



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 907 OF 2015

JOEL ISEME WASIKE.....CLAIMANT

v

DEFENCE FORCES CANTEEN ORGANISATION.....RESPONDENT

JUDGMENT

1. On 3 May 2018 during pre-trial conference, the Court directed the parties to file Agreed Issues. The directive was not complied with, and the Court has therefore adopted the proposed Issues as filed by the Claimant on 23 May 2018.
2. The Cause was heard on 22 February 2019 when the Claimant testified and closed his case, and on 27 March 2019 when the Respondent's Personnel Officer testified and had its case closed.
3. The Claimant filed his submissions on 30 April 2019 while the Respondent filed its submissions on 29 May 2019.
4. The Court has considered the pleadings, evidence and submissions.

Wrongful dismissal

Procedural fairness

5. The Claimant was appointed by the Respondent as a Trainee Storeman through a letter dated 7 May 1996.
6. Around 19 December 2014, the Respondent suspended the Claimant from work without pay, pending certain investigations.
7. On or around 2 January 2015, the Claimant was served with a *charge sheet* calling upon him to answer to allegations of *conduct to the prejudice of good order and discipline contrary to the Terms and Conditions of Service*.
8. The Claimant responded to the allegations in writing on 4 January 2015, and the response was followed with a disciplinary hearing on 12 January 2015.
9. The *Disciplinary Board* found the Claimant guilty on count 2, but still recommended the lifting of the Claimant's suspensions; putting in place mechanisms for proper supervision on receiving and issuing of goods with set quantities and limits; the Claimant pay back 2.5 of total value of the drinks purchased at wholesale price, and that the Claimant be served with a warning.
10. Despite the recommendations of the *Disciplinary Board*, the Claimant was dismissed through a letter dated 23 January 2015.
11. The Claimant was aware of the allegations to confront and was afforded opportunity to make responses both in writing and through an oral hearing.
12. In the circumstances, the Court is satisfied that the Respondent was in substantial compliance with the *statutory requirements* of procedural fairness as contemplated by sections 35(1)(c) and 41 of the Employment Act, 2007.

Substantive fairness

13. By dint of sections 43 and 45(1) & (2) of the Employment Act, 2007, an employer has the burden of not only proving the reasons for termination of employment, but that the reasons were valid and fair.

14. The Respondent presented 1 witness in an effort to discharge the statutory burden placed upon it.
15. The particulars of the charge upon which the Claimant was found culpable were that on 16 December 2014 together with another employee *sold/irregularly released certain brands of scotch whisky (168 bottles) to another storeman knowing the drinks were not for his (the other storeman) use but for unentitled persons.*
16. The evidence before Court was that the drinks were intercepted by the Police.
17. Under cross-examination, the Respondent's witness admitted that at the material time there was no limit as to the amount of whisky which could be sold to one person, and that the work of the Claimant was to issue the drinks while another clerk did the invoicing.
18. The Claimant's testimony was that he was in charge of the warehouse, and that on the material day he released the drinks to a colleague upon invoicing by the Manager/Clerk. He filed copies of the computer generated invoices numbers 99206, 99207, 99212, 99213, 99214 and 99215 all issued on 16 December 2014.
19. The invoices and other evidence before the Court was placed before the Respondent's *Disciplinary Board*.
20. The *Disciplinary Board* made findings of fact which included that in 2014 there were no circulars limiting purchase of drinks, and that there was no loss at the stores.
21. The *Disciplinary Board* also found that the Claimant failed to follow procedures, but recommended that the Claimant's suspension be lifted and guidelines be issued on receipt and issue of goods, and that the Claimant be surcharged and be given a final warning letter.
22. The findings by the *Disciplinary Board* show that the Claimant had not disobeyed any particular policy of the Respondent and that there were systemic weaknesses.
23. Considering that the Claimant released the drinks upon invoicing by an authorised office, the weak systems in place and that the *Disciplinary Board* made specific recommendations which did not include the summary dismissal of the Claimant, it is the view of the Court that the dismissal of the Claimant was not in accord with justice and equity as contemplated by section 45(4)(b) of the Employment Act, 2007.
24. The Court would hasten to add, based on persuasive authority from comparative jurisdiction that the Respondent's Managing Director should not have decided on *summary dismissal* without affording the Claimant another opportunity to make representations on the altered sanction (see *South African Revenue Services v CCMA & others* (2014) 1 BLLR 44; *Branford v Metrorail Services and Others* (2003) ZALAC and *South African Revenue Service v CCMA & others* (C683/11) [2015] ZALCCT 14).

Pay in lieu of notice and compensation

25. With the conclusion, the Court holds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice; and the equivalent of 12 months gross salary as compensation, considering that he served for about 19 years (proved monthly salary was Kshs 33,376/-).

Leave

26. The Claimant did not rebut the Respondent's evidence that he took all leave days prior to 2014.
27. In view of the fact that the Claimant was dismissed in January 2015 before being eligible for pro rata leave, the Court will decline this head of claim.

Conclusion and Orders

28. The Court finds and declares that the summary dismissal of the Claimant was not in accord with justice and equity, and therefore unfair and awards him

(a) Pay in lieu of notice	Kshs 33,376/-
(b) Compensation	Kshs 400,512/-
TOTAL	Kshs 433,888/-

29. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 12th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Muendo instructed by S.K. Muendo & Co. Advocates

For Respondent Mr. Keyonzo instructed by S.M. Keyonzo & Co. Advocates

Court Assistant Lindsey