the same terms with effect from 1<sup>st</sup> May, 2016. That on 1<sup>st</sup> and 2<sup>nd</sup> November, 2017 several motor vehicles delivered wheat to the Appellant premises and he together with other employees were tasked with sampling, analysis and grading. That the motor vehicle assigned to him was KZB 690. Each employee collected samples from one vehicle, analyzed and graded and recorded the results in the grading book. However, around 5 pm, one employee was left behind to transfer results from intake book to grading sheet, and on that day it was his turn, which he transferred the results as they are. On 27<sup>th</sup> November, 2017 he was suspended for allegedly falsifying grading results causing the Appellants financial loss. Subsequently he was served with a Notice to show cause and subjected through a disciplinary hearing where he was dissatisfied with since the main accuser, one Mr. Patrick Kiriga sat in the disciplinary meeting, he was then dismissed on 10<sup>th</sup> January, 2018, upon appeal the appeal was disallowed. The Respondent averred that he was unfairly terminated as the termination did not pass the procedural and substantive fairness.

3. The Appellant on the other hand averred that the vehicles listed by the Respondent, transported wheat to the Appellant premises between 31<sup>st</sup> October, 2017 and 2<sup>nd</sup> November, 2017 and that it's only the claimant who was tasked with sampling, analysis and grading all the wheat in all the vehicles. According to the appellant the falsified grading costed them a colossal sum of money which actions were attributed to the Respondent herein. The verification of the graded wheat was done by the appellant's food safety, quality and regulatory coordinator whose result were different from the results obtained by the Respondent more particular for motor vehicle registration number KZB 690. This variance raised question and the appellant secured services of an independent quality analyst one Ms. Margaret W. Wachira who confirmed the said variance in grading after carrying out her analysis. It is on that basis that the Appellant issued the claimant with a show cause letter and then subject him to a disciplinary hearing, where he was found culpable of the acts of falsifying the graded wheat, leading to his dismissal. That the Respondent incurred a loss of USD 963.41. the Appellant avers that it exercised its disciplinary control in accordance with the law, pursuant to sufficient reason given therefore that the termination was fair in the circumstances.

4. matter proceeded for hearing and judgment delivered for the Respondents as against the Appellant for payment of 12 months gross salary as compensation for the unfair termination, one month salary in lieu of Notice, one month salary for house allowance, Kshs.300,000 compensation in terms of Article 23(3) of the Constitution, the appellant to issue the respondent with a certificate of service and that cost of the suit and interest be paid by the Appellant.

5. This appeal proceeded by way of written submissions with the Appellant filing on 11<sup>th</sup> October, 2021 while the Respondent filed on 12<sup>th</sup> November, 2021.

### **Appellant's submissions.**

**6. The Appellant submitted that the Respondent was summarily dismissed from employment as such was not entitled to notice as was held in Vincent Abuya Obunga V Mast Rental Services Limited [2019] eKLR.**

7. On whether termination was unfair, it was submitted that the Respondent was subjected to a disciplinary hearing that was properly constituted, after according the Respondent sufficient time to prepare and respond. It was further argued that the reason for dismissal was communicated to the Respondent and the falsified graded wheat, was an act carried out solely by the Respondent resulted to loss of money by the Appellant in payment of the said wheat which were not as per the grade indicated in the grading sheet. In addition, that allegation that the chief accuser sat in the disciplinary meeting causing it to be bias, was without basis as the said Patrick Kiriga, merely sat through the meeting to give evidence of his finding and was never the chair of the meeting or a decision maker therein. Nevertheless, at an appeal was carried out and the decision was upheld in absence of the said Mr. Kirigia.

8. It was further submitted that the trial Court erred in holding that the Respondent termination was unfair for the reason that the same was not preceded by a warning letter. It was then argued that there is not provision in law that support that line of thought.

9. It was argued that the trial Court failed to analyze the defence and evidence adduced by the Appellant arriving at a wrong decision. Further that the claim for house allowance and compensation under Article 23(3) of the Constitution was not mentioned in the judgment yet the

Court allowed it without basis and justification.

10. The Appellant in conclusion submitted that they followed due process in the termination process and therefore the claim was erroneously allowed by the Trial court. It then urged this Court to allow this Appeal as prayed with costs.

### **Respondent's Submissions**

11. The respondent on the other hand submitted that the Appellant did not adduce evidence to illustrate the falsification of the said grading results. It was argued that the Appellant was duty bound to furnish this Court with evidence to affirm that indeed the grading results had been tampered with. Secondly that the re-testing was indeed conducted, however 2 weeks after the initial analysis which testing could have been interfered with by the prevailing whether conditions such as humidity, temperature.

12. On the disciplinary process it was submitted that the process was unfair since the person who raised question on the grading sat in the said hearing. Also that the representative who accompanied him was merely asked to listen through the hearing and not defend the Respondent as such limiting the role of the said representative which the trial Court found as much.

13. According to the Respondent the Appellant did not adhere to section 41 of the Employment Act informing the trial court decision of finding his termination unlawful. It was then submitted that the Trial court's decision was sound and the Respondent urged this Court not to interfere with the judgment and instead dismiss this Appeal.

14. I have examined the evidence and submissions of the parties herein. As is the law, this is a 1<sup>st</sup> appeal and therefore this court has an obligation to go through the evidence as adduced at the lower court and reevaluate it before making a determination.

15. The claimant testified in the lower court that he was employed by the respondents as a quality analyst with effect from 1<sup>st</sup> May, 2016 vide a letter signed by the claimant on 16/9/2016.

16. The claimant averred that on 1<sup>st</sup> & 2<sup>nd</sup> November 2017 he was on duty and that was when wheat was delivered at the respondent's premises for which samples were taken and grading done. He averred that he did analysis in respect of motor vehicle KZB 690 only whereas his other colleagues carried out grading sample from motor vehicle KAW 611 V KBR 9677Z and KBT 029D.

17. He contended that though he didn't do samples of those other vehicles, he was asked to transfer the results of the analysis to the grading sheets for all trucks which task he states he diligently did.

18. He testified that on 17/11/2017 he was suspended from duty on the grounds that he had falsified the results thereby causing the respondent financial loss.

19. He was issued with a show cause letter to explain why disciplinary action should not be taken against him. He responded to the show cause letter and later attended a disciplinary hearing and was later dismissed on 10<sup>th</sup> January 2018. The claimant contended that his dismissal was unfair and wrongful for lack of procedural fairness in that he was not given an opportunity to be heard, independent testing was done in his absence by one Patrick Kirigia who also sat on the disciplinary panel as a member and was in constant touch and advising the appeal committee.

20. During the hearing, Patrick Kirigia testified on behalf of the respondent and indicated that he was the Food quality and regulatory coordinator of the respondent at its Nakuru office.

21. He contended that the claimant prepared grading sheets for motor vehicle KAW 611V, KBR 029D and KZB 690.

22. These sheets were used to pay suppliers. He avers that a verification exercise was conducted to ascertain whether the sheets prepared by the claimant were infact accurate.

23. After this exercise, a second analysis was done by an independent analyst and the results showed that the graded results were at variance with the ones done by the claimant.

24. This caused a loss of USD963.1 to the respondents. A disciplinary process was instituted against the claimant and he was then dismissed.

25. Before the lower court, the respondents were found culpable and guilty of dismissing the claimant unfairly. The respondent being aggrieved by the decision of the trial magistrate preferred this appeal accordingly.

26. In determining the merits or otherwise of this appeal, I will consider the validity of reasons that led to the claimant's dismissal.

27. Section 43 of the Employment Act states as follows;

#### ***"43. Proof of reason for termination***

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of [section 45](#).***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

28. It is therefore imperative that this court examines the validity of reason leading to termination or dismissal.
29. In the case of the respondent herein, he was dismissed for falsifying grading results causing the appellants financial loss.
30. He had previously been issued with a show cause letter asking him to explain by 11<sup>th</sup> December 2007 why disciplinary action should not be taken against him for falsifying the grading results.
31. He responded to the show cause vide a letter dated 29/11/2017 and denying any culpability insisting that there were 3 analysts on duty and that he only analyzed motor vehicle KZB 690 and recorded his results on grading book and grading sheets.
32. He indicated that he recorded other gradings into grading sheets as per the information on the grading books done by other analysts.
33. He was later invited to a disciplinary hearing and he also was questioned on the work of the grading that he did.
34. As per the minutes he confirmed that the analysts on motor vehicle KBR 697Z, KBT 029D and on KZB 690 were done by Nyakeruma who is the respondent herein. This was as per the grading sheets.
35. The minutes are herein unsigned and therefore not authenticated.
36. From the minutes it is apparent that the respondent was given an opportunity to be heard. The hearing is however flawed because the minutes indicate that the claimant representative's role was just to listen to the proceedings as a witness but could not be allowed to play advocate or defend the respondent.
37. The committee also declined to have anyone listening to the proceedings who is not from the management as the committee is mostly comprised of members of the management fear.
38. In essence the hearing process was flawed because the respondent's representation was locked out of the proceedings.
39. Section 41 of the Employment Act 2007 states as follows;

***“41. Notification and hearing before termination on grounds of misconduct***

***(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make”.***

40. Given that the respondent was denied an opportunity to go through a proper disciplinary process, the validity of the reason for dismissal were also not established.
41. It is therefore my finding as established by the trial court that the dismissal of the respondent was unfair and unjustified.
42. The trial court upon finding the appellants culpable awarded the respondents 12 month's salary as compensation for the unfair termination.
43. Whereas the trial court did not explain the basis of awarding the 12 months or less, it is my finding that the 12 months compensation would suffice given the unfair meted against the respondent.
44. He was also awarded 1 month salary in lieu of notice which I find is also payable.
45. As to the basis of awarding 1 month's pay for leave allowance the trial court did not explain the basis of this award which I find is not justified as the respondent was paid house allowance as evidenced from his payslip. He was however paid house allowance of 1560/=.
46. Section 31 (1) of the Employment Act 2007 provides that an employee is entitled to payment of house allowance for which Reg 4 of the regulation of Wages (general) order provides that the house allowance payable shall be equal to 15% of the basic minimum wage.
47. It is therefore true that the respondents house allowance was paid at a lower rate and it was apt for the trial court to find that as the position and award the respondent the underpayment due to him.

48. In essence I find no reason to warrant disturbance of the Judgment as issued by court save for the limb on house allowance which I put at 59,665.75 for the underpaid house allowance.

49. I confirm the rest of the Judgment and dismiss the appeal accordingly.

50. For avoidance of doubt, the award for respondent is as follows;

**1. 1 month salary in lieu of notice = 30,952/=**

**2. 12 months salary as compensation for unfair and wrongful termination = 12 x 30,952/=**

**= 380,930.28/=**

**3. Underpaid house allowance = 59,665.75/=**

**TOTAL = 472,330.22/=**

**Less statutory deductions**

**4. The respondent be issued with a certificate of service.**

**5. The appellant will pay costs of this appeal and of the lower court plus interest at court rates with effect from the date of the Judgment at the lower court.**

**DATED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Maragia for Respondent – present

Ekira for Respondent – present

Court Assistant - Wanyoike