



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1568 OF 2013

DYAN OTIENO ODHIAMBO.....CLAIMANT

- VERSUS -

THE EAST AFRICA PORTLAND

AND CEMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 27.09.2013 through Onyoni Opini & Gachuba Advocates. The prayers were for the respondent to pay the claimant:

- a) Kshs.68, 062.35 one month in lieu of notice.
- b) Service or severance pay Kshs.374, 342.90.
- c) Unpaid half salary during interdiction of 2 months Kshs. 68, 062.35.
- d) 12 months compensation Kshs. 816, 748.20.
- e) Total claim Kshs. 1, 327, 215.80.

The memorandum of defence was filed on 09.01.2014 through Harrison Okeche & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was initially employed by the respondent on 01.10.2000 on periodic contracts. On 21.11.2008 he was employed on a written contract of service and confirmed in employment on 11.08.2009. He was employed as a driver. By the letter dated 03.10.2012 the claimant was interdicted from duty with effect from 03.10.2012. The ground was that on the night of 29/30th September 2012 he was caught on CCTV camera taking away 14 pieces of Atox Mill sealing blocks valued at Kshs.411, 915.00 which were recovered from the claimant and they remained unaccounted for. The letter stated that the same amounted to gross misconduct and dismissal of the claimant was thereby contemplated. He was interdicted pending investigations and on half pay of salary and allowances. He was to show cause with 7 days why disciplinary action was not to be imposed against him.

The investigation report on record shows that the claimant drove motor vehicle KBL 913A within the respondent's premises to the place the blocks in issue were kept. Once parked at that place the lights of the vehicle were switched off. The images of the driver to the motor vehicle (the claimant) though not clear on CCTV, are seen moving straight to the blocks in issue. The report says the claimant loaded the blocks on the motor vehicle and managed to drive out of the respondent's main gate A. The guards at the gate did not discover the incident. Further investigations revealed that on 01.10.2012 the claimant was lured to return 5 blocks and he delivered them in the boot of his private car registration number KAE 171 T. It is reported that the rest could not be found. All the blocks are reported to have cost Kshs. 1, 153, 362.00 and those recovered cost Kshs. 411, 915.00 and those still missing Kshs. 741, 447.00. The report concludes that the company guard who alleged to have searched the vehicle as the claimant (on the night of the alleged theft) drove out was not honest.

By the letter dated 19.10.2012 the claimant was invited to a disciplinary hearing scheduled for 24.10.2012. The hearing took place and the claimant was terminated from employment effective 20.11.2012 on account of gross misconduct. He was to be paid salary up to and

including that date and such other dues as per the letter of appointment.

The claimant's appeal was considered at two meetings and the evidence was reviewed. Thereafter the claimant's trade union objected to the composition of the Committee and the same was changed and matter reviewed at the 3rd meeting. The claimant and union were present. The Committee confirmed that the claimant had not been truthful as he had denied returning the 5 pieces of blocks on 01.10.2012 because he denied that he had communicated on phone to the officer (one Mutai) who reported that the claimant had returned the 5 pieces. Once the Safaricom communication records confirmed that the claimant did speak to Mutai on the evening of 01.10.2012, it was confirmed that the claimant was not truthful because he had denied such communication and, Mutai was truthful that the claimant had returned the 5 pieces.

The Court has considered the pleadings, the evidence, and the submissions. The Court returns that the claimant was accorded due process of a notice and hearing as envisaged in section 41 of the Employment Act, 2007. Further, as at the time of the termination the respondent has established the claimant was culpable and the reason was genuine per section 43 of the Act. In particular it was established that the claimant took away the 14 pieces of blocks as was alleged and on the evening of 01.10.2012 he returned 5 pieces of the blocks. The Court returns that the termination was not unfair.

In view of section 35(6) of the Act and the claimant being a member of the National Social Security Fund, the prayer for service pay will collapse. The respondent has established the gross misconduct as was levelled against the claimant and the respondent was entitled to summarily dismiss the claimant under section 44 of the Act with a lesser notice than was agreed so that the claimant is not entitled to notice pay as prayed for. The other remedies will obviously collapse in view of the finding that the termination was not unfair.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at Nairobi this Friday 23rd November, 2018.

BYRAM ONGAYA

JUDGE