



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

2059 OF 2013

MARTIN BUNDI GITONGA.....CLAIMANT

VERSUS

DEL MONTE KENYA LIMITED.....RESPONDENT

JUDGEMENT

The issue in dispute is the unlawful and unfair termination of employment

1. The Claimant was employed by the Respondent and issued with appointment letter dated 19th July 1999 to commence work on 20th July 1999 as a Plant Mechanic in the workshop department. The Claimant was confirmed into this position on 5th November 1999. The Claimant served diligently and was promoted through the ranks and upon a performance appraisal.

2. After serving for 7 years in the Engineering department, the Claimant was transferred to the Engineering-Stores which fell under the Finance Department and the Claimant was made the Store Clerk. The Claimant was then promoted as Supervisor-Stores with effect from 1st April 2008 and then as Foreman-Stores from 1st January 2010.

3. The Respondent had internal policy documents to guide employees on allocated duties in the different departments. The internal control guidelines relating to inventory of stock were all documents and coded *infinium*. There was also the Stores Procedure Manual to guide employees in the department in terms of delineating responsibilities of the Store Foreman/Supervisor, Stores Clerk and Receiving Clerks. Under the manual the responsibility to reconcile data relating to stocks received and issued with a view of ensuring all daily stock inventory was correct was clearly set out;

(a) A storeroom requisition with a serial number was raised by user department and signed with specific quantity of required material;

(b) The requisition is physically presented by user to the store issuing clerk to issue the materials required;

(c) Storeroom requisition is prepared in 4 copies which bear 4 different colours – white, pink, yellow and blue;

(d) White and pink copies remain with the stores issuing clerk who passes the pink copy to the data entry clerk for data input into the electronic system;

(e) Data entry clerk based on the requisition produces daily inventory/check list of *raw materials*

inventory daily receipts and issues report for confirmation of the correctness of data captured;

(f) Stores issuing clerk retains the pink copy for confirmation of accuracy of data and for data reconciliation in the event of any anomaly and where such anomaly is noted this is raised with the supervisor for reversal in the system;

(g) An anomaly may be in the form of error of a credit of higher quantity of material than actually issued or captured in the system; and

(h) In the event the daily reconciliation process and the stores issuing clerk and the data entry clerk fail to note any anomaly in the inventory and daily update report, this is noted in the monthly usage reported generate by different departments on the correctness of data.

4. That any error in the system of capturing data cannot be corrected unless and until any anomalies requiring correction are detected and communicated during daily reconciliation by the stores issuing clerk and the data entry clerk or the user departments upon receipt of the monthly inventory usage reports.

5. On 4th February 2013, the Claimant and his then immediate supervisor, Stores Senior Department head informed him that there was a complaint from the production Manager to the effect that the inventory records for sugar usage from the cannery during the month of January 2013 had been overstated. A comparison of the records confirmed an overstatement of sugar usage by 5,000kgs. As a result of this anomaly, the Claimant asked the supervisor in charge of production materials and distribution to carry out a physical count of the sugar in the stores at the time which count confirmed that there was a variance between the physical stock and that was reflected in the inventory records to the extent that the physical stock was more than what was captured in the inventory record. So as to understand the cause of the variance, the Claimant did a thorough examination of the system sugar usage for the month in issue which led to the discovery of the fact that 2 storeroom requisitions serial numbered 888855 and 888858 for 50kgs of caustic soda and 4 bearings had erroneously been keyed into the system by the data entry clerk as 3,000kgs and 2,000kgs of sugar respectively.

6. That the result of this initial investigation and examination with regard to the variances were communicated to the Respondent Finance Director on 6th February 2013 and who then directed Internal Audit manager, Peter Karanja to carry out an investigation with a view to ascertain any failure in internal controls system and which may have led to the variance. All documents held in the audit were forwarded to Mr Karanja by the stores department.

7. Before the audit was complete, the Respondent set up an investigation panel on 8th February 2013 forming the Human Resource manager, Security manager, Legal Officer and the Finance manager. They summoned and interrogated the store supervisor in charge of production materials and distribution, Molly Kagu, the data entry clerk, Jane Wangechi, the stores issuing clerk, Catherine Mbiya and the claimant.

8. On 13th February 2013 the Claimant was issued with a letter of show cause as to why he should not be disciplined for failure to take corrective action for the variance of sugar. The Claimant submitted his responses noting that he could not note the variances until these were brought to his attention on 4th February 2013 and thus he could not have initiated any corrective measures before then. Similar show cause letters were issued to the Stores Supervisor, Molly Kagu and the Data Entry Clerk, Jane Wangechi in relation to the same variances in sugar inventories but no action was taken against Catherine Mbiya the Stores Issuing Clerk.

9. On 14th February 2013 the Claimant was called to the disciplinary hearing where he faced a panel of Respondent senior officers. The Claimant maintained his defence as per his written submissions. On 15th February 2013 the Claimant was issued with termination letter. Similar action was taken against the Stores supervisor and Data Entry clerk.

10. That the termination of employment was unfair, unprocedural and unlawful and manifestly contrived

and preconceived outcome on the reasons that;

- (a) There was no prior notice of the disciplinary hearing and the Claimant was not allowed the benefit of section 41 of the Employment Act so as to bring a representative of his choice;
- (b) The show cause letter did not indicate the contemplated termination of employment;
- (c) There was no offence of misconduct in the show cause;
- (d) The Respondent failed to note that the Data Entry Clerk had admitted that the cause of the noted variance was due to her action of keying into the inventory system the wrong particulars in respect of storeroom requisition serial numbers 888855 and 888858;
- (e) The Respondent ignored the fact that the Stores Supervisor in charge of production materials and distribution had admitted that she became aware of the variances in January 2013;
- (f) The Respondent failed to take into account that organisation of its stores department had 4 sections – Engineering Stores; Production materials and distribution, Fertiliser and Chemicals; and Fertiliser and Chemicals – all reporting to the Stores Senior Department head and only in his absence to the foreman and therefore knowledge of any variances would not come to the claimant;
- (g) The Respondent failed to take into account that he only became aware of the variance in sugar inventory from January records on 4th February 2013 and could therefore not be possible to take corrective measures;
- (h) That the Stores Issuing Clerks whose duty was to reconcile the daily inventory updates reports had failed to detect the anomaly in relation to the two storeroom requisitions with regard to serial numbers 888855 and 888858 and which were duly corrected;
- (i) That the Claimant caused to be retrieved the records subject of the anomalies on 5th February 2013 which the Stores Issuing Clerk had failed to note in the reconciliation process as was required;
- (j) The failure to take action against the Stores issuing Clerk was an indication of premeditated outcome of the disciplinary process;
- (k) The internal audit was not allowed to complete its investigations into the matter before the Respondent took disciplinary action against the claimant; and
- (l) The Respondent deliberately failed to take into account that the noted variances could have been corrected by issuance of appropriate stores credit notes as was practice as no loss of materials took place as reflected in the physical stock check.

11. The claim is also that at the time of termination, the Claimant was earning a gross salary of Kshs.88,077.00 per month. Despite the Respondent offering to pay terminal dues in line with applicable collective bargaining agreement, such has not been paid to date. The Claimant is seeking;

- (a) *Salary due for 15 days worked in February 2013 at Kshs.44,038.00;*
- (b) *Accrued leave of 15.48 days Kshs.45,447.70;*
- (c) *3 months' pay in lieu of notice Kshs.264,231.00;*
- (d) *Frozen service dues Kshs.50,496.99;*
- (e) *12 months compensation at kshs.1,056,924.00*

12. The Claimant also testified in support of his case. That upon employment by the Respondent he was promoted through the ranks, he was appraised and issued with specific duties in his area of specialisation and had a manual to further set details in each area of work. In requisition for any item required in production, the user had to give details and this would be processed through the departments and a daily record kept that was reconciled each end of day, each store kept a record and overall all stores and department had a monthly report. That where the daily data records were not able to identify any anomaly, his would come out in the monthly report when the overall data record in the system was reconciled. Due to the high movement of goods there would be lapses in terms of quantities noted when entering data and this would be traced from the source and the error or anomaly would be traced to the person who made the error.

13. In February 2013 when the Finance Manager asked the Claimant as to why sugar had been overstated by 5,000kgs, the Claimant went back to all the stages in requisition and data records and traced the problem to records of the Issuing Store Clerk in receipts numbers 888855 and 888858 which had been erroneously recorded. The finance manager directed for an audit to be undertaken and before this could be completed the Claimant was issued with a show cause letter and then he was invited to a disciplinary hearing and immediately thereafter he was terminated. That the termination was effected despite the fact that the error had been traced to the records of the Issuing Store Clerk, Catherine Mbiya who admitted to have made the error and hence the variances in sugar. That once the audit investigations had commenced, the Claimant had to stop his investigations and forward all the store records with the data. Such audit report and investigations were never shared with him before the disciplinary hearing and termination.

14. The Claimant also testified that in his termination letter he was accused of causing sugar variances and inaccurate date capturing and that he failed to take appropriate corrective action and lack of accountability in ensuring store updates reports were checked and reconciled for accurate and reliable data. That there was no physical loss and only data had an error which should have been picked at the audit level. That the error had not come to the claimant's attention as no supervisor had reported the same. That the data clerk had apologised for the error and it must have been a set up from the Data Clerk to report the variance and the Claimant only saw the error document on 5th February 2013. Unless the issue was escalated to the claimant, he had no reason to doubt the data entries made by the Issuing Clerk. Had the Claimant been given time to reconcile all his records, he would have traced the error and the one responsible but in his case there was extra excitement about the error and the Finance manager was keen to see the matter prosecuted quickly and find the Claimant at fault.

15. The Claimant also testified that he had no prior knowledge of the sugar variance before the 5th of February 2013 as there was no report of such variance. At the disciplinary hearing he asked for evidence but none was made available to him. That he could not act without any knowledge of sugar variances and this only emerged from the statements of Data Record Clerk, Jane Wangechi and the statement of Store Supervisor, Molly Kagu. When this information was clarified it became apparent that the Data Entry Clerk accepted the mistake and the person who should have been held responsible for the error was the Issuing Clerk, Catherine Mbinya who was not terminated like the 3 others – the claimant, Jane Wangechi and Molly Kago.

16. The Claimant also testified that due to his termination by the Respondent he has suffered tremendously due to physiological torture and accusations made against him which were false. The Respondent acted in a selective manner and he was taken by his colleagues as having stolen sugar which was not the case. That the Claimant had a loan at the time and was unable to repay and this led to his being blacklisted by the bank and all this was due to the unfair termination of his employment by the respondent. His suffering cannot be reversed but he is seeking compensation for the unfair treatment.

17. On cross-examination, the Claimant testified that he had an earlier warning with regard to handling of a tractor and property of the Respondent but such warning was over a year old and the CBA required that such be cancelled. That he attended at the disciplinary hearing of Jane Wairimu who admitted to making a mistake in entering data. That the Claimant as the department supervisor was responsible over the work of Jane Wairimu but he did not have reason to doubt her work until the sugar variances arose. He was responsible for all stocks and none was missing as only the data records had an error by the Issuing Clerk,

Catherine Mbiya.

18. Reconciliations were done daily with respect to receipts. All entries were done as soon as was possible even though the timelines were not set but this could be done within the month. Data on goods received had to be done within 5 days after cut off – date of reconciliation – and reconciliation was the responsibility of the Engineering stores. The Claimant was the responsible employee in reconciling Engineering Stores. On 14th February 2013 Jane was accused of keying in data wrongly on 8th and 14th January 2013 but the Issuing Clerk should have been the first person to discover the error as she was below the Supervisor, Molly Kagu.

Defence

19. In defence, the Respondent admit they had employed the Claimant and was issued with letter of appointment and job description. The Claimant agreed to the terms and conditions of his employment. The Respondent did not breach the contract of employment. The Claimant failed in the performance of his duties as a Store Foreman in charge of his level or responsibility at the Stores and Warehouse. The Claimant was aware of the duty to ensure correct movement of the contents of the stores and the movement of properly and correctly documented.

20. The defence is also that the Claimant did not live to the legitimate expectations of his position with the Respondent and in particular with regard to improper documentation and or loss of the industrial sugar confirmed not only by the claimant's recklessness but constituted negligence and gross misconduct for which the Respondent had to take appropriate action against the claimant. the Respondent investigated the matter and established that sugar weighing 5,000kgs could be wrongly documented and not noticed; the investigations revealed that the Claimant was negligent in the performance of his duties; the claiomtn was notified of the outcome of the investigations and by way of show cause letter he was invited to a disciplinary hearing; and the Respondent made a decision to terminate the Claimant from his employment.

21. The Claimant was given a hearing and a chance to submit his representations and consideration the investigations and hearing, the Claimant had no satisfactory responses. The Claimant was lawfully dismissed in view of his misconduct. The claim should be dismissed with costs.

22. In evidence the Respondent called Bernard Kinanga, the Industrial Relations Officer. He testified that he is conversant with the claim. There was a disciplinary hearing where he attended and signed the minutes.

23. The disciplinary hearing was triggered by sugar variances in January 2013 noted at one store with inaccurate data entered into the data system. The stores were subdivided into 3 section depending on materials stored and the Claimant was responsible;

1st store for raw materials and packaging and runs 24 hours;

2nd store for Engineering stores in 4 blocks;

3rd is Bulk Stores for agricultural materials with different sub-stores.

24. In the Raw and packaging stores for materials distribution a variance was noted in sugar requisition. The Respondent did an investigation and it was noted there were storeroom records note noted property. The requisition was meant for sugar but a different item was sourced instead.

25. That a store room request is done by a user including sugar and once an item is issued, it is supposed to be requested and recorded and noted at the store. The Respondent ended having more sugar than the system could show. This meant that a decision could have been made to purchase sugar despite having sufficient sugar in the stores due to the error. It was also possible that even if difference was drawn the

excess could have been drawn out of the company which could not have been noted. The excess sugar could have been ferried outside for other purposes.

26. That these variance were found to involve several employees;

- The issuing clerk who was to check stocks and in this case, Catherine Mbiya is the one who issued;
- Supervisor who received all data once all entries were made and the one responsible was Molly Wangui, the Data Entry Clerk;
- Jane Wairimu, who recorded all data and was reporting to the claimant

27. Disciplinary action was taken against these employees. Jane Wairimu in her statement was apologetic for the mistake done and together with Molly were terminated for their mistake. The Claimant was also issued with a show cause letter and he responded. The responsible employee for data entry was Jane Wairimu and she was reporting to the Claimant as the Engineering supervisor. A sugar variance at the Respondent is as important as there was a history where a full container disappeared. This led to severe disciplinary action to the responsible staff at stores. The approximate value of the sugar is 40 million shillings.

28. The Claimant does not deny there was a sugar variance and that Jane Wairimu was reporting to him. The Claimant was therefore terminated having been the overall responsible person.

29. The Claimant was required to clear with the Respondent so as to be paid his terminal dues. He has not cleared. He is entitled to Provident fund and pension dues in accordance with RBA rules; frozen service when he was unionised; pro rata leave; days worked; and notice pay. The claim for compensation is not due as the Respondent followed due process and found the Claimant culpable and the termination was justified.

30. Mr Kinanga also testified that the Claimant was treated fairly and the Respondent relied on the applicable law. At the disciplinary hearing the Claimant had a right to call a witness of his choice but he chose to appear alone. Show cause was issued on 13th February 2014; the Claimant Respondent on 14th February 2013; and on the same day he was invited to attend disciplinary hearing and termination took effect on 15th February 2013. That the Claimant had sufficient time to call a witness and prepare for his defence. The option to waive his right not to call a witness was also lawful.

31. Mr Kinanga also testified that according to the *Stores Credit note* of 1st February 2013 it is noted that the sugar anomaly was done in January 2013 and was brought to the attention of the Claimant in February 2013. However the Respondent noted that due to wrong postings this led to a misrepresentation of items. He however does not know when the wrong entries were discovered. The human resource office learnt of the error in February 2013.

32. That the Claimant was terminated from his employment for not properly doing his job. He failed to take reconciliation in stores. The Claimant was supposed to ensure what was in the system, the physical count and records were in tally. Where the records/data did not tally, there was a corrective process and where there was a variance there was a corrective action.

Submissions

33. The Claimant submit that his termination was not justified, was unlawful and unfair. Section 45 of the Employment Act requires that before an employer effects a termination of employment, three must be procedural and substantive reasons pursuant to the provisions of section 43 of the Act. At the time of termination, the Respondent had no genuine reasons against the Claimant to warrant his termination. In **Bernard Dodo Mbaja versus Air Traffic Limited [2014] eKLR**; the Court held that section 43 of the Employment Act requires an employer to prove the reasons for termination of employment and where there is no proof, the termination is unfair. The reasons given to the Claimant for his termination were not true as he had acted in accordance with his duty and responsibility and did not fail to take account when

an anomaly was noted. The accusation that the Claimant had failed to take corrective measures in addressing variances in the sugar was not true as the Claimant commenced his investigations immediately the anomaly came to his attention and before he could complete he was directed to stop for the audit team to proceed with investigations.

34. The Claimant also submit that in **John Wanjala Wanyama versus Wanandegge Co-operative Savings Sacco and Credit Society [2016] eKLR**; the Court held that any termination of employment on the grounds of poor performance must take into account the provisions of section 41 of the Employment Act and the employer has a duty to give reasons upon which the alleged poor performance arise from. There must be a genuine reasons leading to the termination before an employer can take a summary action against the employee. That where an employee's performance is poor, the employer has a duty to systematically address such a challenge as held in **Kenneth Gichuru versus Board of Governors St. Teresa Girls Secondary School [2015] eKLR**.

35. That the Claimant was unfairly terminated and is entitled to compensation and remedies sought. That further the Claimant was subjected to discrimination against him by the Respondent and should be compensated as held in the case of **Hesbon Ngaruiya versus Equatorial Commercial Bank Limited [2013] eKLR**. Where the main culprit to the offence and error in sugar variances, Catherine Mbiya was well known to the respondent, the Claimant was terminated but she was retained which amounted to discrimination against the claimant. Compensation should be Kshs.500, 000.00.

36. The Respondent on their part submit that the principles of fair, lawful and justifiable termination of an employee by an employer is well settled and codified in the constitution under article 47 of the constitution, section 4 of the Fair Administrative Action Act, and 41 of the Employment Act; ILO Convention No.158 Article 4 and 7 and ILO Convention No.111 article 1. That in employment and labour relations, for an employer to pass the fairness test there must be both substantive and procedural fairness as held in **Walter Ogal Anuro versus TSC [2013] eKLR**.

37. Under section 41 of the Employment Act, the procedures to be followed before termination are set out. Such procedures are mandatory. This is supported by ILO Convention 158 that requires an employee to be given a hearing so as to defend himself. In this case the Claimant was issued with a show cause letter and also given a hearing during the disciplinary hearing. The procedures to be followed were set out in the case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR**.

38. In the case of **Alphonse Machanga Mwachanya versus Operation 680 Limited**; the Court held that the letter of termination must give reasons in a manner of conveying the decision reached upon a disciplinary hearing. There must be compliance with section 10, 12 and 41 of the Employment Act.

40. The Respondent also submit that the Claimant is not entitled to the reliefs sought save for;

- a) Pay for days worked until 15th February 2013;
- b) 45 days' pay in lieu of notice;
- c) Pro rata leave due;
- e) Frozen service dues; and
- f) Provident and pensions dues as per the RBA guidelines.

41. That the termination was justified and no compensation is due. The claim for damages on a case of discrimination has not been proved and this does not arise.

Determination

42. The Respondent admit that the Claimant is owed terminal dues on condition he takes the clearance

process with them. The Respondent in the termination letter offered to pay;

- (a) Pay for 15 days worked in February 2013;
- (b) 45 days' pay in lieu of notice;
- (c) Pro rata leave due;
- (d) Frozen service dues; and
- (e) Provident and pension dues per the RBA guidelines.

43. The above claims are part of the claim by the claimant. On the admission by the Respondent that such dues are owing, such shall be confirmed. However, notice pay is claimed at 3 months. On this basis, the letter of appointment requires a notice of one (1) month of payment in lieu thereof. The Respondent has offered notice pay at 45 days which surpasses the employment contract term. The rate offered by the Respondent shall be confirmed as set out above. save that, it is a good employment and labour practice for an employee to go through clearance with the employer as this is to ensure all parties have done the necessary due diligence with regard to the duties and functions. However such should not be stalled as to deny the Claimant his terminal dues. In terms of time lapse, the Claimant having made demand of his dues, the clearance process should not be used to frustrate his lawfully owing terminal dues. Such should be done without requiring the Claimant to go round the whole establishment of the Respondent so as to have his dues paid. In any event, where the Claimant was owing the Respondent in terms of holding any property, such was never set out in the defence. The Claimant should clear and not take more than half an hour at the Respondent premises for this purpose. To require the Claimant do more than clear with his particular office and supervisor would amount to an unfair labour practices.

44. Claimant was not advised to call his witness under section 41. Here are two employees of the respondent, the Claimant and Jane Wangechi – one denied any wrongdoing while the other admitted to committing an error and regretted the same. What then was the caustic link of this error with the claimant? fair labour relations requires that each employee be given a fair chance to give their defence and be treated equally and in a case where a case of misconduct has happened at the shop floor, each employee's defence must be put into account and not punish each employee for the offence of the other. With the admission of committing an error by one employee and this was put into writing, what then was the purpose of punishing the claimant?

45. On 13th February 2013, Jane Wangechi Wairimu in her statement and response to the show cause wrote;

On the said dates, I erroneously keyed the SRR's stated wrongly which were among a bunch of many more keyed on the same dates. This was by no means intentional.

I was in a state of emotional stress during this period and had requested my supervisor to allocate a duty whereby lesser concentration was needed which highly contributed to commission of error.

...

The issuing Clerks according to the stores procedure manual are charged with the responsibility of counterchecking using their pink copies of the document keyed in by myself. ...

46. Clearly this employee has admitted to the error and gone on to assign the reasons for the same. She further shift blame to the issuing Clerk who should have counterchecked her error using the pink copy but failed to do so.

47. Further to this, on 8th February 2013, when Molly Kagu wrote her statement she wrote;

It was last week when I was doing my daily chores that I came across the daily updates for empty cans, which Catherine Mbinya have [had] left behind for me indicating for me I check with the data clerk why SR No 888855 had been keyed twice and why SR No 888858 was not appearing on the update.

I took the two SR Numbers to Data Clerk – Jane which she requested me to get the white copies of the same of which I did, she checked and she realised that she had keyed 888855 twice instead of 888858 but the quantities were different. She commented on the pink SR “keyed as 888858”.

Pertaining SR 888585 [888858] which was reflecting as sugar and Mbinya had indicated as “SR not seen” she did not tell me about it, but after talking to my boss Martine Gitonga and Jones Aranda they said that could be that 888585 could have been 888858 where the data clerk could have interchanged the numbers since making the SR No. 888858 been keyed in twice.

48. On the statement by 888583 and 888585 Molly, it is apparent that at the point the error/anomaly in sugar had not been noted by the Claimant until when she realised the wrong data entry. She raised this by the issuing clerk, Catherine Mbinya who had noted the error first and left the documents with Molly for her attention so that she could follow up with the Data Clerk. It was only then that the entries were noted to have been entered in error by Jane Wangechi who has admitted to this fact and then the Claimant as the Foreman was notified.

49. The statement of the two employees, Molly and Jane further finds basis in the disciplinary proceedings conducted against the Claimant on 14th February 2016 where the Respondent recorded that;

... He was asked when he started this investigation – he said on 4/02/13. He called Molly for her to explain why she didn't [did not] give information on this anomalies earlier and she answered that she had alerted him but Gitonga [the claimant] said that this wasn't the case but its Gitonga who had inquired about the two SRs.

He further said that he found it unusual that on the SRs which had been keyed in twice she was able to make proper follow up but on the ones which had different stock items which she was aware of she didn't bring them up.

50. The issue before the disciplinary hearing was whether the Claimant was aware of the sugar variances and when this came to his attention he failed to take corrective measures. As such, from the statement of Jane and Molly, it is apparent that the error was committed by Jane, to which Catherine as the Issuing Clerk noted the error same, she left the subject documents for Molly to attend to and Molly took it up with the Claimant for his attention. The Claimant learnt of the error and anomalies on 4th February 2013 and immediately took it up with Molly, all records were retrieved and the error was indeed traced back to Jane.

51. Therefore, when the show cause notice was issued on 13th February 2013, the Claimant was seized of the matter and was addressing it. The Claimant was given 24 hours to respond to the show cause which he did on 14th February 2016.

52. In his response, the Claimant reiterates that he learnt of the error and anomaly on 4th February 2013 when he was summoned by Mr Ananda who informed him of a complaint about overstated sugar. The two seem to have addressed the issue as they traced the error in the SR numbers 888855 and 888858 which had wrong information, and had been misfiled. This was traced on 8th February 2013 by which date, the finance officer was aware of the ongoing and the Claimant was thus summoned by this officer and present were the Human resource manager, security manager and the legal officer. Obviously the matter had been escalated to these senior officers even before the Claimant could address the source of the error at his level based on what Mr Ananda had shared with him. This is the same panel that was to seat at the disciplinary hearing against the claimant. This was the same panel that had required the Claimant to explain the source of the error and overstated sugars even before a show cause letter was

issued to him? Was the Claimant going to get a fair administrative hearing at the hands of these officers?

53. The Court has held that internal disciplinary proceedings need not be similar to Court proceeding where a case must be held and proved beyond reasonable doubt. The employer should have a chance to hear the employee in a fair manner and establish the truth. However, such a process of hearing the employee should not be eschewed from the onset to find the employee at fault at whatever cost. This is to put in motion procedures that abide by the book but all meant to be a sham.

Fredrick Owegi versus CFC Life Assurance, Cause No.1001 of 2012 the Court held;

...where there is procedural unfairness the substantive issue faced by the employee is muzzled in the process. Where there was an opportunity to address the core concerns that an employee may have, once due process is not applied the possible outcome is already eschewed against such an employee. ...

54. This was reiterated in the case of **Elias Maina Karumi versus Kenya Pipeline Company limited, Cause No.914 of 2016**. The employee must be given a fair chance to argue his case at the shop floor. To have a pre-emptive investigation so as to find the employee at fault is an unfair labour practice. In **Joseph Onyango Asere versus Brookside Dairy limited, Cause No.1204 of 2014** the Court held;

... indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably give a hearing to be able to give his defence.

55. In this case, by the 8th of February 2013 when the finance manager called the Claimant to his office to explain how the error and anomaly in sugar arose, the matter had already been escalated to this office and an audit commenced. Was this audit report ever shared with the claimant? was the investigations that the Claimant did and with the knowledge of his supervisor Mr Ananda taken into account at the disciplinary hearing on 14th February where the same officers interrogating the Claimant on 8th February were present?

56. I find the procedures adopted by the Respondent in dealing with the claimant's case are not what is envisaged under section 45 of the Employment Act. The reason(s) for termination at the time of effecting the same must be valid and be fair. Fair procedure is the cornerstone of fair labour relations in employment as set out under section 45(2) which provides that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

57. Further, fair procedure requires that where an employee is faced with a disciplinary matter that is likely to cause the termination of his employment, at the hearing, such an employee should be assured of his right(s) under section 41 of the Employment Act. The safeguards under section 41 of the Act are mandatory as with such security an employer cannot claim to have been denied a fair chance to argue his case in the presence of his witness and that he was not given sufficient time and facilities to argue his case. Section 41 provides that;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

58. The Respondent defence is that the Claimant was informed of his right to call his witness but opted to attend alone. That this was missed out in the minutes of the disciplinary hearing. However, in the invitation calling the Claimant to the disciplinary hearing on 14th February 2013, the notice is precise. The Claimant was advised to bring another employee of his choice. However, I take note of the time allocated in these events as follows;

- On 4th February 2013, the error in overstated sugar was brought to the attention of the claimant;
- The Claimant commenced his investigations with Molly and Jane;
- On 8th his supervisor called him about the matter and both commenced investigations;
- On 8th the finance manager called the Claimant about the errors and an interrogation was done by human resource manager, his supervisor, security manager and legal officer;
- On 13th the Claimant was issued with show cause notice to Respondent in 24 hours;
- On 13th February 2013, the Claimant was invited to a disciplinary hearing for the next day at 3.50pm – by this time the Claimant had not submitted his show cause notice responses as directed as this was submitted on 14th February 2013.
- On 14th the Claimant replied at length and submitted the same to the human resource manager;
- On 14th the Claimant attended disciplinary hearing;
- On 15th the Claimant was terminated from his employment.

59. I take it when the matter was escalated to the finance director, an audit commenced and the Claimant was issued with a show cause notice, and even before he could submit his response he had been invited to a disciplinary hearing. The ground was already hostile. To get a fellow employee to attend and ensure the Claimant enjoyed his right under section 41 of the Employment Act would have been wishful thinking. The other employees involved in the same transaction and subject of the disciplinary case were Molly and Jane who had already received show cause notice and were similarly dismissed on equal date. The time limits given to the claimant to attend and prepare his defence were eschewed against him. The above findings aside, when the claimant was before the disciplinary committee, his rights under section 41 of the Employment Act were not secured. An employee should not be taken through the motions of the law and procedures set out under section 41 of the Act for the sake of it and so as to satisfy such motions. There should be a purposive approach towards addressing any misconduct at the work place and an effort shown that the employer is keen to address it. Procedures under section 41 of the Employment Act should not be a sham. Such is to negate fair labour relations.

60. I find no justification for the termination of the claimant. In any event where the Claimant was the overall responsible officer and he failed to note the error and or anomaly in the sugar variances in good time, when this was brought to his attention he immediately went into the matter and discovered where the error was. The Claimant was able to trace back the procedures and traced the problematic vouchers raised by the Issuing Clerk. I take it that this is the very purpose of the policy manuals and various procedures in the stores in stock taking, stock recording and accounting. That every step is supported by documentation and where there is a lapse, such can be traced back to get the offending document and its author. To have a blanket sanction for all the employees in the stores department and particularly the Claimant was an unfair practice.

61. Where the Claimant took long to detect what was in his line of duty to detect and address, the sanction of a termination I find to be too harsh in this case, a lesser sanction of a warning, caution, or other sanction save for the summary action of a termination would have been appropriate. A termination is so instant and terminal and the obvious psychological trauma is obvious to the person of the claimant. It was taken that he had stolen, his work colleagues could not understand how an employee who had served diligently over a long period of time could suddenly compromise his work duty so carelessly as to make him lose his employment. A lesser penalty of a stern warning would have been sufficient.

62. The Claimant in his submissions raised the issue of discrimination against him by the respondent. It is imperative that such a serious allegation should be specifically pleaded to enable the other party address it

in the defence and not wait until the submission stage to raise such a serious concern. Indeed discrimination at the work place is a matter that is specifically prohibited under the constitution and under the Employment Act. The matter is taken very seriously by the Court as when such an allegation is made, and there is a finding to this effect, the Court must ensure that this is addressed firmly and with authority as to encourage discrimination against any employee is to erode the very essence of fair labour and employment relations. However, each party must be given a fair chance to argue their case and this cannot be brought up in the written submissions after the parties have closed their cases.

63. To address the averments made in submissions at this stage would be to prejudice the Respondent and shift focus from matters pleaded and defence filed. As such, I will not make any finding in this regard.

Remedies

64. On the admitted dues of;

- 1) Pay for days worked until 15th February 2013; the claim for Kshs.44, 038.00 is confirmed.
- 2) 45 days' pay in lieu of notice; the claim for Kshs.264, 231.00 is confirmed.
- 3) Pro rata leave due; the claim of Kshs.45, 447.70 is confirmed.
- 4) Frozen service dues; the claim for Kshs.50, 496.99 is confirmed.
- 5) The claim under Provident and pensions dues is due save that noting the finding that the termination of the Claimant was unfair, the same shall be paid in that regard and as per the RBA guidelines applicable to Respondent employee and the pension management regulations.

65. For the unfair labour practice, the Claimant is entitled to compensation. However, I note the work record of the Claimant is chequered with caution and warning letters and even where such matters have been resolved or lapsed due to the applicable CBA, section 45(5) (f) requires that the Court should take into account such previous conduct in assessing and determination the culpability and remedy due in a case of unfair termination. Putting the past record into account in this case, compensations shall be awarded at 10 months gross pay. This amounts to Kshs. 880,770.00.

In conclusion, Judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a) A declaration that the Claimant was unfairly terminated from his employment with the respondents;**
- b) Compensation awarded at kshs.880,770.00;**
- c) Salary due for 15 days worked in February 2013 at Kshs.44,038.00;**
- d) Accrued leave of 15.48 days Kshs.45,447.70;**
- e) 3 months' pay in lieu of notice Kshs.264,231.00;**
- f) Frozen service dues Kshs.50,496.99; and**
- g) Costs of the suit.**

Delivered in open Court at Nairobi this 25th day of November 2016.

M. MBARU

JUDGE

In the presence of:

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