



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO 125 OF 2013**  
(FORMERLY NAIROBI CAUSE NO. 2006 OF 2012)

*(Before Hon. Lady Justice Maureen Onyango)*

**PAUL OOKO OKOTH.....APPLICANT**

**VERSUS**

**CHEMILIL SUGAR CO. LTD .....RESPONDENT**

**JUDGMENT**

By a memorandum of claim filed in court on 5th October, 2012 and amended on 2nd December, 2014 the Claimant alleges that he was unfairly dismissed by the Respondent and seeks the following remedies.

- a) Unconditional reinstatement of the Claimant to his job without any loss of benefits and he be treated in all aspect as if his respective employment had not been terminated upto date of determination of this claim, and payments of the arrears of salary so accruing from October 2009 till the date of the Award, at Kshs.18,383/= 47,472/= per month.
- b) A declaration that the Claimant's summary dismissal and termination of employment on 8/10/2009 was wrongful, unlawful and unfair and the Respondent be compelled to pay the Claimant the amounts claimed under paragraph 10 above, amounting to Kshs. 1,407,241.49/= Kshs. 2,478,505.20/=
- c) Cost of this suit plus interest at court rates.

The Respondent filed a reply to Memorandum of claim denying the allegations of the Claimant.

At the hearing the Claimant testified on his behalf while the Respondent called one witness Ms. Jacinta Kipkering its Human Resources Manager who testified on its behalf.

**Background**

The Claimant was employed by the Respondent on 3rd January, 1994 as a general worker. In 1997 the Claimant was promoted to the position of junior mason and rose in rank to the position of Mason Grade UG II at the time of dismissal. He was dismissed from employment on 8th October, 2009. At the time of dismissal his gross salary was Shs. 20242 per month.

**Claimant's case**

The Claimant testified that he was accused of holding a fake trade test certificate and was given a letter to take to someone in the Ministry of Labour Nairobi whom he did not find. He was later arrested and charged in court in Nyando Criminal Case No. 133 of 2008 but was acquitted. He was dismissed on 8th October, 2009. Before dismissal he was issued with a Show Cause letter which he responded to. He testified that no disciplinary hearing was conducted and the Respondent did not comply with its disciplinary procedure which required that he is suspended before dismissal.

According to the Claimant the reason for dismissal was the same as the Criminal charges for which he was acquitted. He denied holding a fake certificate and states he got the certificate after assessment. He also denied that he was promoted on grounds of the certificate and states the promotion was based on his good performance. He stated that the trade test certificate was never verified and he did not have any proof that the certificate was valid.

### **Respondent's case**

The Respondent's Human Resources Manager (RW1) testified that in 2009 issues arose of fake certificates and she was charged with the responsibility to verify them. She started with certificates from Directorate of Industrial Training (DIT) which issues trade test certificates. After investigations DIT informed her that out of 213 certificates submitted 84 were not authentic. The Claimant's certificate was among the 84. The certificate serial number 384277 presented by the Claimant belonged to a Mr. Bernard Kinyanjui and was for trade test CAJ Grade 3 done at Karai in 1993 while the certificate submitted by the Claimant bearing the same serial number was issued in 1995 for Trade test Grade II for Mason (Building). The certificate was withheld by DIT and the Claimant was sent to see Mr. Owiti or Mr. Ogenya of DIT for verification. The Respondent issued to him a letter dated 14th September, 2009 addressed to the two officers of DIT.

The Claimant was given one week to do the verification and report back but never did so. He was thereafter issued with a Show Cause letter to which he responded that he did not meet Mr. Ogenya. He was granted leave from beginning of September, 2009 to get the verification but by 29th September, 2009 he had not reported back. The Claimant was thereafter dismissed by letter dated 8th October, 2009. The letter of dismissal had 3 reasons, that he was holding an unauthentic certificate which he failed to authenticate after being given one week to do so, and dismissed for gross misconduct and loss of trust. The Respondent states that the dismissal was fair considering all the relevant factors.

### **Determination**

The issues for determination are whether the termination of the Claimant's employment was unfair and whether he is entitled to the remedies sought.

It was submitted for the Claimant by his Counsel Mr. D. Rakoro that the Respondent failed to comply with Section 43 (1) and 45 of the Employment Act rendering the dismissal unfair. Mr. Rakoro relied on the case of Mathew Kipchumba Koskei -vs- Baringo Teachers Sacco Cause No. 37 of 2013 at Nakuru in which the court set the general principles for disciplinary cases with a criminal element as follows;

a) *Where in the pinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.*

b) *If the employer decides not to conclude the administrative disciplinary case in such and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal*

process.

c) *If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.*

d) *To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon which terms as may be just pending the outcome of the criminal process.*

Mr. Rakoro also relied on the case of Nicholas Otinyu Miruka -vs- Equity Bank Ltd (2013] eKLR where the court held that ;

*"The employer must demonstrate reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to justify a summary dismissal. Mere suspicion is not enough; there must be reasonable and sufficient grounds. Otherwise if employers are allowed to hold mere suspicions, they would use these simple reasons to harass, intimidate and to harass their employees for no just cause."*

He submitted that following the acquittal of the claimant the allegations upon which he was dismissed were mere suspicions. Mr. Rakoro further relied on Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR, where the court stated that *"summary dismissal even in the face of a fundamental breach of the employment contract/obligations or gross misconduct must not be resorted to without complying with procedural fairness/natural justice."*

He submitted that an employer who dismisses an employee without a hearing will be falling foul of Section 41(2) of the Employment. Mr. Rakoro submitted that although the Claimant was issued a Show Cause letter for holding unauthentic certificate she was dismissed for gross misconduct and loss of trust without being involved in any investigations.

It was also submitted for the Claimant that the Respondent failed to comply with clause 9 of the CBA which provides for suspension as follows;

a) *Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period not exceeding 21 days whilst an inquiry is being carried out.*

b) *Depending on the circumstance, all suspension letters will be accompanied by show cause letter within seven days.*

c) *All suspension/Show cause letters shall be copied to the Union Branch Secretary and human Resources Manager within seven days. Where such letters may not be copied for whatever reasons as provided, the Union shall take up the matter in accordance with the grievance handling procedures.*

d) *No suspension period shall exceed 21 consecutive days, if exceeded the employee shall be reinstated where the Union and Management have both agreed that more time is required to complete the investigations or where the investigation is done by the police or the case is pending before a court of law, then the employee will continue to receive half pay.*

e) *If it is proved that the employee has committed an offence, he/she shall be dismissed or terminated as from the date of determination.*

f) *If the offence is does not warrant dismissal or termination of service, the employee shall be served with a written warning letter copied to the Union Branch Secretary.*

g) *If the offence is not proven the employee shall be reinstated in his/her job, with full pay and benefits from the date of suspension.*

It was submitted that the Claimant should have been suspended for the duration of the Criminal case from 3rd October 2009 to 26th July, 2010 but was wrongly dismissed on 8th October, 2009 while the case was pending in court.

The Claimant also relied on the case of John Kirui Torongoi -vs- National Cereals & Produce Board (2013) eKLR and Andrew Dulo -vs- Chemilil Sugar Company Ltd Kisumu I.C. 44/2013.

For the Respondent, Mr. Otieno submitted that it was the statutory burden of the Claimant to prove his case as provided in Section 47(5) of the Employment Act which states that ;

*" For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."*

The Respondent submitted that in spite of his acquittal the Claimant failed to prove that he held a valid trade test certificate .

It was submitted that the Claimant was given time off for one week to authenticate his certificate but failed to do so. He was issued with a show cause letter which he did no respond to and that his actions therefore amounted to gross misconduct and insubordination.

The Respondent relied on the case of Owaga V Trans Ocean (U) Ltd 1990 KLR where the court held that

*"an employer may exercise the power of summary dismissal without incurring legal liabilities if an employee has been guilty of conduct of a wilful nature which amounts to repudiation of the contract of service."*

The Respondent further relied on the Case of George Onyango Akuti V G4S Security Services Kenya Ltd [2013] eKLR and submitted that the Claimant was given an opportunity to be heard through the show cause letter. The Respondent submitted that it was entitled to dismiss the Claimant under Section 44(4) (e) of the Employment Act which provides that

*"an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;."*

It submitted that in the circumstances the dismissal of the Claimant was valid.

## **Determination**

The procedure through which an employee may be validly terminated or dismissed is now well settled in the numerous jurisprudence of this court as affirmed by several decisions of the Court of Appeal. There must be valid reason as provided in Section 43 of the Employment Act and the procedure must be fair as provided in Section 41 of the Act.

In the present case there was no compliance with Section 41. The reasons for termination though valid, were never proved through a fair hearing as the Claimant was never taken through any disciplinary process. He was arrested and arraigned in court in a Criminal case in which the employer was the Complainant and was dismissed two days after being arraigned in court for the very reasons that he was charged. The termination of his employment was therefore procedurally unfair. The Respondent failed to comply with even its own procedure as set out in the collective bargaining agreement.

### **Prayers**

The Claimant prayed for reinstatement. As provided in Section 49(4)(d) Employment Act reinstatement and even re-engagement, are only available in very exceptional circumstances. In this case the Claimant has not demonstrated the existence of any exceptional circumstances. The remedy of reinstatement is also available only within 3 years of termination of employment as provided in Section 12 of the Employment Act. The Claimant was terminated on 8th October, 2009 which is more than 3 years ago.

For these two reasons the remedy of reinstatement is not available to the Claimant. The Claimant further prayed for 3 months in lieu of notice, unpaid salary from October, 2009 to July, 2011 accrued leave of 63 days leave, travelling allowance for 15 years and maximum compensation.

According to Clause 10(d) of the CBA the Claimant is entitled to 3 months salary in lieu of notice. He is also entitled to any leave earned and not taken. He prayed for 63 days leave which the Respondent did not contest and I award him the same. He is not entitled to salary for the period after termination of employment from 8th October, 2009. The Claimant did not prove that he is entitled to leave travelling allowance and the claim is dismissed.

The Claimant is entitled to service gratuity at 25 days per year worked as provided in the CBA in the sum of **Shs 253,025**.

On compensation, I find that there is evidence that the Claimant's trade test certificate was not authentic and he failed to controvert the overwhelming evidence. I therefore find that there was valid reason to terminate his employment and only the procedure for doing so was not complied with. For this reason I award him only 6 months salary as compensation.

### **Conclusion**

In conclusion I declare the summary dismissal of the Claimant by the Respondent was unfair and I award the Claimant the following.

- (i) 3 months salary in lieu of notice .....Shs. 60,726
- (ii) 63 days annual leave .....shs.42,508.20
- (iii) Service gratuity (25 days per year  
for 15 years.....Shs. 253,025
- (iv) 6 months salary compensation.....Shs. 121,452

---

**Total      Shs.477,711.20**

=====

The Respondent shall also pay the Claimant's costs of this suit and interest from date of judgement.

**Dated, signed and delivered this 29th January, 2016**

**MAUREEN ONYANGO**

**JUDGE**