



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**ELRC NO. 721 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> July, 2019)**

**FELIX MUTISO.....CLAIMANT**

**VERSUS**

**BEIERTSDOF EAST AFRICA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant commenced this suit vide the Memorandum of Claim filed on 24<sup>th</sup> April 2015 to challenge the termination of his employment services on 30<sup>th</sup> September 2014. He seeks the following reliefs: -

- 1. A declaration that the termination of his employment by the Respondent vide its letter dated 30<sup>th</sup> September 2014 was not justifiable, unfair, unprocedural and unlawful;***
- 2. Claim for KShs. 1,538,400.00 being 12 months' salary of KShs. 128,200.00 per month as compensation for unlawful termination as itemized at paragraph 22;***
- 3. Interest on (2) above at court rates from the date of filing the claim until payment in full.***
- 4. Costs of the suit.***

2. The Claimant's case is that he was employed by the Respondent on 1<sup>st</sup> June 2005 as an IT Support Assistant within the Finance Department. He rose through the ranks to become a Warehouse Manager within the Supply Chain Department, which was his position at the time of termination.

3. The Claimant avers that he was issued a show cause letter dated 1<sup>st</sup> July 2014, wherein, the Respondent relied on a report by Deloitte and Touche to accuse him of being responsible for the movement of inventory in and out of the warehouse which had led to a net stock loss of KShs. 4,900,000.00 and a cumulative loss of KShs. 9,500,000.00 from December 2013 to April 2014.

4. He responded to the same vide his letters of 12<sup>th</sup> and 14<sup>th</sup> September 2014 explaining that he was not to blame as internal constraints had affected different levels of execution in stock taking. It is his case that the section managers had often urged the Respondent to improve its system of stock procedure, movement and control.

5. It is the Claimant's position that the report had not blamed the losses on the Warehouse section. Further, that he was not involved in the preparation of the report hence had no opportunity to address the

issues raised therein.

**6.** He avers that the reasons for his termination were not in any way related to the issues raised in his letter to show cause. At the time of termination, the Claimant was earning a salary of Kshs. 128,200.00.

**7.** The Claimant further avers that he was entitled to payment of 6 months' salary after his termination, since the Respondent had a contract to insure its employees in the event their services were terminated for reason other than gross misconduct; but the same was yet to be paid to him. He is also entitled to for overtime of 4 extra hours worked each year.

**8.** During cross-examination, **CW1** and the Claimant in this case, admitted that he was informed of the intention to terminate his employment and given the opportunity to be heard regarding the same. He admitted that as the team leader, he was responsible for certain things such as overseeing operations and distribution of finished products.

**9.** It was also his testimony that various Managers of the Respondent held meetings to discuss ways of addressing the challenges faced by the Respondent, however, he conceded that he did not have proof to show that such discussions had been held.

**10.** He also admitted that he had never raised the issue of overtime and that his demand letter had not outlined specific demands. It was his testimony that he did not have a copy of the insurance policy that accorded employees a 6 months' salary entitlement where their services were terminated for reasons other than their gross misconduct.

**11.** He further testified that he did not have communication regarding the negotiations between him and the Human Resource Manager. On re-examination, he testified that he was never issued with any report.

**12.** In its response filed on 2<sup>nd</sup> June 2015, the Respondent contends that the termination was lawful and justifiable. The Claimant was issued with a notice of intention to terminate his services dated 27<sup>th</sup> August 2014, informed of the charges against him and given the opportunity to respond, which he did and his response found unsatisfactory because the Claimant only shifted blame.

**13.** The Claimant was also informed of the disciplinary hearing against him scheduled for 29<sup>th</sup> September 2014 and was asked to choose an employee representative for that meeting. He chose Felix Kiio, who was present at the hearing.

**14.** The Claimant was heard in person but the Respondent was not satisfied with the reasons given and decided to terminate his services because of his negligence at work and failure to deliver his duties. The Claimant's payment for his salary for the month September and pension pay were enclosed together with the termination letter, and were sent to Felix Kiio.

**15.** It is the Respondent's position that the letter of 1<sup>st</sup> July was given to the Claimant in his capacity as the Warehouse Manager. The Respondent contends that the Claimant was involved in the preparation of the reports and denies colluding to alter them with a view of terminating his services.

**16.** The Respondent contends that it is its policy that all senior management are not entitled to overtime pay and that overtime work must first be approved by the Respondent. They also deny ever calling upon the Claimant to work overtime. The Respondent denies there being an insurance policy to cushion those employees terminated on grounds other than gross misconduct or there being consultations between the Claimant and the HR business partner.

**17.** During cross-examination, **RW1** and the Respondent's current Human Resource Business Partner conceded that he had not filed any documents to show that Ernest & Young were its auditors. It was his testimony that the Audit Report indicated that the losses incurred were attributable to failure to follow processes but conceded that the report had not been adduced as evidence.

18. He also conceded that they had not filed any reports to prove that they had done internal audits. He stated that the Claimant was found culpable because he was the team leader. When referred to page 3 of his witness statement, he admitted that it stated that there was a third party involved. He conceded that he had not adduced evidence to prove the variance in stock taking.

19. Upon re-examination, he stated that the Claimant was issued with a notice of termination and responded disputing the reasons for his termination.

### **Submissions by the Parties**

20. The Claimant in his submissions dated 8<sup>th</sup> April 2019, submits that the procedure adopted by the Respondent in terminating his services were unfair as there was no substantive justification since the Respondent was unable to prove that the reasons for termination were valid.

21. The Claimant further submits that the Respondent's witness was unable to tell the Court whether there were any internal investigations carried out to establish the root cause of the losses. He relies on the case of **Walter Ogal Anuro vs. Teacher Service Commission [2013] eKLR.**

22. It is the Claimant's submissions that his termination was unlawful as no evidence or justification was given to substantiate the reasons for his termination. It is his position that once he alleged that his employment had been terminated unfairly, the burden of proof shifted to the Respondent to justify the grounds for termination. He relies on the case of **Christopher Omutubachi vs. Metallic Crowns Limited [2019] eKLR, Grace Gacheri Muriithi vs. Kenya Literature Bureau [2012] eKLR and Makena vs. Explico Insurance Company Limited [2019] eKLR.**

23. The Respondent in its submissions dated 6<sup>th</sup> May 2019 submits that it followed the procedure for termination as set out in the Employment Act and that the reason furnished for the Claimant's termination relates to his apathetic conduct towards his responsibilities as a Warehouse Manager. They rely on the cases of **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR, Caudle vs. Louisville Sales & Service Inc. 1999 SKQB 276 and Davis vs. Unemployment Insurance Review Board of the Indiana Department of Workforce Development 900 ne 2d 488 [2009].**

24. As regards the testimony of the Respondent's witness, they submit that it is admissible by dint of Section 33 (b) of the Evidence Act since the witness relied on and produced the statements and records made in the discharge of his professional duties.

25. The Respondent submits that the Claimant is not entitled to the reliefs sought as it has proved that proper termination procedure was followed and that the reasons for termination were valid.

26. I have examined all the evidence and submissions of both parties. The issues for determination by this Court are as follow:-

- 1. Whether there were valid reasons to warrant dismissal of the Claimant.*
- 2. Whether the Claimant was accorded due process before termination.*
- 3. What remedies to award in the circumstances.*

### **Reasons for termination**

27. On 30<sup>th</sup> September 2014, the Claimant was served with a letter of termination which indicated that he failed to deliver on his key responsibilities leading to financial losses by the Respondent.

28. The key responsibilities he failed to deliver on were stated as follows:-

**1. Accounting for all inventories in the Beiersdorf warehouse.**

**2. Management of stock control and movement procedures.**

**The three previous stock take counts revealed variances that were as a result of:-**

**1. Lacking/inaccurate stock movement documentation and improper verification of receipts in the warehouse.**

**2. Non enforcement of stock control procedures, issuance of raw materials and packaged materials to production and receipt of finished goods (timely and correct documentation of controls).**

**3. Stock pilferage by worker under your supervision disguised as sales orders and sales returns.**

**4. Lack of alignment with third party agency, transporter management and security team.**

**5. Improper processing of credit notes for goods not issued to/or returned from customers.”**

**29.** He was informed that he was the person responsible for the custody and movement of inventory within Beiersdorf East Africa but failed to effectively manage and deliver on the above key responsibilities, which resulted in losses to the tune of 4,607,806 million in December 2013 and a further 490,632 million in April 2014. The Respondent concluded that he was guilty of negligence and poor performance hence the termination.

**30.** Before this termination, the Claimant had been issued with a show cause letter dated 1.7.2014 indicating that there had been a stock inventory done in December 2013 which revealed loss of 4.6 million to the company.

**31.** He was expected to respond by not later than 21<sup>st</sup> July 2014. The Claimant responded to this letter and indicated that he bore no personal culpability in regard to inventory discrepancies. He indicated that he acted with utmost transparency in upholding the Respondent's Code of Conduct in a complex working atmosphere to deliver his mandate.

**32.** After this, the Claimant was served with a Notice of Intention to terminate his services dated 27<sup>th</sup> August 2011 asking him to inform Respondent of his choice of employee representative who was going to be his witness in this intended process of termination.

**33.** On 14/9/2014 the Claimant responded denying allegations raised in the Notice of Termination. He indicated that the Respondent were determined to terminate his services yet the problem facing the Respondent were mere arising mainly from internal capacity constraints which are presently at different levels of execution.

**34.** On 15/9/2014, the Claimant was invited to a disciplinary hearing to explain why his services should not be terminated.

**35.** The minutes of the disciplinary hearing only indicate that the Claimant was not able to explain and give substantial reasons as to why he could not put an end to the stock pilferage or at least present it or come up with counter measures to address the situation. The minutes also indicated that he was given a fair hearing and his witness also given a chance to speak on his behalf.

**36.** The minutes were signed by one Eddie Karisa, Human Resource Business Partner. The minutes do not however provide the verbatim question and answer of the meeting but only the conclusions and therefore it is not easy to discern what really transpired in the meeting.

**37.** The Claimant's case is that he was a middle level Manager as Team Leader of Warehousing

Department and was not the one responsible for the loss. He attributed the loss to the Respondent's own capacity shortfall.

38. The Respondent called a witness RW1 who indicated that the Claimant was to blame for the loss as a Team Leader. The prudent thing the Respondent was do was to demonstrate how the Team Leader failed in his duties that led to the loss. In this Court's view the Respondent only indicated that the Claimant was the Team Leader but did not demonstrate what commission or omission that are attributed to the Claimant which led to the losses.

39. The Respondent produced confidential minutes, which indicate that they found the Claimant culpable. The details of the conversation between the Claimant and Respondent in the disciplinary hearing was missing. It is therefore not possible to discern what the minor details of the omission or commission on the part of the Claimant were that led to the conclusion that he was culpable.

40. Section 43 of Employment Act 2007, state as follows:-

***“(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”.***

41. As the law stands, the Respondent must establish with finality the reasons for the Claimant's dismissal. However, in the circumstances of this case, they failed and I return a verdict that there were no valid reasons to warrant the dismissal of the Claimant.

42. On the issue of due process, the process envisaged is as provided under Section 41 of Employment Act 2007 which provides as follows:-

***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”.***

43. In the case of this case, the process followed was rather strange. The Claimant was issued with a Notice of Termination 1<sup>st</sup> on 14-9-2014. On 15/9/2014, his Staff Provident Benefits were released to him. On 29/9/2014, he was now invited for a disciplinary hearing, which took place on the same day culminating in his termination on the same day.

44. The chronology of events show a determined Respondent to terminate the Claimant by releasing his provident benefits before the termination an indication that the decision to terminate the Claimant was long decided. Then the Claimant is invited for a disciplinary hearing on the same day of the hearing and dismissed thereafter on the same day.

45. The above process falls short of the process envisaged under the law and the fact of release of the Claimant's provident fund dues before even the disciplinary hearing points to the fact that the Respondent had a pre-determined position to terminate him. I therefore find that the Claimant was terminated without due process.

**46.** I therefore find the termination of the Claimant unjustifiable, and unprocedural and I award the Claimant 10 months' salary as compensation for the unfair and unprocedural termination = 10 x 128,200 = **1,228,200/=** less statutory deductions.

**47.** The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **1<sup>st</sup> day of July, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Karanja holding brief Mwangi for Claimant – Present

Gitonga holding brief Ligami for Respondent – Present