



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 608 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 4<sup>th</sup> December, 2018)**

**RICHARD ONDIEGE ONYANGO.....CLAIMANT**

**VERSUS**

**PZ CUSSONS EAST AFRICA.....RESPONDENT**

**JUDGEMENT**

1. This claim was initially instituted on 1.9.2009 at the Chief Magistrate's Milimani Commercial Court's Nairobi as CC No.5677/2009. On 28/10/2011, the Hon. J. Ogolla ordered the case transferred to the Industrial Court Nairobi for hearing and disposal.
2. On 11.7.2014, the Claimant filed a Memorandum of Claim again but the order of the Court (J. Onyango) on 19/6/2014 was for parties to file documents they were going to rely upon.
3. I will therefore strike out the Memorandum of Claim filed on 11.7.2011 and rely on the Plaint filed on 28/10/2011 plus documents annexed to the alleged Memorandum of Claim filed in Court on 11.7.2014.
4. In the Plaint before Court the Claimant's case is that he was employed by the Respondent on 8/10/1992 as a Store Worker. The employment was also subject to a Collective Bargaining Agreement between the Defendant and the Kenya Chemical & Allied Worker Union (KCAWU).
5. He avers that by virtue of Clause 13 of the Collective Bargaining Agreement, it was provided that before an employee could be summarily dismissed for an offence other than of gross misconduct, he would be given at least (3) written warnings within a period of 12 months.
6. He avers that by a letter dated 25/10/2005, the Defendant terminated his services with immediate effect on account of what the Defendant alleged was 'a high degree of negligence'.
7. It is the Plaintiff's contention that the negligent acts did not amount to gross negligence for which he could have been dismissed under the provisions of the then Employment Act Cap 226 Laws of Kenya.
8. He avers that the dismissal was wrongful and he suffered loss and hence seeks damages for the wrongful and unlawful dismissal from employment.
9. The Plaintiff gave evidence in Court and stated that the Respondent had changed their computer system and they were still learning about it. The system had been introduced in July 2005 and he was training on it for 5 days i.e. on 20/7/2005, 17/8/2005, 27/7/2005, 10/8/2005 and 3/8/2005.
10. He averred that during his absence his deputy was one doing his work. He contends that he could use both manual and electronic method in doing his processes and especially when the system failed.
11. He contends that when the Respondents discovered faults, they suspended him and then terminated him without any disciplinary hearing and without any warnings.
12. In cross-examination, he stated there were some stock variances which were necessitated by lack of training. He stated that he was given 3 months' salary in lieu of notice at the time he was dismissed but was never paid his terminal dues.

13. The Respondents on their part filed their Statement of Defence on 8/12/2009 through H. M. Mudeizi and Company Advocates. They denied the Claimant's allegations of unfair termination. They aver that Clause 15 of the Collective Bargaining Agreement was not applicable to the Plaintiff's case and that the Claimant's conduct amounted to gross misconduct. They aver that the Plaintiff's negligence occasioned stock variances occasioning great loss to the defendant on 28/8/2005 and 7/9/2005.

14. They also contend that the Plaintiff failed to follow the requisite procedures of MFG Pro-transactions and failed to adhere to the Defendant's distributions operations procedure and policies in respect of returns for trade out of stocks, short delivery manual transactions.

15. They therefore aver that they were right in invoking Clause 14 of the Collective Bargaining Agreement to summarily terminate the Plaintiff. They therefore ask Court to dismiss this claim with costs.

16. The Defendant called 1 witness who stated that he was a former employee of the Respondent and retired in 2012. He stated that the Plaintiff was an employee of the Respondent from 1992 October to September 2005.

17. He averred that the Claimant worked well till September 2005 when he started experiencing stock losses under his case. He was issued with a show cause letter and a warning (page 9) and he accepted the error.

18. That the error persisted and he was thereafter terminated and paid his 3 months' salary, pending leave, overtime pay and pension dues. He avers that the payments were made based on the Collective Bargaining Agreement. He was also issued with a certificate of service.

19. In cross-examination, RW1 stated that in July 2005, MFG Programme was introduced for managing stock and the Claimant was trained on the system for about 1 week. The training was in July and August 2005. He admitted the memo to Claimant at page 12 (a) was not a warning but a letter requiring an explanation and the Claimant explained what had happened. He however indicates that the explanation was not satisfactory. He avers that the reason for the termination was high degree of negligence but the stock lost was not indicated.

20. He stated that stocks got lost but he does not know how much it was. He also admitted that there is evidence of manual delivery of stocks after the Claimant left (pages 18(a) and 19(e) and yet one of the memos written to the Claimant was to stop using manual deliveries.

21. The Parties also filed their respective submissions whereby they reiterated their evidence.

22. I have examined all the evidence and submissions of the Parties. The issues for determination are as follows:-

*1) Whether the summary dismissal of the Claimant was fair and justified.*

*2) Whether the Claimant is entitled to remedies sought.*

23. The Claimant was dismissed in 2005 and therefore the law applicable in this case is the Repealed Employment Act Cap 226 laws of Kenya and the Collective Bargaining Agreement between the Respondent and the Kenya Chemical & Allied Worker Union (KCAWU) where the Claimant was a member.

24. There was also a warning system that had to be invoked before termination. The Claimant was never issued with any warning. He did not commit a gross misconduct as provided in the Repealed Act. He may have made mistakes or erred but these could not be construed as gross misconduct.

25. It is my finding that the Claimant was terminated for gross misconduct but he had not committed such an offence. I therefore find that the termination of the Claimant was unfair and unjustified.

26. In terms of remedies, the only prayer sought in the Plaintiff is for damages for unfair termination.

27. I find the Claimant is indeed entitled to damages as prayed and I award him an equivalent of 8 months' salary for the same= 8 x 41,559 = 332,472/=.

**Total = 332,472/=**

28. 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 **4<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Karanja holding brief for Keyonzo for Claimant – present

No appearance for Respondent