



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 333 OF 2014
BETWEEN
PETER KILATYA.....CLAIMANT
VERSUS
BAMBURI CEMENT LIMITED.....RESPONDENT

Rika J

Court Assistance: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

Njeru & Company Advocates for the Respondent

JUDGMENT

1. This is an ancient Claim. It was initiated at the Senior Resident Magistrate's Court at Mombasa on 28th January 2000. It is 17 years now, from the date of filing of this Claim. It was registered at the first Court as Civil Suit Number 301 of 2000.
2. It was transferred to the High Court at Mombasa through a Consent Order dated 5th May 2002. The High Court transferred the matter to the Industrial Court Mombasa, through an order dated 8th July 2014. The Claimant had given evidence at the High Court. The Claim was registered as Cause Number 333 of 2014 at the present Court.
3. Upon transfer, the Parties agreed the matter is determined on the strength of the record. They confirmed the filing of their Closing Submissions at the last mention in Court on the 8th February 2017.
4. The Claimant's position is that he was employed by the Respondent Cement Maker as a Driver, in March 1989. His contract was terminated by the Respondent on 21st April 1998. He earned a monthly salary of Kshs. 23,870 as of the date of termination. His main duty was to transport cement in bulk, from Respondent's factory at Bamburi, to its silos at Mbaraki and English Point within Mombasa.
5. The Respondent alleged the Claimant, on 8th April 1998, delivered bulk cement at English Point instead of Mbaraki as instructed. It was alleged the silo at English Point contained higher grade cement, than the cement at Mbaraki silo. There was contamination.

6. The Claimant states the confusion leading to contamination of the cement was occasioned by Respondent's Supervisor and Security Guard, who failed to tag the Claimant's vehicle. The allegation made by the Respondent that the Claimant was responsible for contamination was unjustified and meant cover up on Respondent's malicious and unfair dismissal.

7. Kilatya invokes Sections 41, 44 and 45 of the Employment Act 2007, among other provisions, to argue that termination was unfair, and he is entitled to among other prayers, 12 months' salary in compensation for unfair termination under Section 49 of the Employment Act 2007. In all he prays for the following Judgment against the Respondent:-

a. 2 months' salary in lieu of notice.

b. Annual leave pay at Kshs. 30,343.

c. Overtime at Kshs. 61,104.

d. Shift pay at Kshs. 5,724.

e. Gratuity for the service period 1989 to 1998 at Kshs. 128,877.

f. Salary for days worked in 1998 at Kshs. 16,708.

g. Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 286,440

Total Kshs. 600,908

h. Interest from the date of termination 21st April 1998 to-date at 14% per annum.

8. The Respondent's position is that the Claimant was Respondent's Employee. His employment history, and the terms and conditions of service are not disputed. He was entrusted cement on 8th April 1998, clearly tagged for delivery at Respondent's silo at Mbaraki. He delivered, and discharged cement at the silo at English Point, which held cement of a higher grade. The cement was contaminated. About 1,440 tonnes, or 100 truckloads of cement, was contaminated. It cost the Respondent about USD 54,720 to clean up. He was alerted by a Security Guard at the English Point that he was discharging cement at wrong silo. He removed the tag and told the Guard to keep quiet. The Respondent states the applicable substantive law to the dispute is the repealed Employment Act Cap 226 the Laws of Kenya, termination having taken place in 1998. The Respondent makes the following offer of terminal benefits, stating the offer is payable immediately the Claimant clears with the Respondent:-

a) Salary for April 1998 at Kshs. 26,734.

b) Salary for 7 days worked in May 1998 at Kshs. 7,002.

c) Wage arrears at Kshs. 45,092.

d) 23 days of annual leave at Kshs. 21,115.

Total.... Kshs. 73,209

Less tax Kshs. 19,090

9. The Respondent counter-claims the amount of USD 54,720, being the cost of cleaning up the contaminated cement. It is not indicated by the Respondent what this dollar amount would convert to in Kshs. at the time the cleaning up was done.

The Court Finds:-

10. There is no dispute on the employment history of the Claimant, and on the terms and conditions of employment. The significant dates in this history, and the rate of his monthly salary, are not disputed. It is common ground termination of Claimant's contract of employment, was at the initiative of the Respondent, after the Claimant had delivered cement to the wrong silo, leading to contamination of 100 truckloads of higher grade cement.

11. The Claimant was suspended on 14th April 1998. He was asked to give an explanation by the Respondent. He replied on 16th April 1998. He stated the vehicle he ordinarily drove, was on the material day at the garage. He found another vehicle already loaded with cement which he was made to believe, was to be discharged at English Point silo. It was after he had twice made deliveries subsequently at Mbaraki, that he was made aware the initial delivery was also, meant to be delivered at Mbaraki. The Respondent did not find the explanation satisfactory and wrote to the Claimant on 21st April 1998, dismissing him summarily.

12. The applicable substantive law at the time, as pointed out by the Respondent, was the repealed Employment Act, Cap 226 the Laws of Kenya. The provisions of the Employment Act 2007, cited by the Claimant in his Submissions, have no application at all, as they were not in place at the time. The Respondent would not be expected to bear the burden of substantive justification, and procedural fairness imposed on Employers under Section 41, 43 and 45, in a termination of employment process, which took place in 1998.

13. It has not been argued by the Claimant that there was a contract; a CBA; or workplace human resources manual, imposing on the Employer the burden of substantive justification, and procedural fairness at the time his contract was terminated. The letters asking the Claimant to give an explanation, and the letter of summary dismissal, do not mention any clause in any contract, CBA or human resources manual imposing such a burden on the Respondent.

14. The Claimant mentioned in his evidence before the High Court that he was a Member of the Chemical Workers' Union. He was represented at some pre- adjudication process, by the Union. He filed a copy of the CBA which applied in 1998. That CBA embraces termination law as then was, and does not have any specific requirement for an Employee to be heard before being summarily dismissed.

15. The Claimant did not pursue his Claim under the Trade Disputes Act Cap 234 the Laws of Kenya, notwithstanding his membership of, and representation by the Union. Had he had so, he may have accessed the remedy of 12 months' salary in compensation for unfair termination under Section 15 of the Trade Disputes Act, at the Industrial Court upon proof that he was unfairly dismissed. He opted to go before the Magistrate's Court, the High Court, before coming to the Industrial Court. The present Court cannot apply the Employment Act of today retrospectively as the Claimant appears to implore the Court to do.

16. Termination under the Employment Act, at the time, was at the will of the Employer. It could be made for good cause, bad cause, or no cause at all.

17. The Court is persuaded the Respondent was not legally or contractually under any obligation to justify termination.

18. Even had such obligation been shown to exist, the events leading to the contamination of Respondent's cement could largely, have been blamed on the Claimant. He was a long-serving Driver. He was aware of the process of loading and off-loading of cement at the different silos. He did not explain himself adequately in his response to the letter of suspension. He ought to have known the consequences of discharging the wrong brand of cement at the English Point silo. The old law had similar provision the current law, in requiring Employees to carry out their duties carefully, particularly if the nature of their jobs requires the exercise of care. The Claimant did not demonstrate a reasonable degree of care when he made delivery at English Point. He did not perform his duty properly, and carefully. He is not entitled to 12 months' salary in compensation for unfair termination as claimed.

19. He was dismissed for an act of gross misconduct. Clause 17 of the CBA he exhibited denies notice pay to an Employee whose contract is terminated for gross misconduct. The prayer for notice pay is rejected.

20. The prayer for gratuity is not rooted in any law or contractual clause. Clause 30 of the CBA provided for gratuity on normal retirement. The Claimant did not leave employment on normal retirement. There is no other clause providing for gratuity. The Court is not able to grant him the prayer for gratuity.

21. There is no material on record supporting the prayers for overtime pay and shift pay. There are no records authorizing overtime work. No details are given when the work was carried out, for how many hours, and the mode of computation of overtime is unstated. No details have been given of shift pay, or an attempt made to bring the prayer within the CBA. These items are declined.

22. Kilatya prays for salary for days worked in April 1998 at Kshs. 16,708. The Respondent has offered a salary of Kshs. 26,734 for April 1998, which is more than the Claimant, seeks and is even a higher monthly rate than pleaded by the Claimant. He has also been offered 7 days' salary for work allegedly carried in May 1998, even though termination was in April 1998. ***He is allowed the prayer for salary for days worked at a total of Kshs. 33,736 as offered by the Respondent in its Closing Submissions.***

23. The Respondent offered Kilatya 23 days of annual leave at Kshs. 21,115, while he claims annual leave for unclear number of days, at Kshs. 30,343. In the absence a clear number of days given by the Claimant, the Court adopts the days and amount of money stated by the Respondent, ***and allows the prayer for annual leave pay at Kshs. 21,115.***

24. The Respondent offered Kshs. 45,092 as wage arrears, which the Claimant has not claimed. What is offered to an Employee, by an Employer, is not to be taken away from the Employee by the Court. ***The Claimant is granted wage arrears at Kshs. 45,092.***

25. ***Certificate of Service shall be issued under clause 20 of the CBA.***

26. The Respondent relies on an internally generated estimate cost of cement contamination, in making is dollar counter-claim. The estimate is mere guesswork of Respondent's Chief Economist, in which the author makes certain startling statements such as " *other costs are not taken into account, but the figure could be worse if they are...*" The Respondent submits the dollar amount counter-claimed is the cost of cleaning the cement. The Chemist indicates this to be the cost of the cement contaminated. He concludes in convoluted language, " *it is important to note that to get to the actual impact in cost terms if properly valued could be easily more than twice this figure.*" The understanding of the Court is that there was no professional assessment of the actual damage and loss which could be attributed to the Claimant. The Chemist makes a guess, and then confirms no professional assessment had been made. This document in the view of the Court cannot be relied upon to extract USD 54,720 from the Claimant. The counter-claim has no support in evidence and is rejected.

27. ***In sum therefore the Court finds in favour of the Claimant for a total amount of Kshs. 99,943 made up of salary for days worked, annual leave pay and wage arrears.***

28. ***He is granted costs of the Claim.***

29. He prays for interest from the date of termination. The Court has in the past stated that terminal benefits must be paid as soon as practicable, before, during or after termination as the case may be. The Respondent states the Claimant will be paid as soon as he clears. There is no provision in the law or the contract governing the Parties which was brought to the attention of the Court, requiring the Claimant to clear, so as to be paid long outstanding terminal benefits. The Court was not told what the Claimant was to do, what he refused to do, so as to meet the clearance requirement. The letter of termination dated 21st April 1998 did not advise the Claimant to clear, and make it clear what the process entailed. The Court has seen nothing which would justify the withholding of an Employee's benefits, 21 years after termination. Parties have attempted settlement before coming to Court. Why did not the Respondent pay

the amount offered to the Claimant, to his Union, the Conciliator or even the Court? There is no justification in withholding of terminal benefits. The prayer for interest from the date of termination is allowed, at the rate of 14% from 21st April 1998.

IT IS ORDERED:-

- a) The Respondent shall pay to the Claimant a total sum of Kshs. 99,943 less PAYE tax.***
- b) Certificate of Service to issue.***
- c) Costs to the Claimant.***
- d) The Counter-Claim is rejected.***
- e) Interest granted at 14% per annum from 21st April 1998 until payment is made in full.***

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge