



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 344 OF 2013

JOHN EDISON NGARE

CLAIMANT

v

NATIONAL CEREALS & PRODUCE BOARD

RESPONDENT

JUDGMENT

1. John Edison Ngare (Claimant) contends that the termination of his employment by National Cereals & Produce Board (Respondent) through a letter dated 16 November 2011 was unfair, while the Respondent asserts that the termination of employment was fair.
2. The Cause was heard on 9 November 2015, 1 February 2016, 7 December 2016 and 20 February 2017.
3. The Claimant filed written submissions on 6 March 2017, while the Respondent filed its submissions on 20 April 2017.
4. The Court has considered all the material placed before it and identified the issues arising for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies including entitlements accruing out of the employment contract.*

Whether dismissal was unfair

Procedural fairness

5. The Claimant was suspended through a letter dated 22 March 2011 and the letter outlined the allegations leading to suspension as *being involved in theft of maize at Bungoma Silos on the night of 13th March 2011, failure to account for 452 pieces of gunnies and shortage of 538 bags after dipping.*
6. The suspension letter also called upon the Claimant to show cause within 72 hours as to why disciplinary action should not be taken against him.
7. The Claimant responded to the allegations through a letter dated 23 March 2011 in which he denied the allegations.
8. On 22 July 2011, the Claimant appeared before the Respondent's Regional Advisory Committee and was asked questions concerning the allegations and also made oral representations.

The Regional Advisory Committee recommended that the Claimant be held accountable for the losses and that the Respondent take appropriate disciplinary action.

10. The particulars given by the Claimant for challenging the procedural fairness of the process leading to his dismissal both in the pleadings and during oral testimony were not disclosed clearly, but appears to have been that he was not given notice, but in cross examination he admitted receiving the suspension letter, responding to it and attending a hearing on 22 July 2011 during which he made representations.

11. On the basis of the evidence presented, the Court is satisfied that the Claimant was informed of the allegations to confront through the suspension letter and was afforded an opportunity to make written representations which he did and that he also made oral submissions before the hearing panel on 22 July 2011, and this process was substantially in tandem with the requirements of section 41 of the Employment Act, 2007.

Substantive fairness

12. 3 reasons were advanced for dismissing the Claimant from employment, and it is these 3 reasons which the Respondent had a burden to prove and prove as valid and fair reasons in terms of sections 43 and 45 of the Employment Act, 2007.

Theft of maize on 13 March 2011

13. It is not disputed that a theft occurred on the night of 13 March 2011 and that the Claimant was not seen at the scene.

14. The Claimant attributed the theft to a casual employee, but admitted that he had custody of the keys to the silo in contention which he would return to the Manager on Fridays and collect on Mondays from his office.

15. On the particular period in issue, he admitted that there was no breakage of the doors and also stated that he kept the keys to the Silo in his drawers but handed over the keys to the main door to the Manager.

16. The Respondent's Depot Manager at the time confirmed the procedure regarding the keys but stressed that the silo keys under the custody of the Claimant were never traced and that the Claimant could not explain the whereabouts of the silo keys until they were found on a footpath by a pupil on the way to school.

17. Considering that there was no sign of breakage and that the Claimant had the responsibility to secure the keys to the Silo from which the theft took place, it is the Court's view that it is more probable that the theft was an arranged theft which involved the Claimant.

Failure to account for gunny bags

18. The Claimant's written explanation in response to the suspension letter that the bags had been taken by the Manager and that he had informed the Regional Manager of the same was not mentioned during his oral testimony, but because the Respondent's witnesses also did not advert to the explanation directly except to state that some bags were taken from a Clerk, leads the Court to reach a conclusion that this was not a valid and fair reason to dismiss the Claimant.

Shortage of 107 bags

19. The Claimant did not directly address this allegation in his written response. The shortage was found after a stock take audit and the actual loss was established as 107 bags and during the meeting of 22 July 2011, the Claimant appeared to admit responsibility for the loss.

20. The Respondent's Internal Auditor's testimony that the Claimant was responsible because he had custody of the keys to the store where the 107 bags were kept was also not interrogated and taking the two factors together (admission and custody of keys), the Court finds that this was a valid and fair reason to dismiss the Claimant.

Whether Response should be struck out

21. The Claimant urged in his submissions that because the Response was filed over 10 months late and without leave of Court, it should be struck out.

22. The Court has confirmed from the record that indeed that is correct but cannot fathom the reasons which led the Claimant to bring to the attention of the Court that fact either before hearing commenced or during the hearing in order for the Court to give appropriate directions or orders.

23. It is also not disputed that the Claimant participated actively in interrogating the defence documents filed together with the Response during cross examination.

24. Because the Claimant has not demonstrated any prejudice suffered and for its failure to bring the issue to the attention of the Court timeous, the Court declines to strike out the Response.

25. Before discussing appropriate remedies, the Court must make three observations.

26. One that the Claimant's pleaded case was anchored on redundancy, while the evidence led did not point to redundancy.

27. Two, that the Claimant opted to give incoherent testimony rather than give a logical and sequential narration of the case he was advancing

28. Three, that the entering of a *nolle prosequi* to terminate the criminal case against the Claimant and others is of no material effect to the cause of action presented herein.

Appropriate remedies

Pay in lieu of notice

29. Because the Court has reached a conclusion that the dismissal was fair, pay in lieu of notice is not available to the Claimant.

Leave for 2011

30. No evidential basis for this head of claim was laid before Court and it is declined.

Medical (outpatient) allowance

31. Equally no evidential basis for this relief was presented and it is declined.

Compensation

32. This is a discretionary remedy and because the Court has found there was no unfair termination of employment, this relief is not available.

Unpaid wages during pendency of criminal case

33. Under this head, the Claimant sought Kshs 1,188,480/- for the period March 2011 to May 2013.

34. The Claimant was dismissed through a letter dated 16 November 2011 but the effective date of dismissal was 22 March 2011 when he was suspended.

35. Legally, therefore he cannot sustain a claim for remuneration after dismissal. As a generally rule, remuneration is earned and is not paid for work not done.

Certificate of Service

36. Although not pleaded, the Claimant raised the issue of a certificate of service in the written submissions.

37. This being a statutory entitlement, the Respondent should issue one to the Claimant within 14 days.

Conclusion and Orders

38. The upshot of the foregoing is that the Court finds no merit in the Cause presented and orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 28th day of April 2017.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Onyancha instructed by Chepkwony & Co. Advocates
For Respondent	Ms. Kavangi instructed by Lutta & Co. Advocates
Court Assistant	Nixon/Daisy