



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 484 OF 2012

(Before Hon. Justice Mathews N. Nduma)

KANANGA M'NCHEBERE.....1ST CLAIMANT

STEPHEN KAMAU.....2ND CLAIMANT

VERSUS

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED.....RESPONDENT

J U D G M E N T

1. The suit is based on an amended statement of claim filed on 5th September, 2013 by the two Claimants seeking reliefs set out under paragraphs 5.2 as follows:-

- (a) Three months salary in lieu of notice.
- (b) Lost earnings for the period April, 2012 to June 2014, in respect of 1st Claimant and up to June 2015 for the 2nd Claimant.
- (c) Bonus payment.
- (d) Gratuity calculated at 31% for the 5 years.
- (e) 12 months compensation for wrongful dismissal.

2. The 1st Claimant was appointed on 19th July, 1994 as a Shift Manager and worked in various capacities from January 2009. He was promoted to Production and Operations Manager and was acting General Manager.

3. In July of 2009, 1st Claimant was promoted again to the position of Head of Operations and reported directly to the Managing Director. The 1st Claimant earned gross salary of Kshs.838,325 as at the date of termination of his employment on 21st March, 2012.

4. The 2nd Claimant Stephen Kamau was appointed as the Human Resource Manager on 13th November, 2007. On 28th June, 2010 the 2nd Claimant was appointed Head of Human Resource reporting directly to the Managing Director. The Claimant's employment was also terminated on 21st March, 2012.

5. The two Claimants were dismissed for disregard of authority and gross insubordination in that on 20th and 21st March respectively, they refused to receive letters of interdiction and refused to show cause why their employment ought not to be terminated. In addition on 21st March 2012, both stormed company's premises with help of a mob of staff and mobilized staff in meeting to defy the Managing Director.

6. The two were terminated with immediate effect and the finance department was directed to process their final dues.

7. At the time there was a tag of war between the Board of Directors and the Government. On 22nd December, 2011, Government suspended the Board pending investigations. The Managing Director Mr. Kephah Tande was also suspended. The suspended Chairman of the Board

and the Managing Director issued circulars and verbal instructions to all members of staff warning them of dire consequences if staff members supported Government Officials.

8. The permanent secretary convened a meeting to assure staff that their employment would be protected.

9. The Board commenced judicial review proceedings at the High Court on 27th December, 2011 seeking to set aside their suspension. No interim orders were granted on 9th January, 2012, the Respondent filed a separate suit at Milimani Commercial Division against the permanent secretary and the Government. The court granted interim orders.

10. Following these orders, the Board and Managing Director made attempt to resume duty at the factory but workers blocked them from accessing office. Factory was closed on 13th January, 2012 until 27th January, 2012 due to the standoff. The High Court issued orders on 19th January, 2012 directing police to supervise opening of the office.

11. Meetings were subsequently held to normalize the situation on 20th & 21st January, 2012. A circular was issued to all staff by the Managing Director on 3rd December, 2012 assuring all staff that the company would continue to operate as before and that a committee to address staff grievances would be formed and that there would be no victimization of staff. Agreement between the Board and the Union dated 21st January, 2012 settled on this position and same was produced as appendix '14'.

12. The Claimants state that the blatant victimization of the two on unfounded grounds of incitement and insubordination was in violation of the moratorium and agreement reached to resolve the simmering tension and dispute.

13. That the Claimants did not chase the security who purported to serve them with letters of interdiction in their house, but respectfully asked them to take the letters to the office.

14. The Claimants state that they were simply caught in between the conflict between the Board and Government. That they played no role at all to fuel that dispute. That they were unlawfully and unfairly dismissed from employment. That they be reinstated and in the alternative compensated for the unlawful and unfair termination of employment and their terminal benefits set out in the memorandum of claim be paid.

Defence

15. The Respondents filed Amended Memorandum of Defence and Counter Claim on 19th June, 2014 in which all particulars of claim are denied and states that the Claimants' employment was terminated for insubordination and showing disregard and contempt of due process and disciplinary procedure when they both refused to be served with the interdiction letters on 20th and 21st March respectively. That they both chased the security guards away and mobilized staff to storm the factory and addressed staff to defy the managing Director. That their conduct was in breach of Respondent's Code of Conduct and Staff Rules in particular clause 14.2 (a) to 14.5 on integrity, collective responsibility, leadership and obligation of managers to ensure discipline, law and order.

16. The specific claims made by the Claimants were denied and counterclaim made by the Respondent against the Claimants for payment of general damages and/or special damages for losses incurred by the Respondent due to the conduct by the Claimants which spurred closure of the factory for the specified period. The Respondents also claim interest and costs of the suit.

Testimony

17. The Claimants testified in support of the respective cases led by Advocate Guserwa. The two were closely cross examined by Mr. Muchiri for the Respondent. The Respondent called RW 1 John Kiwanjoi to rebut the testimony by the Claimants. RW 1 was the Head of Human Resources. He worked for the Respondent since May 2000. RW 1 denied the particulars of claim and testified that the Claimants were insubordinate and defied to the Managing Director. That the two instigated rebellion and work withdrawal by the staff of Respondent and the two be held responsible for the losses incurred by the Respondent as set on in the statement of defence and counterclaim.

18. The witness further testified that the Claimants were paid various terminal benefits, some of which they were strictly not entitled to. That the two are not entitled to any further payment of terminal benefits and the claim for compensation be also dismissed for want of proof.

19. The court adjourned after RW 1 had testified in chief when the matter was set for further hearing on 4th October, 2018. RW 1 informed the court that he wanted to repudiate his testimony in chief and did not wish to further testify in the matter for personal reasons. The court learnt that RW1 had since lost his employment with the Respondent, hence his decision to repudiate his evidence in chief.

20. Upon arguments by counsel, the court ruled that it would proceed to have RW1 cross examined by counsel for the Claimants. The witness told the court under cross examination that he wished to withdraw the witness statement he had recorded and filed in court. That he had recanted its contents and prayed it be struck off the record. The witness was not cross examined any further by Advocate Guserwa for the Claimants. Mr. Muchiri for the Respondent re-examined RW 1. RW 1 told the court that under re-examination that what he stated in the witness statement signed on 21st July, 2013 was the truth and that the testimony he had given in chief was the truth. He said his employment was terminated by the Respondent on 12th May, 2017 and he therefore wanted his witness statement and oral evidence in chief be expunged from the record. That he had written a letter dated 26th June, 2018 to the court to that effect.

21. RW 2, was Michael Kiriwa, accounting manager of the Respondent. He adopted a witness statement dated 21st July, 2015 as his evidence in chief. His evidence concerned the tabulation of the counter claim which comprised of losses incurred by the Respondent in November 2011 as a result of breakdown of machinery and disturbances by the employees of the Respondent. He testified that these losses

were attributable to the head of production operations and the head of human resource who should have ensured that machinery was in good order and that staff did not unlawfully withdraw their services to the Respondent.

22. RW 2 was closely cross examined by Advocate Guserwa for the Claimants regarding relationship of the stated loss to the Claimants and if he had any evidence linking the Claimants to the said losses RW2 confirmed that the operation of the Respondent depended on the Board, the Managing Director, Head of Departments and individual staff and its closure, or failure to operate did not depend on the two Claimants.

Determination

23. The issues for determination are as follows:-

- (a) Whether the termination of the employment of the Claimants was for a valid reason and if it followed a fair procedure.
- (b) Whether the Claimants are entitled to the reliefs sought.
- (c) Whether the counter claim has merit and if so if it be granted as prayed.

Issue (a)

24. The Board of Directors of the Respondent and the Managing Director of the Respondent on the one hand and the Government of Kenya on the other hand got into a dispute on the leadership of the Respondent. Government suspended the Board and the Managing Director and entered the management floor with assurances to the existing staff that all will be well.

25. The Board of Directors and the Managing Director obtained interim orders from the High Court injuncting the suspension and they too stepped back to the management floor with threats to any staff who sided with Government on the matter.

26. Agitated staff on the third hand stepped up dissent and picketing against the deposed Board and Managing Director.

27. The Claimants being the most Senior Members of Management enjoined by the Government to steady the Respondent's boat during this time of crisis got caught up in the middle.

28. Indeed the 1st Claimant was recalled from leave to come in and help steady production and operations whereas, the 2nd Claimant being the head of Human Resource had a key role to play in ensuring that employees continued to work during this period of crisis.

29. The action by the Managing Director to suspend the two for insubordination and fanning the defiance by members of staff was clearly not based on any tangible evidence. The Claimants were simply the grass trampled on by the two fighting giants. The two were innocent victims of an ownership and control wrangle of the Respondent between the Government of Kenya, which partly owns the Respondent and the private sector investors and owners of the Respondent represented by the Board.

30. No genuine and credible disciplinary action against the Claimants by the Managing Director was possible in this time of turmoil and none was conducted. The Claimants were unlawfully and unfairly hounded out of their jobs for being seen to be supportive of Government vis a vis the Board of Directors and the Managing Directors. The two were helpless ponies in a difficult chess game between the protagonists.

31. It is the court's finding that the termination of the employment of the 1st and 2nd Claimants was not for a valid reason and the same was not effected following a fair procedure. The termination violated sections 41, 43 and 45 of the Employment Act. As was stated by Ndolo J. in **Moses Kaunda Moro v CMC Motors Group Limited [2013]** –

“In the case of walter ogal Anuro vs Teachers Service Commission [2013] eKLR, this court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

32. The Respondent failed both the substantive and procedural test of fairness. Confronting the Claimants in their houses and subsequently hounding them out of the Respondent's premises under the guise of insubordination was to say the least, below the belt for doing or failing to do that which was beyond their control in the circumstance of this case.

33. The Claimants have proved their case on a balance of probabilities and the court declares their termination unlawful and unfair.

Issue (b)

34. The second issue is whether the Claimants are entitled to the reliefs sought.

Terminal Benefits

35. The Respondent adduced evidence vide RW 2 and produced exhibit 1 pages 1 – 4 showing that the 1st Claimant was on 26th May, 2015 paid terminal dues in the sum of Kshs.4,045,557.84 being net pay upon deduction of tax and staff debts owed by the 1st Claimant from a

gross payment of Kshs.7,424,907.22. The payment comprises of –

(a) Gratuity for the 21 months period served by 1st claimant based on the monthly salary of Kshs.523,325 and calculated at 18% thereof in the sum of Kshs.1,978,168.50.

(b) Notice Pay

The 1st Claimant was paid six months' salary in lieu of notice calculated on the gross pay (523,325 – basic salary x 90,000 house allowance and car/entertainment allowance 220,00) in the sum of Kshs.4,999,950.

(c) In addition, the 1st Claimant was paid in lieu of 20.49 leave days Kshs.446,788.72 calculated on the basic salary of Kshs.523,325.

36. The 1st Claimant claims payment in lieu of 3 months notice @ a gross salary of Kshs.1,017,913 per month which translates to Kshs.3,053,739.00. The court finds that the Claimant was correctly paid in lieu of notice period as demonstrated above and is not entitled to any further payment on this head. The 1st Claimant also claims bonus payment in the sum of Kshs.2,448,258.05. The Respondent states that Bonus payment was gratuitous and not mandatory. Payment of Bonus is not provided in the contracts of employment for both Claimants. The claim lacks merit and is dismissed.

37. The 1st Claimant further claims lost earnings for the unserved period from April 2012 to June 2014 when the 5 year contract was due to expire. This claim has no basis in law and is dismissed.

Gratuity

38. The 1st Claimant was paid gratuity calculated at 18% of the basic salary. The 1st Claimant seeks payment calculated at 31% and not 18% of the entire 5 year period and not the 21 served months.

39. The letter of appointment of the Claimant produced as exhibit 2 provided for a consolidated gross salary of Kshs.760,000 comprising Kshs.450,000 basic salary; 90,000 house allowance; Kshs.160,000 car allowance and Kshs.60,000 entertainment allowance.

40. Gratuity was payable upon completion of each contract term calculated at 31% of Basic Salary for each completed year of service. The Respondent calculated gratuity paid to 1st Claimant at 18% of basic salary for each completed years of service. The 1st Claimant is entitled to the difference (31 – 18%) @ 13% of the the basic salary for the completed years of service in the sum of Kshs.1,428,677.25.

Leave Days

41. The payment in lieu of 20.49 leave days ought to have been based on gross pay and not basic pay. The Claimant is entitled to the difference (801,150 – 446,788.72) Kshs.354,361.28. These payments are less applicable tax.

2nd Claimant Mr. Stephen Kamau

42. The above arguments are applicable to the 2nd Claimant Mutatis Mutandis and the 2nd Claimant is entitled to additional payments as follows:-

Gratuity

43. $523,401 \times 21 \times 13\% = \text{Kshs.1,428,884.73}$.

Leave Days

44. $(885,076 - 804,511.14) = \text{Kshs.80,564.86}$.

45. The calculations are based on a gross salary provided by the Respondent in the respective tabulation as follows:-

$(523,325 + 90,000 + 220,000) = \text{Kshs.833,325}$.

2nd Claimant – $(523,01 + 85,000 + 180,000) = \text{Kshs.788,401}$

46. The gross salary for the 2nd Claimant is correctly stated in the amended plaint whereas the gross salary for the 1st Claimant is wrongly stated to be 1,017,913. There is no evidence to support this figure and the court has applied Kshs.833,325 gross salary per month.

Compensation

47. The contract of employment provided for a six months termination notice or payment in lieu thereof. The Respondent honoured the termination notice. This payment largely mitigates the loss and damage suffered by the Claimants as a result of the unlawful and unfair

termination of employment. The Claimants had moved on almost immediately and acquired alternative employment.

48. That notwithstanding the Claimants are entitled to compensation in terms of section 49(1)(c) and 47 of the Employment Act, 2007.

49. The court considers that the Claimants wished to be reinstated to their jobs. That they lost very senior positions that were very well paying unlawfully and unfairly. They were paid terminal benefits upon termination. This was mitigating factor. The Claimants relied on the cases of **Sylvester Ouma Onduu v Prime Steel Mills Limited [2017] eKLR** in which the court awarded employees unlawfully dismissed equivalent of three (3) months salary in compensation, **Charles Abiero & another v One Acre Fund [2018] eKLR** in which the court awarded equivalent of 10 months' salary in compensation ; **Kenya Union of Sugar Plantation and Allied Workers v Sony Sugar Co. Limited [2018] eKLR** in which the court awarded equivalent of 12 months' salary in compensation.

50. Having considered the above said cases, and peculiar circumstances of this case, the court awards both Claimants equivalent of three (3) months' salary each in compensation for the unlawful and unfair termination of their employment as follows:-

(i) 1st Claimant Kshs.2,499,975

(ii) 2nd Claimant Kshs.2,365,203.

51. In the final analysis judgment is entered in favour of the 1st and 2nd Claimants as against the Respondents as follows:-

A. 1st Claimant

(i) Kshs.2,499,975 in compensation

(ii) Additional Gratuity Kshs.1,428,677.25

(iii) In lieu of leave Kshs.354,361.28.

Total **Kshs.4,283,013.53**

2nd Claimant

(i) Kshs.2,365,203 in compensation

(ii) Additional Gratuity 1,428,884.73

(iii) In lieu of Leave Kshs.80,564.86

Total **Kshs.3,874,652.59**

B. Interest is payable at court rates from date of judgment in respect of compensation and from date of filing suit in respect of Gratuity and Leave pay till payment in full.

C. Respondent to pay costs of the suit to both Claimants.

Dated and Signed in Kisumu this 11th day of February, 2019

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 15th day of February, 2019

Maureen Onyango

Judge

Appearances

M/s. Guserwa for Claimant

M. Muchiri for Respondent

Daniel Ngumbi – Court Clerk