



**REPUBLIC OF KENYA**

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

**CAUSE NO. 237 OF 2013**

**WILLIAM EKAMAIS EWOI**

**1<sup>st</sup> CLAIMANT**

**JULIUS OUMA AGWUYA**

**2<sup>nd</sup> CLAIMANT**

**v**

**VEGPRO KENYA LTD**

**RESPONDENT**

**JUDGMENT**

1. William Ekamais Ewoi (1<sup>st</sup> Claimant) was employed by Vegpro Kenya Ltd on 9 February 2010 as a storekeeper. On 26 July 2010, he was confirmed.
2. Julius Ouma Agwuya (2<sup>nd</sup> Claimant) was confirmed by the Respondent as a storekeeper, Kongoni River Farm-Gorge Division, through a letter dated 27 December 2011.
3. On 21 February 2012, the Respondent summarily dismissed the Claimants through letters of even date. The reasons given for both dismissals were systematic fraud in the stores leading to loss of materials of huge financial value.
4. The letters also informed the Claimants that an audit had revealed deliberate irregularities and attempts to distort records with an intention of misleading its management.
5. Before the dismissals, the Claimants and a third person had been arraigned before the Naivasha Magistrates Court charged with stealing by servant contrary to section 281 of the Penal Code.
6. The Claimants were acquitted of the charges on 21 May 2013 under section 210 of the Criminal Procedure Code.
7. On 25 July 2013, the Claimants jointly commenced legal proceedings alleging unfair termination of employment and seeking various reliefs.
8. The Respondent filed a Response and Documents on 20 August 2013. It filed witness statements on 27 November 2013 and further Documents on 3 November 2014.
9. The Cause was heard on 20 January 2015 and 12 March 2015. Both the Claimants testified while the Respondent called 3 witnesses.
10. On 31 March 2015, the firm of Kamwaro & Co. Advocates filed a Notice of Change of Advocate to come on record for the Claimants. Together with the Notice were the Claimants submissions.
11. The Respondent had on its part filed its submissions earlier, on 16 March 2015.
12. From the pleadings, evidence and submissions, the Court has identified the issues for determination as, *whether the dismissals were fair and appropriate remedies.*

**Whether dismissals were fair**

***Procedural fairness***

13. The Claimants contended in the pleadings that they were not granted a fair hearing and that due process was not followed. They also contended that the Respondent did not comply with the rules of natural justice and that their defences were not considered by the Respondent.
14. In testimony, the 1<sup>st</sup> Claimant stated that before the dismissal, he was not afforded an opportunity to be heard. Prior to the dismissal, the 1<sup>st</sup> Claimant stated that he was on leave and was summoned back to participate in a stock take in December 2011.
15. He also stated that when he resumed duty in January 2012, he was instructed to return home because investigations were being carried out and he was later arrested by the Police on 17 February 2012 and charged but was acquitted.
16. The 2<sup>nd</sup> Claimant also stated that he was not afforded an opportunity to be heard before decision to dismiss was taken. He stated he did not appear before the Human Resources officer for a disciplinary hearing. He also stated that he was arrested on 17 February 2012 and was released on bond after a month.
17. The Respondent's first witness was its General Manager, Henry Mark Milbank. He stated that a surprise audit was carried out in January 2012 and DAP fertiliser was established to be missing. Further audit revealed discrepancies of over 100,000 kgs of fertiliser worth over Kshs 3,800,000/- missing, and that the Claimants were involved.
18. As a result, the Claimants were suspended on 28 January 2012 to enable investigations and that they were asked to give explanations. He stated he had 2 separate meetings with the Claimants to get to the bottom of the matter but no minutes were kept.
19. The witness further stated that the Human Resources office issued show cause letters to the Claimants and the Claimants responded to the show cause notices. He contended that the copies of the letters got lost.
20. The Respondent's second witness conducted an audit covering the period 30 January 2012 to 3 March 2012. He recommended further investigations. This witness did not disclose whether he interviewed the Claimants.
21. The Respondent's last witness was its Head of Legal Services, Musa Juma. He stated that he received a report of the loss of fertiliser from the General Manager, and he advised that further investigations be carried out.
22. He also stated that the Claimants were heard before they were dismissed but the records including show cause notices were plucked from the Claimants files.
23. Under section 41 of the Employment Act, 2007, a dismissal would be unfair if a fair procedure is not followed. The employee is entitled to be informed of the allegations in a language he understands. The employee is also entitled to make representations in response to the allegations. The employee may have the assistance of a colleague or union representative.
24. Procedural fairness within the context of section 41 of the Employment Act, 2007 does not require an employer to conduct a mini-court, unless the contract provides for a more rigorous process. The process can be through correspondence or take a face to face form.
25. Where the process takes a face to face form, a prudent employer is well advised to keep notes or minutes.
26. The Respondent in the present case contends that show cause letters were issued and the Claimants responded in writing. However, the correspondence could not be produced, allegedly because they were plucked from the Claimants files.
27. Assuming that the records were removed from the files, the Respondent should have known who notified the Claimants of the allegations to confront. The identity of this person was not disclosed. The Respondent's General Manager was content with stating that the Claimants were issued with show cause letters and that it was the Farm HR who gave out the show cause letters.
28. With the identity/name of the Human Resource officer who gave the show cause letters not disclosed and the said officer not presented in Court to give evidence, and further because no explanation was tendered as to why the officer could not attend Court, the Court is unable to accept that the Respondent followed a fair procedure before taking the decision to dismiss the Claimants.
29. This Court has previously referred to the threshold that an employer who has no records of disciplinary proceedings should meet to demonstrate it followed a fair procedure (see *Peter Onyango Nyabongo v Citadelle Security Ltd* (2015) eKLR, *Keziah Nduta Kiema & Ors v Lion Niru Shah, Lions School Management Board* (2014) eKLR).

30. The Respondent, in its submissions advanced a case that it was not reasonable to conduct a parallel hearing because of the police investigations and reference was made to ILO Convention no. 158 of 1982. It was further submitted that the right to a hearing before dismissal is not absolute and that any hearing would have been an exercise in futility.
31. In my view, the position advanced by the Respondent flies in the face of the express provisions of the statutory framework regarding the right to a hearing in Kenya.
32. The Court is enjoined to consider primarily the statutory framework obtaining in Kenya before taking recourse to the ILO conventions or international treaties.
33. The statutory framework in Kenya (section 41 of the Employment Act, 2007) is that a hearing is mandatory if the employer intends to terminate the employment of an employee on the grounds of *misconduct, poor performance or physical incapacity*. The Claimants dismissal herein was because of alleged theft and hence misconduct.
34. The right to a hearing in such case is a legal requirement.
35. Further, the Court is not convinced that the audit or any meetings held between the Claimants and the Respondent's General Manager met the test of a hearing as contemplated by section 41 of the Employment Act, 2007. Such meetings must have been to establish the facts upon which to take disciplinary action against the Claimants.
36. The Court therefore reaches the conclusion that the dismissal of the Claimants was procedurally unfair.
37. With the conclusion, it is not necessary to discuss whether the Respondent has proved the reasons for the dismissals (section 43 of the Employment Act, 2007) or that the reasons are fair and valid (section 45 of the Act).

### **Appropriate remedies**

#### ***Gross pay for 15 months***

38. Both Claimants sought Kshs 367,500/- being the wages they would have earned during the pendency of the criminal trial before the Magistrates Court.
39. And to support this head of claim, the Claimants sought to rely on the decision of Ongaya J. in *Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers v Timber Treatment International Ltd* (2013) eKLR, where the learned Judge observed that,

the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work.....

40. But I am of the contrary view. This head of claim is not legally tenable in cases of unfair termination or wrongful dismissal. Such a legal principle would only apply in cases of unlawful suspensions or suspensions without contractual authority.
41. The Claimants here complained of unfair termination on 21 February 2012. The Claimants therefore suffered actionable wrongs or legal injury on 21 February 2012 when they were *unprocedurally* dismissed and the fact that they were charged and acquitted on 21 May 2013 did not restore the employment relationship entitling them to claim wages for the period of the criminal process despite and in spite of the acquittal.
42. The criminal process has its own objectives and purposes.
43. The Claimants cause of action therefore accrued on 21 February 2012 and not on the acquittal on 21 May 2013, and the statute has clearly and expressly provided the remedies where the Court finds unfair termination/wrongful dismissal.

#### ***Compensation***

44. This is one of the primary remedies where the Court finds unfair termination of employment.



TOTAL **Kshs 168,667/-**

60.2<sup>nd</sup> Claimant

- a. 5 months gross wages compensation Kshs 27,170/-
- b. Unpaid wages(January/February 2012) Kshs 13,693/-
- c. 18 Off days Kshs 11,277/-
- d. 28 accrued leave days Kshs 20,943/-

TOTAL **Kshs 73,083/-**

61.The heads of claim for gross pay for 15 months and gratuity are dismissed.

62.Claimants to have costs of Kshs 75,000/-.

**Delivered, dated and signed in Nakuru on this 22<sup>nd</sup> day of May 2015.**

**Radido Stephen**

**Judge**

Appearances

For Claimants

Mr. Kamwaro instructed by Kamwaro & Co. Advocates

For Respondent

Mr. Muturi instructed by Muturi S.K. & Co. Advocates

Court Assistant

Nixon