



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 70 OF 2013

JOSEPH ONGANGA MTULAH

CLAIMANT

v

OL KALOU DAIRY LTD

RESPONDENT

JUDGMENT

1. For determination are the questions, *whether the termination of the Claimant's employment on 17 February 2012 was fair and if so, appropriate remedies.*
2. The firm of B. W. Mathenge & Co. Advocates purported to file written submissions on behalf of the Claimant on 18 January 2016. The said firm is not on record and the Court suo moto expunges the said submissions from the record.
3. The Respondent's submissions were filed on 18 February 2016.
4. The Court has considered the pleadings, testimonies and Respondent's submissions.

Procedural fairness

5. The Respondent, through a letter dated 3 February 2012 summoned the Claimant to appear before its Board to answer to certain allegations which were set out in the letter.
6. The Claimant admitted that he received the summons to appear before the Board and that he appeared before the Board on 17 February 2012, but stated that he was not allowed to make representations.
7. The Respondent produced an extract of the minutes of a meeting held on 17 February 2012 and they indicate the Claimant was questioned.
8. A disciplinary hearing ought not to be a mini-court with the technical formalities of the courtroom and the Court is satisfied that the procedures adopted by the Respondent substantially met the basic statutory requirements as envisaged by section 41 of the Employment Act, 2007.

Substantive fairness

9. Sections 43, 45 and 47 of the Employment Act, 2007 have placed an onerous burden upon employers in disputes concerning the fairness of termination of an employee.
10. The Claimant was summoned to answer to allegations of *abuse of office of manager, occasioning massive losses; failure to disclose information to the Board; failure to effectively manage Respondent's human resource and moving away company properties without authority.*
11. The Respondent's first witness stated that investigations had established massive irregularities in that Claimant had hired *ghost farmers and contractors* but he did not disclose any details of these *ghost farmers and contractors.*
12. Apart from making brief reference to the massive irregularities, the witness did not even give particulars of any amounts of monies paid to these ghost farmers or contractors. He equally did not

- lead any evidence at all on the other allegations.
13. With the material placed before Court, the Court reaches the conclusion that the Respondent failed to discharge the burden placed on it by sections 43 and 45 of the Employment Act, 2007, on a balance of probabilities.
14. The termination of the Claimant's employment was thus substantively unfair.

Appropriate remedies

15. The Claimant filed a schedule of the heads of claim/dues he was seeking on 12 January 2015.
16. The Claimant testified that his letter of termination was accompanied by a cheque for Kshs 137,350/40.

Pay in lieu of notice

17. The Respondent's witness testimony that the dues paid to the Claimant included 3 months pay in lieu of notice was not challenged/controverted and therefore nothing turns on this head of relief.

Compensation

18. The Claimant served the Respondent for about 6 years and considering the length of service, the Court is of the view that the equivalent of 6 months gross wages would be fair.

Unpaid wages

19. The Claimant sought Kshs 40,000/- on account of unpaid salaries during the period he was on extended leave.
20. The Claimant went on leave in December 2011, and his employment was terminated on 17 February 2012.
21. The Respondent produced the pay slips for December 2011 and January 2012 and its witness' testimony that the same were paid through the Claimant's bank account was not challenged. Claimant also accepted receiving a cheque.
22. The pay slips indicate the pay point as Equity Bank Ltd and the Court finds on a balance of probabilities that the salaries were paid.

Conclusion and Orders

23. The Court finds and holds that though the termination of the Claimant's employment was procedurally fair, the Respondent failed to prove the reasons as valid and fair and therefore the termination was substantively unfair.
24. The Court awards and orders the Respondent to pay the Claimant

a. Compensation **Kshs 241,800/-**

25. Claimant is denied costs for having failed to file submissions through the Advocates on record.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu instructed by Simiyu & Co. Advocates

For Respondent Mr. Mbugua instructed by Ndegwa Wahome & Co. Advocates

Court Assistant

Nixon/ Mwangi S.