



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**

**CAUSE NO. 149 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**DAVID OTIENO.....1<sup>ST</sup> CLAIMANT**  
**JOSEPH OLACHI.....2<sup>ND</sup> CLAIMANT**  
**JACOB OUKO.....3<sup>RD</sup> CLAIMANT**  
**ELIUD MIGIDO.....4<sup>TH</sup> CLAIMANT**  
**BENSON OMONDI.....5<sup>TH</sup> CLAIMANT**

**VERSUS**

**SPECTRE INTERNATIONAL LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimants are former employees of Spectre International Limited who filed suit initially through the Kenya Chemical and Allied Workers Union but have since ceased to be members of the said union. The Respondent on the other hand is a manufacturing company registered in Kenya and based in Kisumu County, which manufactures extra neutral alcohol, Neutral alcohol and coloured methylated spirit.

In the amended memorandum of claim dated 13<sup>th</sup> October 2015, the claimants seek the following orders: -

- a) That the respondent acted unfairly, wrongfully and unlawfully for dismissing the five grievants/employees in total disregard to provisions of the Employment law sections 43 and 45.
- b) Claimants be reinstated back to work without any loss of benefits and/or privileges and to be paid their monthly wages for the period they have been out to date.
- c) If reinstatement is not possible, the court consider awarding the claimants benefits and entitlement under the law and give also maximum compensation.
- d) The court declares that termination is unlawful, illegal, null and/or void and award general damages for unfair termination.
- e) Costs of this suit and interest from the date of termination.

**The Claim of Mr. Eliud Midigo**

Mr Midigo avers that he was employed by the Respondent on 5<sup>th</sup> April 2007 as a general worker in the production department with a salary of Kshs. 9,000/= per month as per his appointment letter and at the time of dismissal his salary was Kshs.17,583. He further avers that he worked for the Respondent up to 21<sup>st</sup> July 2011 and was summarily dismissed on grounds that he neglected to perform his duties satisfactorily which led to considerable financial loss to the company.

He contends that he was suspended and dismissed without being given any chance to defend himself against any allegation levelled against him nor was he availed the outcome of the investigation carried out by the Company as required by the law which implicated him in any

allegation of misconduct.

He avers that he had worked for the Company for 6 years with a clean record without any warning letter and in his view the decision to summarily dismiss him was inhumane.

#### **The Claim of Mr. David Otieno**

Mr Otieno avers that he was employed by Spectre International Limited on 3rd January 2005 as a Weigh Bridge Clerk in Logistics Department with a salary of Kshs 20,000/- per month and at the time of dismissal his salary was Kshs 37,617/- . He further avers that he worked for the Respondent until 21<sup>st</sup> July, 2011 when he was summarily dismissed on grounds that he neglected to perform his duties satisfactorily which led to considerable financial loss to the company.

He contends that he was suspended and dismissed on 22<sup>nd</sup> July 2011 without being given any chance to defend himself against any allegation levelled against him nor was he availed the outcome of the investigation carried out by the Company as required by law which implicated him to any allegation the Company had against him.

He avers that he had worked for the Company for 6 years with a clean record without any warning letter in his record and in his view the decision to summarily dismiss him was inhumane.

#### **The Claim of Mr. Joseph Olachi**

Mr. Olachi avers that he was employed by Spectre International Limited on 3<sup>rd</sup> January 2005 as a Molasses Receiver within Logistic Department, with a salary of Kshs.9,000/- per month and as at the time of dismissal he was earning a salary of Ksh.17,582/-. He further avers that he worked for the Respondent until 21<sup>st</sup> July 2011 when he was summarily dismissed on grounds that he neglected to perform his duties satisfactorily which led to considerable financial loss to the company.

He contends that he was suspended and dismissed on 22<sup>nd</sup> July 2011 without being given any chance to defend himself against any allegation levelled against him nor was he availed the outcome of the investigations carried out by the Company as required by law which implicated him.

He avers that he had worked for the Company for 6 years with a clean record without any warning letter and in his view the decision to summarily dismiss him was inhumane.

#### **The Claim of Mr. Jacob Ouko**

Mr Ouko avers that he was employed by Spectre International Limited on 10<sup>th</sup> January 2005 as a Weigh Bridge Clerk within Logistic Department, with a salary of Kshs.12,000/- per month and as at the time of dismissal he was a earning a salary of Kshs.22,174/-. He further avers that he worked for the Respondent until 21<sup>st</sup> July 2011 when he was summarily dismissed on grounds that he neglected to perform his duties satisfactorily leading to considerable financial loss to the company.

He contends that he was suspended and dismissed on 22<sup>nd</sup> July 2011 without being given any chance to defend himself nor was he availed the outcome of the investigation carried out by the Company as required by the law which implicated him of any allegations the Company had against him.

He avers that he had worked for the Company for 6 years with a clean record without any warning letter and in his view the decision to summarily dismiss him was inhumane.

#### **The Claim of Mr. Benson Omondi**

Mr Omondi avers that he was employed by Spectre International Limited on 10<sup>th</sup> January 2005 as a Molasses Receiver within Logistic Department with a Salary of Kshs.9,000/- per month and as at the time of dismissal he was a earning a salary of Kshs.17,582/-. He further avers that he worked for the Respondent until 21<sup>st</sup> July 2011 when he was summarily dismissed on the grounds that he neglected to perform his duties satisfactorily leading to considerable financial loss to the company.

He contends that he was suspended and dismissed on 22<sup>nd</sup> July 2011 without being given any chance to defend himself against any allegation levelled against him nor was he availed the outcome of the investigations carried out by the Company which implicated him of any wrongdoing.

He avers that he had worked for the Company for 6 years with a clean record without any warning letter in his record and in his view the decision to summarily dismiss him was inhumane.

The Claimants further aver that there were several meetings held between the Claimant's former Union at branch level, and during such meetings, the Respondent Company acknowledged that, these summary dismissals were based on suspicion and they could not prove any negligence at work, as alleged by them, and without such proof, the Union maintained that such workers should be reinstated back to their jobs without loss of privileges, and they should be paid for the period they were out of employment on suspension.

That at the time of suspension they were nine employees but only five were summarily dismissed and four were reinstated back to their jobs

and positions. They contend that since there was no evidence adduced to warrant their dismissal they all should have been reinstated.

They contend that during the last meeting between the Company and their former union it had been agreed to reduce the summary dismissals to normal termination to resolve the dispute, which was not acceptable to the Union as there was no ground for termination.

That the Claimants through their former union reported a formal trade dispute to the Minister for Labour on 18<sup>th</sup> October 2011 and the Ministry appointed Ms. Hellen Maneno of Kisumu Labour Office as a conciliator through a letter dated 2<sup>nd</sup> December 2011. They claim that they addressed their memorandum to the conciliator on 27<sup>th</sup> February 2012. That the Ministry released its report dated 1<sup>st</sup> August 2012 and recommended that the Claimants be paid their entitlements which they rejected.

They further aver that the Respondent contravened Sections 41, 43 and 45, that the Claimants were not given any opportunity to be heard by the Respondent before their respective dismissals and to defend themselves against allegations levelled against them. They claim that the termination was in bad faith, amounted to unfair labour practice, wrongful and unlawful and as such seek the Court's intervention.

The Respondent filed a memorandum of defence opposing the claim. They admit the employment relationships but cited the dates of employment as:-

1. David Otieno - Weighbridge Clerk on 3<sup>rd</sup> January 2005,
2. Joseph Olachi - Molasses Receiver on 3<sup>rd</sup> January 2005,
3. Jacob Ouko - Weighbridge Clerk on 10<sup>th</sup> January 2005,
4. Eluid Migido - General Worker on 5<sup>th</sup> April 2007
5. Benson Omondi - Molasses Receiver on 10<sup>th</sup> January 2005.

Their letters of appointment are annexed to the Defence as Appendix 1.

The respondent contends that nine employees including the five claimants were suspended on 1<sup>st</sup> July 2011 for 21 days on grounds of neglect to perform duties satisfactory, which led to considerable financial loss to the company. That the suspension was to enable the company investigate who were involved in allowing adulterated molasses in to the company that resulted into loss of millions of shillings in production.

The Respondent avers that during the claimants period of suspension the respondent monitored the receiving and offloading of molasses and it became evident that the company lost only 30 tons of molasses during the period when the claimants were on suspension down from 600 - 700 tons per month when the claimants were on duty. Further that receiving, weighing and offloading of molasses improved and trucks were fully emptying the molasses carried.

It is alleged that the losses incurred when the claimants were on duty were attributed to the manipulation of the weighbridge, falsification of records and deliberate failure to fully empty molasses from the trucks when offloading. This was done in collusion with truck drivers to sell the molasses and share the proceeds.

That the claimants were dismissed on 22<sup>nd</sup> July 2011 having been found to have committed or on reasonable and sufficient suspected of having committed a criminal offense against or to the substantial detriment of the employer or employer's property. It is the Respondent's position that before the dismissal the Claimants were given a hearing where they were unable to exonerate themselves from the misconduct committed.

The respondent contends that several meetings were held between the respondent and Kenya Chemical Workers Union that represented the claimants during which no agreement was reached. That the Conciliator's report recommended that the dismissal of the claimants be reduced to normal termination and they be paid their benefits and in addition, the claimants be paid four months' salary for loss of employment. The respondent prays that the court disallows the claim and orders for settlement of the claim as per the Conciliator's report.

## **Evidence**

On 12<sup>th</sup> July 2016, Parties agreed that Mr. David Phaniel Otieno testify on behalf of his Co-Claimants since they were terminated under similar circumstances.

Mr Otieno testified that he worked for the Respondent as weighbridge clerk in logistics department earning a salary of Ksh.20,000. His duties were to weigh goods coming and leaving the premises using a weighing machine. That at the gate whenever a vehicle stopped at the scale it was weighed and a receipt automatically produced. There were three copies of the receipt, one for the file, second copy one for the transporter and third copy to accounts office.

He further stated that vehicle leaving the Respondent's premises would be weighed and the weight was deducted from the weight at entry. That he did not do anything else with the machine other than weigh. That the repairs and maintenance of the machine was done by another company. He denied manipulation of the weighbridge to compromise on the weight it recorded.

He testified that he worked until 1<sup>st</sup> July 2011 when he was issued with a suspension letter for 21 days before which he had not received any warning letters or complaint of any sort neither was there a report to the police over his work. He stated that he reported back to work on 22<sup>nd</sup> July 2011 when he was served with a summary dismissal letter. That the said letter was handed to him at the gate by the security guard. He further stated that he was not given an opportunity to defend himself or shown any reports that caused his dismissal. That he was also not involved in the investigations carried out by the Respondent. That at the time of dismissal his salary was Kshs. 37,617/=. He denied any consent reached between his former union and the Respondent as it was allegedly reached without his consent. He urged the Court to order payment of notice, 37 leave days and costs of the suit.

In cross-examination, Mr. Otieno denied colluding with the drivers of the companies trading with the Respondent who did not off-load all the molasses which was later sold and the profits shared between the Claimants and the drivers. He stated that the Claimants complained against discrimination because lab employees were not dismissed. That they were not called by the plant director during the suspension period for questioning.

### **Respondent's Evidence**

On behalf of the respondent, one Allan Perez Ayodi Nengo testified. He stated that he was engaged by the Respondent as an Industrial Relations Officer. He testified that the decision to suspend and eventually dismiss the weighbridge staff was triggered by an incident where a truck full of adulterated/diluted molasses was arrested as the driver attempted to offload the same into storage tanks. That the confidence with which the lorry driver drove into the company premises with watered/adulterated molasses led the management to suspect that it was habitual for them to deliver the adulterated molasses. It was therefore suspected that the drivers were colluding with company staff charged with weighing and analysing molasses.

The truck was arrested by chance because there was a blackout and it could not drive direct to the weighbridge. That the guards noticed watery molasses discharging from the tanks on the truck, raised alarm and the driver of the truck ran away. That this led the company to suspect that the then prevailing poor alcohol production by the plant was caused by the adulteration as the dilution of the molasses compromised the sugar content that yields alcohol.

Mr. Ayodi further stated that preliminary investigations were conducted which established that the Respondent's weigh bridge staff and laboratory staff were colluding with the drivers to deliver adulterated molasses by adding water to the tanks on the way to replace the amount sold by the drivers. That when the staff were questioned they denied knowledge of the molasses adulteration and stated that they conducted their duties diligently.

That following the outcome of the investigations, the claimants were invited to appear before the disciplinary committee to explain the issue of adulterated molasses which they denied. Another hearing was conducted after expiry of the suspension period where they were handed the findings of the investigations. That the matter went through the dispute resolution process and the conciliator made a report, which was adopted by the parties to the dispute culminating in the signing of a consent.

On the claim made by the claimants he stated that the consent factored in the 36 days owed to the Claimants, notice pay and pay for July 2011. That overtime claimed by the Claimants was already factored in the monthly pay as itemized in the pay slips and proof to the contrary was not adduced by the Claimants. He denied that the Respondent owed the Claimants any allowances.

In cross-examination, Mr. Ayodi stated that the respondent had reasonable ground to suspect that an offence had been committed by the claimants but nevertheless the respondent did not press charges against them. That after the incident cameras were installed focusing on the weighbridge and it was noted that drivers may have chosen not to stop the vehicle with all tyres on the weighbridge. He further stated that the results of the investigations were given to the Claimants verbally and that the Report containing the investigations report was part of the evidence in court.

As to the disciplinary committee hearing RW1 stated that they held a hearing and minutes were taken but the same were not produced in evidence as well. It was his evidence that the lab technicians were reinstated back to work.

He stated that the letters of suspension informed the Claimants of their right of appeal and after the investigations the Respondent proceeded to dismiss them. That the Claimants were offered payment of all their dues in the settlement entered into with the claimants' former union which included accumulated leave days, employer's pension contribution, overtime and four months' salary.

### **Claimant's Submissions**

Counsel for the Claimants addressed the issue of the settlement consent entered into by the Claimants' former union and the Respondent. He submits that the said consent led to a dispute between the claimants and their union leading to their resignation as members of the said union by notices dated 30<sup>th</sup> September 2013, which were served on the Union before the matter was mentioned in Court on 1<sup>st</sup> October 2013, but the union disregarded the same and had the Court endorse the consent.

Following the falling out with the union, the Claimants appointed an advocate who filed an application to set aside the consent judgment. That in any event the said consent was not honoured as the said consent stipulated that the payment was to be effected by 31<sup>st</sup> October 2013, to date no reason has been advanced for not honouring the consent. Further that the said consent did not comply with the law as it did not factor the issue of interest, that the calculations were wrong and need corrections before the consent can be valid.

On termination, it is submitted the same was unfair as the respondent did not give the claimants a hearing. They were never informed of the outcome of the investigations and they have never been charged with any offence relating to investigations and/or accusations made by the respondent that led to their dismissal. That no evidence at all was presented to Court to show that the claimants were heard before they were dismissed.

On the allegation that on the 22<sup>nd</sup> July 2011 the claimants were given opportunity to defend themselves before they were terminated on the same day counsel submits that this evidence is disputed by the claimants who stated that after their suspension they were called and letters handed to them without any explanations. That it is still not fair that the Claimants were not given time to prepare and respond to the raised allegations if any.

That from the evidence of RW1 it is clear that some of the Claimants are not culpable as their instructions were limited to overseeing the offloading of molasses and as such could not have interfered with the molasses. That if the molasses was adulterated, it must have occurred in a different docket. It is therefore counsel's submission that the reasons and procedure of termination were not adhered to and the Court should uphold this position.

It is also submitted that the settlement proposal in the conciliator's report is too little and he urged the court to award twelve months' salary as damages. He also prayed for the part of the provident fund benefits left out of the settlement to be included in the judgment of the Court.

### **Respondent's submissions**

It is submitted on behalf of the Respondent that the reason for termination was mainly loss incurred by the Respondent as a result of what was deemed to be the Claimants' actions. That such loss and the cause was not denied materially within the Respondent's premises nor when the matter was subject to conciliation.

Counsel submits that the entire transaction fell within the purview of Section 44 (4) (c) of the Employment Act, 2007 which provides that an employee can be summarily dismissed if:

*"An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly."*

Further, what the Claimants were suspected to have been involved in was criminal as envisaged in Section 44 (4)(g) of the Employment Act, 2007.

As such Counsel submits that the Respondent had reason to initiate disciplinary action against those who were involved in the fraudulent scheme.

On procedural fairness it is submitted that several meetings were held between the respondent and Kenya Chemical Workers Union that represented the claimants as reflected at Appendix 3 of the Respondent's bundle. After the parties disagreed at their level, Kenya Chemical Workers Union reported a trade dispute to the Minister for Labour. The Conciliator came up with her report. This report recommended that the dismissal of the claimants be reduced to normal termination and they be paid their benefits. In addition, the claimants be paid four months' salary for loss of employment. Refer to Appendix 4.

The union rejected the report while the Respondent accepted the report. That the dispute was filed in the Industrial Court and both the Respondent and Kenya Chemical Workers Union agreed to resolve the dispute and the claimants to be paid as follows:-

- a) One months' salary in lieu of notice
- b) Pending annual leave
- c) Provident fund contribution
- d) Four and half month's salary as compensation for loss of employment.

This agreement was registered with the court but the grievants (claimants) protested and opted to abandon their Union and litigate on their own. It is submitted that the cumulative effect of the discussions that the parties engaged in particularly when the Union reported a Trade Dispute canvassed every conceivable opportunity the Claimants had to tell their side of the story.

Counsel urges the Court to appreciate and uphold the provisions of the Labour Relations Act, 2007 on the role of the unions as well as the sanctity of industrial relations and conciliation. In lieu thereof counsel prays on behalf of the Respondent that the proposed settlement in appendix 5 be upheld.

### **Determination**

The issues for determination are whether the termination of the claimants was unfair and whether they are entitled to the remedies sought.

### **Fair Termination**

Fair termination entails both valid reason for termination and fair procedure. Taking into account what transpired at the weighbridge on 1<sup>st</sup> July 2011, there was sufficient grounds for the respondent to suspect collusion between the claimants and lorry drivers who delivered molasses to the company.

I therefore find that the requirements of Section 43 being proof of reasons for termination were met by the respondent.

I however do not find the procedure adopted by the respondent to have been fair. In the first place the letters of suspension only referred to adulterated molasses being deliberately allowed entry into the company and advised the claimants of the intended investigations to be carried out during the 21 days that they would be on suspension.

All the claimants deny that they were subjected to a hearing. According to the claimants they reported back from suspension and were immediately served with letters of dismissal by a guard at the gate. The grounds for dismissal were not stated in the letters of dismissal.

The letters of suspension which were identical stated as follows –

*“ July 1, 2011*

*Dear Sir*

*RE: LETTER OF SUSPENSION*

*Following evidence of adulterated molasses being deliberately allowed entry into the company resulting in loss of millions of shilling production, the company sees no otherwise but to suspend your services for a period of 21 days to allow for investigation into the matter.*

*You will have the right of appeal against any disciplinary outcome during the hearing.*

*Yours Faithfully*

*Spectre International limited*

*SIGNED*

*Lynn Owino*

*Human Resources Manager*

*Cc: Plant Director”*

The letters of summary dismissal on the other had read as follows –

*“ July 22, 2011*

*Dear Sir*

*RE: SUMMARY DISMISSAL*

*We refer to our letter dated 1<sup>st</sup> July 2011 addressed to you.*

*The investigations into this matter have been concluded and it has been decided that you be summarily dismissed with immediate effect on the grounds of neglecting to perform your duties satisfactorily leading to considerable financial loss to the company.*

*Your dues will be paid to you in accordance with the terms of your contract.*

*Yours Faithfully*

*Spectre International limited*

*SIGNED*

*Lynn Owino*

*Human Resources Manager*

*Cc: Branch Secretary KCAWU”*

The letter of dismissal does not give the reason for dismissal. It does not make any reference to a disciplinary hearing. There are no letters inviting the claimants to a disciplinary hearing. The letters of dismissal accuse the claimants of neglecting to perform their duties satisfactorily without specifying omission or commission that the claimants were accused of.

RW1 stated the claimants were given the report of investigations verbally but did not produce a copy of the report. There were no minutes of the disciplinary hearing. RW1 in his evidence during cross-examination stated–

*“Other than this matter, the claimants had no disciplinary incidents. After investigations, there were no warnings. We proceeded and dismissed them.”*

I find that the respondent did not comply with Section 41 of the Employment Act by informing the employees of the charges against them or giving them a hearing. They were not informed of the right to be accompanied by a union official or colleague of their choice. They were not given an opportunity to prepare and present their case before the dismissal. The claimants were never ever required to record statements of what they knew about the accusations against them or issued with show cause letters.

I find that the summary dismissals were unfair for failure to comply with requirements of fair procedure.

The claimants prayed for reinstatement. In view of the time that has lapsed since their dismissal, it is not practical to reinstate the claimants. The claimants prayed for maximum compensation in the alternative to reinstatement.

All the claimants had worked from January 2005 except Eliud Mugido who had worked from 5<sup>th</sup> April 2007.

Taking into account all the circumstances of the case, the length of service and the manner in which the claimants were terminated, I award each of the claimants seven (7) months' gross salary as compensation.

Each of the claimants is further entitled to pay in lieu of notice, any leave due and any other benefits as provided for in the CBA. Since no tabulation was made of the other benefits due to each claimant in the pleadings or evidence, the court is unable to state the amount due to each employee as terminal benefits

The parities are directed to tabulate the amount due to each claimant and the mention the case within 30 days to confirm the same should the parities not agree.

The respondent will pay the claimant's costs of the suit. All terminal dues shall attract interest from date of filing suit while compensation will attract interest from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**