



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 259 OF 2014**

**BENSON OKAALO OKALONGO**

**1<sup>ST</sup> CLAIMANT**

**JACOB OMANYO WASHUMA**

**2<sup>ND</sup> CLAIMANT**

**v**

**UNGA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Between 28 October 2013 and 29 October 2013, about 250 bags of flour disappeared from the Respondent's Eldoret depot.
2. The Respondent blamed the Claimants and both of them had their employment summarily terminated on 5 December 2013, after a disciplinary hearing on 19 November 2013.
3. The Claimants were aggrieved and on 30 June 2014, they launched a joint Memorandum of Claim alleging that the dismissals were procedurally and substantively unfair.
4. An amended Memorandum of Claim was filed on 5 November 2014 and this prompted the Respondent to file an amended Response on 25 November 2014.
5. The Cause was heard on 29 June 2015, 3 February 2016 and 10 October 2016. The Claimants filed their submissions on 24 October 2016, while the Respondent filed its submissions on 2 November 2016.
6. The Claimants identified 4 issues for determination in the submissions while the Respondent identified 5 issues.
7. The Court has given due consideration to the pleadings, evidence and submissions and collapsed the issues for determination into 2, to wit, *whether the summary dismissals were unfair and appropriate remedies.*

**Whether dismissals were unfair**

**Procedural fairness**

8. Both Claimants were suspended through letters dated 5 November 2013 to pave way for investigations. The letters informed the Claimants of the allegations under investigations.
9. On 19 November 2013, both Claimants were invited to a disciplinary hearing and the invitation letters

also set out the allegations.

10. The Claimants attended separate hearings on the same day with colleagues of their choice(s), after which they were informed of the dismissals.

11. Although the Claimants pleaded that they were not afforded opportunity to make representations before the dismissals, the Court is satisfied that the Respondent complied with the requirements of section 41 of the Employment Act, 2007 in that they were alerted as to the allegations to confront after which they were invited to attend a face to face hearing in which they had colleagues present.

### **Substantive fairness**

12. The Claimants disputed the Respondent's contention that 250 bags of flour disappeared.

13. The Respondent's Production Manager who testified on its behalf testified that a stock take on 31 October 2013 established a variance of 250 bags of flour in the system and the warehouse, and that investigations established that a truck KBH 976L though weighed by the 1<sup>st</sup> Claimant on 28 October 2013 did not offload the flour it was carrying. It left and returned the next day.

14. She also testified that the 1<sup>st</sup> Claimant failed to take the weight of the truck on 29 October 2013, when it returned for offloading.

15. The witness further told the Court that various requisite records prepared by the Claimants including tally sheets had also been tampered with or not kept.

16. Although the Respondent caused the Claimants to go through lie detector tests which they failed, in certain respects, (results were not produced or proved in Court), it has baffled the Court how a truck with 250 bags of flour could enter and leave with such a huge amount of cargo without the security personnel at the gates noticing.

17. The Respondent's witness was content with barely disclosing security procedures at the gates, and that failure in the view of the Court is telling.

18. The Claimants were middle or lower tier employees, and it is surprising how they could carry out such a feat of stealing 250 bags of flour without being detected by the outsourced guards.

19. The Court was told that investigations were carried out, but the outcome was not disclosed nor the investigations report filed or brought to the attention of the Court.

20. The person who carried out investigations was not called to testify in Court, nor was the failure to call him explained. The Court would give the benefit of doubt to the Claimants.

21. Under sections 43 and 45 of the Employment Act, 2007, it is the duty of the employer to prove the reasons for dismissal and that the reasons are valid and fair.

22. In the case at hand, the Court finds that the Respondent has failed to discharge the burden, and therefore the dismissals were substantively unfair.

### **Appropriate remedies**

#### ***Pay in lieu of notice***

23. With the conclusion reached on fairness of the dismissals, the Court finds each Claimant is entitled to 1 months' pay in lieu of notice (1<sup>st</sup> Claimant was earning Kshs 29,472/- at time of dismissal while 2<sup>nd</sup> Claimant was earning Kshs 17,708/-).

### ***Pending wages***

24. The Claimants are entitled to wages up to date of dismissals on 5 November 2013. The Respondent did not dispute the amounts set out in the Amended Memorandum of Claim.

### ***Outstanding leave***

25. The Claimants did not lay an evidential basis for any outstanding leave despite outlining the amounts in the Memorandum of Claim.

29. The dismissal letters indicated pending leave days which the Respondent did not compute and Court adopts computations by the Claimants.

### ***Off days***

27. No evidence was led in respect of off days.

### ***Terminal benefits***

28. Again, no evidential, contractual or legal foundation for this relief was led.

### ***Unpaid house allowance***

29. The Claimants were on consolidated wages according to the contracts of employment, and therefore cannot claim house allowance.

### ***Unpaid leave travelling allowance***

30. No evidential, contractual or legal basis was led for this benefit.

### ***Compensation***

31. The 1<sup>st</sup> Claimant served for about 4 years, and considering the length of service, the Court is of the view that the equivalent of 5 months wages would be fair.

32. The 2<sup>nd</sup> Claimant served for about 5 months, and in the view of the Court, the equivalent of 1 month's wages as compensation would be fair.

### ***Certificate of Service***

33. This is a statutory right and the Respondent should issue the same to each Claimant within 14 days.

### ***Conclusion and Orders***

34. The Court finds and holds that the summary dismissals of the Claimants were substantively unfair and awards them

#### ***1<sup>st</sup> Claimant***

- |                           |               |
|---------------------------|---------------|
| (a) Pay in lieu of notice | Kshs 29,472/- |
| (b) Pending Wages         | Kshs 32,419/- |
| (c) Outstanding leave     | Kshs 32,419/- |

(d) Compensation                      Kshs 147,360/-

**TOTAL                                      Kshs 241,670/-**

**2<sup>nd</sup> Claimant**

(a) Pay in lieu of notice              Kshs 17,708/-

(b) Pending wages                      Kshs 2,951/-

(c) Outstanding leave                 Kshs 16,527/-

(d) Compensation                      Kshs 17,708/-

**TOTAL                                      Kshs 54,894/-**

35. Claimants to have costs.

**Delivered, dated and signed in Nakuru on this 18<sup>th</sup> day of November 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants`                              Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates

For Respondent                              Mrs. Omwenyo instructed by Omwenyo & Co. Advocates

Court Assistant                              Nixon/Daisy