



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 290 OF 2013

SAMUEL NZIOKA MUSAU.....CLAIMANT

- VERSUS -

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 31st May, 2018)

JUDGMENT

The claimant filed the statement of claim on 01.03.2013 through Mulandi Kisabit & Associates. The claimant prayed for judgment against the respondent for:

- a) Special damages of Kshs. 910, 648.00 being Kshs. 30, 916.00 pay in lieu of notice; expected income till retirement at 60 years Kshs. 844, 732.00; unpaid leave Kshs. 5, 000.00; and overpayment of Kshs.30, 000.00.
- b) Punitive damages for unlawful termination.
- c) General damages

In alternative:

- d) Reinstatement of the claimant and restoration of his employment file and records as if the claimant's employment had not been terminated.
- e) Special damages for the period the claimant had been wrongly terminated at 8 months times Kshs. 30, 916.00 making Kshs. 247, 328.00.

The respondent's response to the statement of claim was filed on 08.04.2013 through J.M. Mburu & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that on 23.03.2007 the claimant was employed by the respondent as a staff under a formal contract of employment as a salesman cum driver and the claimant's payroll number was P/No. 7644. The claimant served in Mombasa and was later redeployed to serve in Kisumu.

By a letter dated 14.06.2012, the claimant was invited to a disciplinary committee meeting to be held on 18.06.2012 starting at 10.30am. The letter stated that the claimant would be given a chance to defend

himself against the disciplinary issues that had been raised against him.

The disciplinary hearing proceeded as scheduled. The record of proceedings shows that the claimant defended himself that he cleared underpayment amounting to KShs.70, 000.00 which was owed by Janek Wholesalers. The record shows that claimant stated that there had been contradiction in what was captured against physical goods loaded. The record further shows that the claimant stated at the meeting that some wholesalers' accounts were overpaid whereas others were under invoiced. Further, there were instances where goods were invoiced and the supply was limited as a result culminating to the hanging balance. The committee recommended that the human resource manager was to commence the separation process. The meeting resolved that the underpayment raised integrity issues hence the claimant's services would have to be terminated.

By a commitment signed on 26.05.2012, the claimant undertook to pay on or before 02.06.2012 a total amount of Kshs. 70, 141.82 being money received from sales and due to New Kenya Cooperative Creameries Ltd, the respondent herein. The claimant further stated that he fully understood that failure to remit the said amount in full may result to disciplinary action, civil litigation or criminal prosecution.

The security investigation report dated 05.06.2012 states that the investigation had established that as at 26.05.2012, the claimant had a total underpayment of Kshs. 70, 141.82 and the same had been fully recovered by 02.06.2012.

The respondent addressed to the claimant the letter dated 25.06.2012 as follows:

“Dear Sir,

RE: Termination

Reference is made to the disciplinary committee held on 18th June 2012. I wish to bring to your attention that the committee considered your defence and found it to be unsatisfactory.

Your action of not following due process in clearing underpayment in total disregard of circular NSM/C1/0128/10/OA/pn dated 26-5-10 is completely unacceptable. It took you 3 months to clear the under payment amounting to Kshs.70, 141.82/= and this happened after Cost Accountant and Security Manager pointed out the anomaly.

In view of the foregoing your actions contravened the provision of Para 23 of the Collecting Bargaining Agreement. However, on a without prejudice basis and purely on a humanitarian ground, the committee has decided to substitute the penalty of summary dismissal with that of termination.

Please note that your final dues will be paid if any less liability you may owe the Company after completing the normal clearance.

Please be guided accordingly.

Yours faithfully,

For. NEW KENYA CO-OPERATIVE CREAMERIES LIMITED

Signed

ANDREW MASESE

INDUSTRIAL RELATIONS MANAGER”

The record filed for the claimant shows that the disciplinary process had commenced with the internal

memo addressed to the claimant by the Regional Sales Manager dated 05.05.2012. The memo stated that analysis by cost management accountant on stock variance indicated that the claimant took stacks on various dates worth Kshs.170, 000.00 from the depot store but which the claimant had not accounted for. He was required to account by 10.05.2012 failing, he would face disciplinary action. The claimant replied on 08.05.2012 stating that the same had been accounted for on 06.01.2012 in invoice no. 90491159 but physically loaded on 09.01.2012 and no additional documentation was needed. The claimant further relied on a note dated 06.05.2012 said to have been signed by one Carolyn Simiyu of reconciliation referring to the same invoice no. 90491159 but physically loaded on 09.01.2012 and requiring no further documentation.

The **1st issue** for determination is whether the termination was unfair. The claimant's case is that the termination was unfair because as he went for disciplinary hearing he did not have particulars of the case. The Court finds otherwise. The disciplinary process had commenced with issuance of the Regional Manager's internal memo of 05.05.2012. The claimant knew the particulars of the case that confronted him at the disciplinary hearing. He answered the allegations but his answers were found unsatisfactory. The evidence is clear that the claimant signed the commitment dated 26.05.2012 to pay the sum of Kshs. 70, 141.82 by 02.06.2012. The Court returns that the commitment and the subsequent payment confirmed the allegations as they amounted to admission of the allegations. The Court returns that the termination was not unfair because the respondent complied with a notice and a hearing as per section 41 of the Employment Act, 2007. Further, as at the time of the termination, the Court has found that the reason for termination was valid as envisaged in section 43 of the Act. The claimant's claim of unfair termination will fail.

To answer the **2nd issue** for determination the Court returns that the claimant is not entitled to any of the remedies as prayed for as the prayers were predicated on the finding that the termination was unfair but which has been found not to have been the case. The Court considers that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

- a) the dismissal of claimant's case; and
- b) each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 31st May, 2018.

BYRAM ONGAYA

JUDGE