



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2003 OF 2011

RAMADHAN MUTIMBA.....CLAIMANT

VERSUS

THE EAST AFRICAN PORTLAND CEMENT

COMPANY LIMITEDRESPONDENT

JUDGMENT

Introduction

1. The claimant's claim is contained in the Amended Statement of Claim filed on 5.8.2016 which seeks the following prayers:

- (a) An order that the claimant was reemployed by the respondent as a Depot Supervisor from 13.2.2007 to 22.9.2011 when he was terminated.
- (b) Salary for July, August and September and October 2010 when he was on suspension.
- (c) Salary for June, July, August and September 2011 when he was on his second suspension.
- (d) Leave allowance for 2011 till date of termination.
- (e) Refund of unremitted NHIF deductions.
- (f) Compensation for unfair termination being 12 months salary.
- (g) Salary in lieu of notice.
- (h) Gratuity for years of service.
- (i) Severance pay.
- (j) Certificate of service.
- (k) General damages for unlawful dismissal.
- (l) Costs and interest on the above from date of termination.

2. The respondent filed defence on 10.8.2016 contending that she employed the claimant as Deposit Assistant on 19.9.2001 at a salary of Kshs.3,770 per month but later became Acting Depot Supervisor in Kisii. She averred that during his time at Kisii Depot the claimant performed his duties negligently as a result of which, she lost a good number of bags of cements on diverse dates. The respondent further avers that the claimant was suspended and later invited to make his representations in defence after which he was terminated for his gross negligence. She denied the claim for service pay because the claimant was a member of the NSSF. In addition, she averred that the claimant was paid all his allowances for acting as Depot Supervisor and that after the termination all his terminal dues were used to settle the lost cement. She therefore prayed for the suit to be discussed with costs.

3. On 8.5.2017 the claimant obtained leave of the court to further amend his claim to pray for salary underpayment but he did not do so within the 7 days given and on 31.5.2017 the leave was extended by 14 days.

He however delayed until 13.3.2018 when he filed his Re-amended claim which was way after the leave to do so had expired. Consequently the said Further Amended claim is of no consequence and it is expunged from the record.

4. The suit was heard on 19.9.2018 when the claimant testified as Cw1 and the respondent called her Employee Relations Officer Mr. Peter Nyanchi who testified as Rw1. Thereafter only, the claimant filed written submissions within the time given by the court.

Claimant's Case

5. Cw1 testified that he joined the respondent 19.9.2001 earning Kshs.3,770 per month. That he worked diligently as Depot Clerk in various Depots as a result of which he was promoted to act as Depot Supervisor on 13.2.2007 and his salary increased to Kshs.20,000 per month from 1.10.2007. That he was made to serve in the acting capacity upto 22.9.2011 when he was terminated against the HR policy, which provided for acting service of 6 months maximum.

6. Cw1 further testified that he continued pressing for confirmation to a permanent employee and for his arrears of his rightful dues but that resulted to victimization by the employer who hatched a plan to terminate his employment by alleging that he had lost bags of cement. That first he was suspended by the letter dated 14.7.2010 for alleged loss of 560 bags of cement valued at Kshs.431,200 but after 4 months' suspension he was found innocent and the charges withdrawn.

7. Secondly, he was suspended by the letter dated 14.6.2011 for alleged loss of 257 Bags of cement which was occasioned by hand over of challenges whereby he signed the report after the counting and verification was done in his absence. That he was forced to shoulder the burden of paying for the lost 257 bags of cement which he did vide receipts dated 14.5.2011, 16.5.2011, 27.5.2011, 3.6.2011, 15.6.2011 and 18.10.2011.

8. Cw1 contended that, although he paid for the lost cement, he blamed the loss on the handing over and the previous Depot Managers. He also blamed it on the lack of resources and the location of the Depot. He further blamed the same on the challenge of counting the bags to verify the stock when he returned from handing over Bungoma Depot because the Kisii Depot on 18.6.2011 was full beyond capacity and he found trucks still off-loading. That the only noticed about the deficit when the stock was reduced after selling and then reported the matter to the Head Office. In response, he was served with termination letter dated 22.9.2011 on ground that he had failed to account for 257 bags of cement. He contended that the termination was without prior hearing.

9. On cross examination, Cw1 admitted that he was employed in 2001 and that his salary was increased periodically. He further admitted that in 2007 he was appointed Depot Supervisor. He stated that in June 2011 he discovered the missing cement and thereafter internal audit was done by Mr. Cheruiyot. He maintained that the depot was full beyond capacity making it impossible to count the bags of cement. He further maintained that he undertook to pay for the missing bags after being threatened with a dismissal. He however admitted that on 26.4.2011, he wrote to the Sales Coordinator referring to loss of 50 bags of cement and undertaking to pay for the loss after he was arrested.

10. Cw1 admitted that he took over the Kisii depot and signed a Taking Over Report dated 8.6.2011. He further admitted that on 14.6.2011 he was served with a show cause letter about the 257 lost bags of cement and he responded on 20.6.2011. He however denied any knowledge of the disciplinary hearing held on 27.7.2011, and denied service of the hearing notice. He admitted that he was not a member of the union but contended he was entitled to gratuity under his contract of service. He however admitted that he was deducted NSSF from his salary. He further admitted that the termination letter offered him terminal benefits less his liabilities to the company. He denied ever being appointed Depot Supervisor in acting capacity. He further denied ever being served with any warning letter.

Defence Case

11. Rw1 testified that he joined respondent in 2010 as the Employee Relations Officer. He admitted that the claimant was employed by the respondent as Depot Supervisor at Kisii. That Cw1 signed a taking over report. Thereafter, 199 bags of PPC bags of cement and 8 bags of OPC cement were not accounted for while under the claimant's custody.

That an Internal Audit confirmed the said loss.

12. Rw1 further testified that the said loss was not the first one for the claimant and as such, he was served with a show cause letter for 257 bags of cement which also suspended him from service. That thereafter the claimant was invited to hearing. Where testimonies from witnesses showed that he had relaxed in his job and consequently he was terminated. That as at the time of termination, the claimant had a debt Ksh. 193,827 being the value of 259 bags of cement.

13. Rw1 further testified that the claimant was deducted NHIF from his salary and the same was remitted the Fund. He denied the claim for salary in lieu of notice and compensation for unfair dismissal. He further denied the claim for gratuity contending that the NSSF was remitted to the fund on behalf of the claimant.

14. On cross examination Rw1 maintained that the claimant was served with notice to attend disciplinary hearing held on 27.7.2011. He further contended that the allegation about the claimant's laxity at work was made by his colleagues at Kisii Depot. He however admitted that the claimant was never served with any warning before the termination. He further admitted that the Disciplinary Committee observed that it could not establish whether the 259 bags of cement were lost before or after the claimant took over the Kisii Depot. He also admitted that he never participated in any meeting where the claimant was discussed.

15. On re-examination, Rw1 contended that the minutes of the disciplinary Committee dated 27.7.2011 showed that the committee considered the representations by the claimant but found him guilty of negligence.

Claimant's Submissions

16. The claimant submitted that the termination of his employment was unfair because he was not accorded any hearing before the termination as required by section 41 of the Employment Act. He denied ever being served with any invitation to attend the hearing and contended that the minutes of disciplinary hearing held on 27.7.2011 did not confirm that he attended the hearing.

17. He further submitted that the termination was not justified because Rw1 admitted in evidence that the disciplinary committee observed that it could not confirm whether the 259 bags got lost prior or after the claimant reported to Kisii depot. He relied on *Francis Gitau Muraya Vs Registrar, High Court of Kenya & 2 others [2017]eKLR*, *CMC Aviation Ltd Vs Muhammad Noor [2015]eKLR* and *Kenfrieght (EA)Ltd Vs Benson K. Nguti [2016]eKLR* to fortify his submission that he was unfairly and unlawfully discharged. He therefore prayed for compensation for the unfair termination equaling 12 months salary. He further urged for one month salary in lieu of notice as proved under the contract of service.

18. The claimant further submitted that he is entitled to acting allowance from 13.2.2007 to 2009. He contended that he was only paid the allowance from 2010 to 2011. He relied on clause 9.8.1 of the respondent's HR Policy Manual to urge that the maximum period for acting in a position is 6 months only but he was made to act for years on end.

19. The claimant further submitted that under section 28 of the Employment Act, he was entitled to annual leave of 21 days but contended that he never went for any annual leave for the 10 years he worked. He therefore prayed for cash in lieu of the accrued leave contending that the injury suffered was continuous and therefore the claim is not statute barred.

20. In addition, the claimant submitted that despite being deducted NHIF contributions for 10 years, nothing was remitted to the fund and his account remained dormant. He relied on the NHIF statement to urge for a refund of all the deductions done from his salary for the 120 months served.

21. The claimant also urged that he was terminated at the age of 43 years while he was entitled to retire at 60 years. He therefore prayed for the salary for the 17 years lost due to the premature termination.

22. Finally, the claimant submitted that under section 51 of the Employment Act he is entitled to a certificate of service.

Analysis and Determination

23. After careful, consideration for pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent from 2001 as Depot Clerk and later became Depot Supervisor. There is further no dispute that the claimant was suspended in June 2011 for the loss of 259 bags of cement belonging to the respondent and on 22.9.2011 he was terminated for failure to account for the said stock of cement. The issues for determination are:-

- (a) Whether the termination was unfair and unlawful.
- (b) Whether the claimant is entitled to the relief sought.

Unfair termination

24. Under section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed.

Reason for termination

25. The reason cited for the termination in the letter dated 22.9.2011 was the failure to account for 259 bags of cement with Kshs.193,821 which was in his custody as the Kisii Depot supervisor. The letter went on to state that the decision was reached after considering that it was not the first time the claimant had committed a similar offence. The respondent produced minutes of the disciplinary hearing which was not objected to by the claimant. The claimant also never objected to the minutes of meeting held at Kisii Depot on 1.4.2011 to investigate the loss of 199 bags of cement and 8 bags of OPC cement.

26. There is no dispute that after considering the proceeding in the minutes of the meeting held on 1.4.2011 and the representations made by the claimant in writing and also orally at the disciplinary hearing, the disciplinary committee found that the claimant had acted in gross negligence in performance of his duties. That although the committee could not establish whether the cement was lost before or after the claimant moved to Kisii depot, he signed the handling/taking over report before verifying the actual stock in the store and when suspended he offered to pay for the loss.

27. Under section 43 of the Employment Act, the reason for termination are those matters, which the employer genuinely believed to exist at that time of terminating his employee. In this case, the respondent considered the signing of a handing over report without verification of the stock as gross negligence. The said belief was fortified by the claimants history similar conduct where stock was lost and the undertook to pay for the loss. In my view, the respondent has proved on a balance of probability that the claimant performed his job negligently. In addition, the claimant admitted the said negligence when he said that he signed the hand over report without verifying the actual stock. The said negligence facilitated the loss of 199 bags of cement and 8 bags of OPC cement. Such conduct justified termination of his services by

dint of section 44(4) (c) of the Act.

Procedure followed

28. Under section 41 of the Employment Act, before terminating the services of an employee on ground of misconduct, poor performance on physical incapacity, the employer must first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice. Thereafter the employee and his chosen companion are entitled to a chance to air their representation before the termination is decided.

29. In this case, the claimant denied that he was given a hearing Rw1 admitted that he never attended any hearing called to discuss the claimant. He however, relief on the minutes dated 27.7.2011 which indicated that the claimant attended the hearing with 5 union officials. The production of the said minutes was not objected to by the claimant. They are therefore full proof that a hearing was conducted on 27.7.2011 and the claimant defended himself. The said proceedings are in my view evidence that the claimant was terminated after a fair procedure which accorded to justice and equity. Consequently I return that the termination of the claimant's services was fair and lawful within the meaning of section 45 of the Employment Act.

Reliefs

30. In view of the foregoing finding that the termination of the claimant's services was fair and lawful, I dismiss the claim for compensation for unfair termination. I however award him salary in lieu of notice because the claimant admitted that she terminated the claimant with benefits as opposed to summary dismissal. As per payslip dated April 2010, his salary was Kshs.21,800 plus acting allowance of Kshs.25,204 totaling to Kshs.47,004.

31. The claim for declaration that the claim was employed as Depot supervisor on 13.2.2007 to 22.9.2011 is granted as prayed. The claimant produced the letter dated 13.2.2007 whereby he was promoted to Depot Supervisor in Bungoma. Thereafter he worked as such until termination while serving as Depot Supervisor at Kisii.

32. The claim for salary for July, August, September and October 2010 when the claimant was on suspension for alleged loss of 560 bags of cement is allowed. There is no evidence to prove that the salary claimed by the claimant was paid by the employer. The suspension was lifted by the letter dated 14.11.2010 after the charges were withdrawn. He is therefore awarded the unpaid salary for the said months at the rate of Kshs.47,004 per month.

33. I further award the claimant the salary for the period of the second suspension for the alleged loss of 259 bags of cement being June, July, August and September 2010. There is no evidence to prove that the said salary was paid and as such I allow it at the rate of Kshs.47,004 per month. Although the suspension ended up in a dismissal, in September 2011, the parties were still bound by the terms of the contract including payment of salary. in any case the claimant paid for the lost cement.

34. The claim for leave allowance is dismissed for lack of particulars and evidence. Leave allowance is a vague term, which is not equal to accrued leave.

35. The claim for refund of NHIF if found on a statement from NHIF but the statement is not clear. I decline the claim because although the payslips show deductions for the same, the claimant has not proved that it was remitted.

36. The claims for gratuity is dismissed for lack of evidence and particulars. There is also evidence that the claimant was a contributing member of the NSSF and unless otherwise proved to the contrary, the claim for gratuity cannot succeed. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy. The claimant will however have certificate of service as prayed by dint of section 51 of the Employment Act.

37. Finally, the claim for General damages for unlawful dismissal is dismissed because the claimant was discharged fairly and lawfully.

Conclusion

38. I have found that the claimant's services were fairly and lawfully terminated. I have however found that he is entitled to some benefits that accrued under his contract of service as at the time of separation. Consequently I enter judgment in the following terms:-

- (a) Notice47,004
- (b) Salary for July – October 2010 (Kshs.47,004x4)..... 188,016
- (c) Salary for June – September 2011 (Kshs.47,004x4)...188,016

Total

423,036

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The claimant will also have costs and interest at court rates from the date of filing the suit. The award shall be paid subject to statutory deductions only since there was no counter claim filed.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE