



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 245 OF 2016

(Before Hon. Justice Mathews N. Nduma)

JOHN PAUL NYASAKA.....CLAIMANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

JUDGMENT

1. The suit was filed on 19th August 2016 by the claimant praying for an order in the following terms against the respondents:

- (i) Payment of 3 months salary in lieu of notice.
- (ii) Refund of provident fund dues at 2,763 per month for 9 years.
- (iii) Payment of overtime of 800 hours.
- (iv) Payment in lieu of leave days not taken for the year 2016 being equivalent of two months salary.
- (v) Communal allowance
- (vi) Payment for public holidays worked.
- (vii) Payment for rest days worked and
- (viii) Maximum compensation being equivalent of 12 months salary for the unfair termination.
- (ix) Payment of lost earnings between age of termination and age of retirement at 60 years old.
- (x) Interest and costs.

2. CW1, the claimant testified under oath that he was employed by the respondent on 1st April 2007 as a stores clerk and worked continuously until April 2016 when he was suspended from duty.

3. CW1 testified that on 13th July 2016, he was dismissed from employment. The claimant relied on the memorandum of claim and produced '62' documents annexed thereto as his exhibits.

4. CW1 testified that at the time of dismissal he was based at Kitale maize depot and earned a monthly salary of Kshs. 33,265. At the time of dismissal, the claimant worked as a way bridge clerk.

5. CW1 testified that on 25th April 2016, he was sent home on allegations of maize shortage in the depot to await investigations. That on 17th June 2016, he was called to appear before advisory committee for a disciplinary hearing. That on 14th April 2011, the claimant had made a written explanation to the allegations made against him.

6. CW1 testified that he was asthmatic and had requested to be posted to a low altitude area. That he was not transferred and that is when his problems started.

7. That on 17th June 2016, he was called into the meeting in the evening and was not given sufficient opportunity to explain his case.
8. CW1 denied that he was involved at all with the maize shortage since that was not his work at the time. That his work was to weigh maize coming into the depot. CW1 denied charges of theft of maize.
9. That on 13th July 2016, CW1 received a letter of summary dismissal. CW1 denied the allegations made against him that he did not follow the Board's policy, procedures and standing operations.
10. CW1 testified that the dismissal was wrongful and unfair. CW1 stated that his letter of appointment provided two months salary in lieu of termination notice and claims accordingly. CW1 testified that provident fund monies were deducted from his salary and he sought refund of the same. CW1 testified that he was paid about four hundred thousand shillings upon dismissal but was not sure what the money was for.
11. CW1 testified further that he reported to work from 8 am in the morning and worked up to 5 pm from Monday to Sunday. That he was not paid for overtime worked. CW1 added that the letter of appointment did not provide for overtime but he was given no option but to work overtime. CW1 stated that he did not write to the respondent claiming overtime while he worked.
12. CW1 testified further that he did not go on leave in the year 2016. CW1 stated that he was entitled to one month leave in a year. That he was claiming leave days in respect of the year 2015 and 2016 when he did not go on leave.
13. The claimant prays for payment of commuter allowance. CW1 testified that only management paid itself travel allowance from the house to the work place every day. CW1 states that he is entitled to claim payment for the said travel as he was never paid.
14. Furthermore, CW1 claims payment in respect of 10 public holidays worked every year for the 9 years he worked. CW1 said he did not work during all the holidays for 9 years. CW1 stated that he did not write to the respondent demanding payment for holidays and Sundays worked before he left employment of the respondent.
15. CW1 stated that he was the only weigh bridge clerk at Kitale and so was not given any rest day and was not paid in lieu of rest days not taken. The claimant prays to be paid in respect thereof as pleaded.
16. Furthermore, the claimant testified that he be paid compensation for unfair termination. That he had worked for 9 years. That he lost earnings, he would have earned till retirement date. That he was no longer working and was based at his home in Kitale.
17. Under cross examination CW1 stated that he was asked to be accompanied by a colleague or union official at the disciplinary hearing. CW1 stated that he was entitled to 2 (two) months termination notice but not 3 (three) months he had pleaded in the statement of clam. CW1 stated that his family was based in Kisii and had requested for a transfer on medical grounds. CW1 said he still had medical problems before he was posted to Kitale. CW1 said he was paid for medical expenses. That he went on leave when he was based at Nakuru and Kisii. That his leave days' arrears accumulated overtime. That he worked from 8 am to 5 pm and at times he closed at 7 pm. That he had requested for payment of overtime but management took time to pay him. That overtime was approved by officers. CW1 stated that he was not aware how provident fund worked. That he contributed to the fund through the pay slip. That his employer has the money.
18. CW1 stated further under cross-examination that he worked during public holidays including Christmas on 25th and 26th December and on 1st January of the following year and so on. That he was on standby all the time. That he had a clean record and did not have any warning letter prior to the dismissal. CW1 denied that the letter headed insubordination was a warning letter though it was addressed to him. CW1 stated further that he was entitled to 28 days leave per year.
19. The respondent called six witnesses (RW1 to RW6) in support of its defence to the suit. The six (6) witnesses adopted their witness statements filed in court as their evidence in chief and were then cross examined by the claimant in person.
20. RW1, Fredrick Kennedy Nyamach testified that he worked as a machine attendant at the Kitale maize depot from 3rd January 2013 to date. That during maize intake season, his duty was to attend to the drying machines and also tabulate and convert wet maize to dry maize. That on 3rd December 2015, RW1 realized that his book entries were not tallying. The book quantity was more than the physical quantity delivered. RW1 suspected that the difference may have been caused by irregularities.
21. That on the same date, 3rd December 2015, earlier in the day, RW1 had noticed one of the lorries delivering maize to the depot making too much movement (on and off) the weigh bridge, which was not the usual way during weighing. RW1 moved closer to see due to the variance he had earlier noticed. RW1 inquired from the weigh bridge clerk (CW1) why the lorry was moving to and from the weighing bride. The clerk informed RW1 that the bridge had a problem that had already been reported to the Depot Manager. The clerk also informed RW1 that the weigh bridge stamp had been taken away by the Trans-Nzoia weights and measures county officers. RW1 escalated the matter to his immediate supervisor and to the Depot Manager hoping that collective measures would be taken urgently. RW1 testified further that on 28 January 2016, a vehicle registration number KAU 426S was discovered by Mr. Mwayi to have been allocated weight (on ticket) that did not correspond to its actual delivery at the time.
22. RW1 and Mwayi escalated the same issue to the plant supervisor who further escalated the matter to the Depot Manager. Auditors were called in to help demystify the variations and they discovered huge shortages of maize. That sample weights were taken at the weigh bridge and it was established by the officers that allegations of the defective weighbridge was not true. That CW1 was the weigh clerk at the time and was responsible for the data and records at the weigh bridge.
23. RW2, Patrick Lumumba testified that he was the policy inspector stationed at Kitale town working for the respondent. RW2 collaborated

the testimony by RW1 that during the maize take in season which started on 17th November 2015, he noticed that trucks were permitted to the weigh bridge platform in and out several times. RW2 got suspicious and asked CW1 what was happening. CW1 informed RW2 that the machine had a problem and the vehicles had to drive in slowly at a low pace and that the monitor read errors when the vehicles moved fast. RW2 reported to the Depot Manager. CW1 stated that he had already reported the problem to the Depot Manager.

24. On 3rd December 2015, RW2 complained that he had noted huge difference in the actual maize delivered and the figures entered on the tickets. An audit team was called in from Eldoret and did reconciliation of maize stock. The auditors discovered big loss of maize which was attributed to the discrepancies in the weigh bridge ticket records vis a vis the actual maize delivered.

25. RW2 stated that CW1 was responsible for the discrepancies discovered.

26. RW3, Vincent Moi Aburiri testified that he was a produce inspector based at Kitale Depot. RW3 testified that during the maize take in season that commenced on 17th November 2015, CW1 complained frequently that the machine was faulty. RW3 had noticed unusual movements by trucks at the weighbridge. RW3 testified that he had asked CW1 what the problem was and CW1 explained that the machine was not balancing properly and was showing errors on the monitor screen. RW3 suggested to him to stop using a defective machine as that would lead to losses of stock. CW1 stated that he had raised the matter with management.

27. On 3rd December 2015 RW1 reported variance in the actual maize received and the records from the weighbridge tickets.

28. RW3 testified that the Auditors subsequently confirmed the losses. RW3 stated that the loss would have been avoided if CW1 had avoided using a faulty machine as he alleged.

29. CW4 Joseph Mwangi Mungoya testified that he was a stocks clerk employed by the respondent. RW4 testified that on 28th January 2016 he noticed a canter lorry registration number KAU 426S owned by a farmer named Felix Kipkoech Boit entering the weigh bridge scale and moving to and fro severally. RW4 went to the bridge to establish what was going on. RW4 asked CW1 what was wrong and CW1 told RW4 that the weigh bridge was not balancing well and the monitor was reading errors, hence the need for the vehicle to go in and out of the bridge and repeat the motion so as not to disturb the sensors. RW4 noted the gross weight of the counter was recorded at 17,500 kg (WBT NO. 121350) and when RW4 queried the large weight from a small canter, CW1 kept quiet.

30. The Canter was weighed a second time and it weighed 1,340 kg. RW4 recorded the ticket number in his notebook. RW4 testified that 17,500 kg meant the canter had 151 bags of 90 Kgs of maize which was not possible since the Tire weight of the canter was 3,860 Kg and could only load and carry at most 70 bags of 90 Kg maize. The record by CW1 was thus double the capacity.

31. On the same date in the evening the same vehicle delivered maize vide (WT NO. 1218521). RW4 witnessed the entire process and the canter recorded a net weight of 6190Kg indicating it had delivered 68 bags of maize yet it was fully loaded. RW4 testified that the second ticket had the correct weight and RW4 concluded that the maize shortage at the drier was caused by falsified or doctored weights of vehicles at the weighbridge. RW4 testified that CW1 was responsible for the shortage of maize at the Kitale depot.

32. RW5 was Zephania Chepchieng, an Internal Auditor previously but now credit controller of the respondent. RW5 testified that respondent received informal information that Kitale Depot was experiencing maize shortages at the drier. The informer attributed irregularities taking place between the grading office, weigh bridge and the hopper. On 29th February 2016, RW5 went to Kitale depot to conduct an Audit. The inspection revealed that there were violations of intake procedures, at the intake points but mainly at the weighbridge.

33. The cumulative loss at Kitale depot was Kshs. 5,719,100. These are attributed to twelve (12) tickets in respect of maize received under code 1052 and 06 of maize received under code 1060 which had weights anomalies. RW5 attributed this to manipulation by the staff working at the weigh bridge. RW5 testified that the fraud audit covered all maize intake processes including gate registers by security guards, farmers register by produce inspectors, weighbridge register by the weigh bridge clerk, Hopper Register by drier operator, Drier Analysis register by Drier operator, Stock card by stores clerk; purchase Advise/Payment vouchers files by Depot Cashier, weighment; staff meeting records, and Exit conference.

34. RW5 testified that all the above procedures had inconsistencies, characterized by non-compliance to the laid down quality management systems through omissions, cancellations and overriding of process figures.

35. Under the claimant's weigh bridge docket, there were over printing of vehicles screen weights on tickets and trucks were weighed at an interval of one minute which was impossible. These timings were physically checked in presence of Depot Manager and Depot Records clerk and were found to be unrealistic. Inconsistencies at the weighbridge register concerned two farmers namely Mr. Edwin Kiplimo Too Boit and Mr. Felix Kipkoech Too.

36. RW5 testified that CW1 allowed driver of a truck to proceed to be weighed whilst still in the truck cabin, and then the same truck was weighed after the truck driver alights hence giving two different gross weights.

37. RW5 testified further that investigations confirmed that the weighbridge had been duly serviced and the same was not faulty. That tests done in the presence of CW1 confirmed the machine worked perfectly. RW5 testified that CW1 breached protocol and was engaging farmers promising to increase the weights of their maize delivery for a fee. That CW1 targeted large scale farmers as was evidenced by two consignments of Mr. Muya Ticket no. 121937 and 121945 of 4th January 2016 and 6th January 2016 respectively.

38. In conclusion, RW5 testified that CW1 together with other staff intelligently interfered with the gross weights of maize hence the loss. RW5 recommended that all the staff involved be investigated and be disciplined by the Human Resource Advisory Committee. A hearing was held accordingly on 17th June 2016. RW5 concluded that CW1 was guilty as charged and the punishment meted on him was lawful

therefore.

39. RW6 Charles Nzioki Kisilu testified that he was Senior Human Resource Manager of the respondent and had served 12 years. RW6 testified that the claimant was first employed by the respondent on 2nd April 2007 and was posted at Sotik Depot and was moved to Nakuru, Kisii and finally Kitale Depot. That at Kitale Depot, the claimant was found to be soliciting monies from customers to fast track their work, raising fictitious weighbridge tickets in the month of December 2015 and January 2016 occasioning the respondent loss of Kshs. 5,719,100.

40. The claimant was asked to respond to these issues vide warning letters and responded by a letter dated 25th February but the same concerns persisted. Auditors were sent to Kitale Depot between 29th February 2016 and 11th March 2016 and the said malpractices leading to the losses were confirmed.

41. The staff involved including the claimant were invited to a disciplinary hearing before the Human Resource Advisory Committee on 17th June 2016. The claimant was present together with a union representative. The committee found the claimant was negligent in carrying out his duties and made unfounded allegations about the weighbridge machine which the auditors found to be in good order and working properly. The committee found the claimant guilty of misconduct that led to the loss of Kshs. 5,719,100 in maize stocks. The committee recommended dismissal of all the staff involved together with the claimant.

42. RW6 stated that the respondent had good reason to dismiss the claimant and a fair procedure was followed in doing so.

Determination

43. The issues for determination are:

- (a) Whether the respondent had a valid reason to dismiss the claimant and if a fair procedure was followed in doing so.
- (b) Whether the claimant is entitled to the reliefs sought.

44. In answer to issue (a) above, the court has carefully analyzed the testimony by the claimant vis a vis that by RW1 to RW6. The court is satisfied that the testimony by RW1, RW2, RW3, RW4, RW5 and RW6 is credible, consistent and established on a balance of probabilities that the claimant had engaged in misconduct while stationed at the weighbridge that caused the respondent loss in maize stocks estimated at Kshs. 5,719,100. The respondent has established that it had a valid reason to dismiss the claimant together with other staff who were involved in the misconduct.

45. The cross examination by the claimant of RW1 to RW6 did not dent their credibility. It is apparent that the claimant was engaged in deceit and fraudulent activities at the weighbridge. It is clear that he deliberately manipulated the weigh bridge to suit his fraudulent intent. The weighbridge was found to be fit for purpose contrary to allegations by the claimant.

46. The claimant was given show cause to which he responded in writing. The claimant appeared before a disciplinary committee together with a union representative where he was given opportunity to defend himself. The defence by the claimant before court is hollow and holds no water. It is the finding of the court that a fair procedure was followed to dismiss the claimant from his employment.

47. Accordingly, the suit by the claimant that the dismissal was unlawful and unfair lacks merit. The respondent has satisfied the requirements of *Sections 41, 43, 45 and 47 of the Employment Act, 2007*. The claimant is not entitled to compensation or reinstatement under *Section 49 of the Act*.

Issue b

48. With regard to the reliefs sought by the claimant, the court finds the following claims to be without basis and devoid of any merit:

- (i) 12 months compensation for unfair termination.
- (ii) Loss of earning between dismissal date and retirement age of 60.

49. These two claims fail following the determination of the suit on merits

(iii) Refund of provident funds

50. The claimant has not proved that the respondent deducted provident fund dues from his salary and failed to remit it to the fund. The fund is a separate entity from the respondent. All the respondent needs to do, if has not done so, is to facilitate payment of pension by the pension fund to the claimant in terms of the statute and regulation governing the fund. The claim for refund lacks merit and is dismissed.

(iv) Overtime

51. The claimant testified that he did not issue a demand letter to the respondent during the 9 years period of his employment for payment of overtime. The client also testified that his letter of appointment did not provide for payment of overtime. The onus of proving that the claimant worked overtime and was not paid rests on him. The claimant failed to discharge that onus and the particular claim is dismissed.

52. Similarly, the claimant did not sufficiently prove that he worked on specific holidays for which he was not paid double pay. Again the claimant did not make any demand in this respect during his employment with the respondent. The claim lacks merit and is dismissed for want of proof.

(v) Payment in lieu of leave days not taken.

53. The testimony by the claimant is that he was entitled to 28 days leave a year and leave days had accumulated between the period 2015 and 2016 amounting to the equivalent of two months salary. This claim was not contested by RW6, the human resource manager who testified for the respondent. The court finds that the claimant proved that he was owed Kshs. 29,620 being equivalent of two (2) months salary in lieu of leave days not taken.

(vi) Two (2) months notice pay

54. The court found that the summary dismissal of the claimant was justified and therefore he was not entitled to notice or payment in lieu of two (2) months notice provided in the letter of appointment. The claim lacks merit and is dismissed.

55. In the final analysis, the suit by the claimant against the respondent is dismissed in its entirety except an award of Kshs. 29,620 in lieu of leave days not taken in the year 2016. The same is payable with interest from date of filing suit till payment in full. Each party to bear their costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Claimant in person

Mr. O'rao for respondent

Chrispo – Court Clerk