



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1543 OF 2013

PAUL BILLY NYAGILO.....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT CO LTD.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially heard by my brother, **Nzioki wa Makau J**, who in a judgment delivered on 3rd February 2015, dismissed the Claimant's claim with costs to the Respondent. The matter went on appeal and the Court of Appeal, in a judgment delivered on 16th June 2017, remitted the Claimant's claim for salary during suspension, gratuity and leave allowances for re-hearing on liability and quantum by a different Judge.

2. Upon directions issued by the Principal Judge, **Nduma J** on 27th September 2017, the file was referred to me for retrial as directed by the Court of Appeal. When Counsel for the parties appeared before on 10th October 2017, Mr. Wesonga for the Claimant abandoned the issue of leave allowances, thus leaving only two issues for re-trial; that is salary during suspension and gratuity, which Counsel agreed to dispense with by way of written submissions.

3. The facts of the case are well captured on record and I will therefore go straight to the two specific issues for re-trial.

Salary during Suspension

4. From the evidence on record, the Claimant was suspended by letter dated 14th July 2010 stating as follows:

"Dear Paul

RE: LOSS OF 5,600 BAGS OF CEMENT AT KISUMU DEPOT VALUED

AT KSHS. 4,155,200

Following the recent close of year stock take exercise as at 30th June 2010, it was noted that 5,600 bags of PPC cement valued at Kshs. 4,155,200 could not be accounted for. This liability and or

potential loss to the Company was realized during your tenure at Kisumu as Depot Supervisor. In this regard you are directly responsible and fully accountable for this loss to the Company.

To facilitate detailed investigations into this loss, this letter serves to advise that you are hereby **suspended from employment with immediate effect**. You are required to handover Company property in your custody to your immediate supervisor.

Furthermore, you are required within the next 14 days, to show cause why stern disciplinary action should not be preferred against you and how the Company will recover this liability.

Upon suspension from duty, you will keep away from your place of work unless when required by management in relation to the investigations being carried out.

Your representations, if any, should reach the undersigned within the stipulated period failure to which the anticipated disciplinary action will be taken without further reference to you.

Yours faithfully,

For: E.A. Portland Cement Co. Ltd.

(Signed)

STEPHEN KAMAU

HEAD OF HUMAN RESOURCES

5. The Claimant stayed on suspension until 18th November 2010, when he was summarily dismissed. During this period, he was not paid any salary. The decision to withhold the Claimant's salary during suspension was based on Clause 12.10, which provides that no salary is payable during suspension. The Claimant faults this policy on two scores:

a) First, that it flies in the face of Section 18(4) of the Employment Act, 2007 which provides as follows:

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of dismissal.

b) Second, that it contradicts Clause 12.12 of the Respondent's Human Resources Policy Manual which provides that an employee who has been summarily dismissed is entitled to salary and applicable allowances up to the date of dismissal.

6. In ***Rashid Jeneby v Prime Bank Limited [2015] eKLR*** this Court rendered itself as follows:

“Ordinarily, suspension is not a disciplinary action nor does it fall within the stages of the disciplinary procedure. It is a neutral action to allow for unfettered investigations into allegations made against an employee and does not attract loss of benefits.”

7. In the case now before me, it would appear that the Respondent treated the Claimant's suspension as a disciplinary measure and no legal basis for this stance was laid before the Court. I therefore find that the Claimant was entitled to his full salary during the period he was on suspension.

Gratuity

8. The second issue for determination is whether the Claimant is entitled to gratuity for the period he was a unionisable employee governed by Collective Bargaining Agreement (CBA) negotiated between the Respondent and the Kenya Chemical and Allied Workers Union. From the evidence on record, the

Claimant ceased being a unionisable employee in December 2009 when he was appointed to the position of Regional Sales Executive. The Claimant submits that his gratuity entitlement crystallized when he was promoted and hence stopped paying union dues.

9. In *Bamburi Cement Limited v William Kilonzi [2016] eKLR*, the Court of Appeal held that gratuity is payable if it is provided for in the contract of employment. Prior to promotion to the position of Regional Sales Executive, the Claimant was not on an individual contract of employment. The terms and conditions of his employment were governed by the obtaining CBA between his Union and the Respondent. The CBA provided for gratuity based on the length of service and I find no reason why the Claimant would have been excluded from this benefit. I find therefore that the Claimant is entitled to gratuity for the period he was a unionisable employee.

Final Orders

10. In light of the foregoing, I direct the Respondent to tabulate and pay to the Claimant the following, within the next thirty (30) days from the date of delivery of this judgment:

- a) The entire amount in salary withheld during the period he was under suspension;
- b) The entire amount in gratuity for the period he was a unionisable employee.

11. In view of the fact that this judgment arises from an order for partial retrial, I direct that each party will bear their own costs. I will also not make an order for interest at this stage.

12. These are the orders of the Court.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Wesonga for the Claimant

Miss Oyombe for the Respondent