



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 223 OF 2013

BETWEEN

JOHNSON MWANGOMBA LEJACLAIMANT

VERSUS

BAMBURI CEMENT LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Odundo Advocate, instructed by Nyandwat Odundo & Company Advocates for the Claimant

Mr. Njeru Advocate, instructed by Njeru & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

(Rule 27(1) (a) of the Industrial Court (Procedure) Rules 2010

1. The Claimant filed his Claim at the Industrial Court in Nairobi on 20th June 2012. It was registered as Cause Number 1051 of 2012. The Cause was transferred to Mombasa Industrial Court, on 12th June 2013, and registered as Cause Number 223 of 2013.
2. The Claimant states he was employed by the Respondent Cement Company as a Packing Plant Foreman commencing 1st March 2009. He was confirmed after probation, on 7th September 2009. He was summarily dismissed by the Respondent on 27th December 2011, on the allegation that he had breached his obligations to the Respondent. His total pay at the time of dismissal was Kshs. 129,049 comprising basic pay of Kshs. 104,442; meal allowance of Kshs. 7,200; and shift allowance at Kshs. 17,407. He was not issued with a notice of termination, nor given cogent reason in justification. He seeks the following orders against the Respondent:-
 - a. 3 months' salary in lieu of notice at Kshs. 313,326.
 - b. Severance pay at 21 days' salary for each year completed in service at Kshs. 146,218.
 - c. Balance due upon pension contribution of Kshs. 153,557.

d. Unutilized leave days for the year 2011 at Kshs. 12,765.

Total.....625,867

e) Costs, Interest and any other suitable relief.

3. The Respondent filed its Statement of Response on 24th August 2012. The Claimant was a Supervisor, responsible for ensuring cement was not packed in underweight or overweight bags. In May 2011, the Respondent issued cautionary note to the Claimant. He was warned about recurring complaints by customers regarding underweight bags. He was warned to always take due care in performance of his duties, failing which the Respondent would take disciplinary action. On 22nd November 2011, another incident of underweight bags occurred. The Claimant was suspended on 5th December 2011 to pave way for investigations. Investigations were carried out and the Claimant subsequently heard on 21st December 2011, and in a notification meeting held on 23rd December 2011. He was summarily dismissed on 27th December 2011. The reasons for the decision were stated in the letter. He was advised on his right of appeal, but opted not to appeal. He is not entitled to notice pay and severance pay, having been summarily dismissed. The amount of Kshs. 153,557 claimed as balance of the pension, has been deferred in accordance with the rules of the Retirement Benefits Act. Leave days have been paid off in full. There is no discernible cause of action against the Respondent. The Claim should be dismissed with costs to the Respondent.

4. The Claimant testified, and closed his case on the 16th December 2014. The Respondent called 2 Witnesses; Dispatch Operations Manager at the time the Claimant was dismissed and now Production Manager Ms. Salome Chelagat, and the Career Development and Human Resource Support Manager at the time of Dismissal Ms. Irene Mwamanga Naibo. Naibo is currently working for Bima Cement, a Subsidiary of the Respondent, based in Uganda. The Respondent's Witnesses gave evidence on 16th December 2014 when the hearing closed. Parties confirmed the filing of their Closing Submissions at the last mention in Court on the 13th February 2015.

5. The Claimant testified he is currently working for another Company known as Leather Front, based in Mombasa, in the position of Quality Control Personnel. He worked for the Respondent from 1st March 2009. He was the overall Supervisor in the Packing Plants. His duties included supervision: of all contractors; loading processes; flow of the trucks; manual loading; letting trucks out to the weighbridge; spot-checking all trucks at the weighbridges on all the 3 Plants; observing DPS [Data Processing System]; and posting all orders to the computer.

6. Leja told the Court he worked diligently and was recognized and rewarded through bonus payment every end of the year. He was summarily dismissed on 27th December 2011. His basic salary on this date was Kshs. 104, 442. He was only paid salary for December 2011 and pension. He was not issued with a notice of termination; instead, he received a confirmation of termination. His prayers, he told the Court, are as set out in the Statement of Claim.

7. The Respondent charged the Claimant had failed to detect underweight bags which left the Plant, into the market. Leja explained the DPS was faulty. It was inaccurate. It was linked by 1 computer to all the 3 Plants. The computer displayed 1 Plant packing at a time. It was based in the Claimant's office. Monitoring could not be done at once in all the Plants. DPS gave actual time of the discharge of the bags. If there were underweight bags, the System would indicate red on the screen. If underweight bags were not displayed, there would be no alarm pop-up.

8. The information could not be printed directly from the machine; it could only be imported through excel. Respondent's annexure 4 shows the underweight bags only; it was supposed to show everything, including overweight bags. Annexure 4 is an edited version. The cautionary letter issued to all Employees in the particular Section; it was not issued to just the Claimant. It was to show the Employees how serious the work they did was meant to be. There were 5 Foremen, all who received the cautionary letter. There was no particular incident leading to the caution.

9. The Respondent alleged the Claimant was responsible for the loading of about 30 bags. DPS shows about 72 bags. The order number would be loaded in the system and reflect at the weighbridge. 27.50 tons were loaded. The weighbridge ticket would be produced by the weighbridge clerk. It was weighed before loading. After loading the weight was 27.50 tons. If in excess or less, it would not be released. The Truck left with the correct weight.

10. The Claimant agreed he was informed of the charges against him. He never saw the Investigation Report. He was advised he could call Witnesses, and be accompanied by a Colleague to the disciplinary hearing. He did not know who the complainant was. He did not recall being informed of the possible sanctions. Summary dismissal surprised the Claimant, as no evidence of underweight bags was shown to him. He testified he was not paid any annual leave days. He is owed approximately Kshs. 219,000 in annual leave pay and off days. He was not aware of any money deducted to pay his Sacco obligations. He did not authorize any such deductions. He did not intentionally fail to log into his account. His Colleague failed to log out. The reasons for termination were neither valid, nor fair.

11. Cross-examined, Leja told the Court he was suspended and informed about the allegations against him. He was invited for a hearing, and the allegations restated in the invitation letter. He was advised he could call Witnesses. He was informed about the disciplinary panel's composition. He was advised he could ask for any assistance from the Respondent, including, in relation to documentation, in preparation for the hearing. Allegations were read out.

12. About 70 bags were underweight. They were packed during the Claimant's shift. At the hearing, the Claimant stated he did not run the report, and was not able to pick the underweight bags. Evidence of underweight bags was not shown to the Claimant. He did not ask for any documents from the Respondent during the hearing. It is not shown in the minutes that he made such a request. He did not dispute the contents of the minutes.

13. He was a Member of the Pension Scheme. His Employer contributed to the Scheme. He was paid a lump sum, with Kshs. 153,557 part pension deferred. He has not prayed for compensation for unfair termination. The DPS had a fault. He was the primary user of the System. Packing is central to the Respondent's business. The Claimant was the Foreman. The System showed underweight in red. The Claimant had earlier been warned by the Respondent over the same issue. The bags emanated from the Nairobi Packing Plant. The problem would cost the Respondent financially. He did not log into the System, using his name. He used a Colleague's name. It was against the Company's protocol.

14. Redirected, the Claimant testified he requested the Respondent to supply Order Confirmations; Tally Sheet; Weighbridge Tickets; Photos; Documents of Underweight bags; and complaints from the Customer. The request was not captured in the minutes. Leja approved the minutes. The System was directly running. As long as the System was running, the Report would be running. The cautionary note issued to all Foremen. The Claimant urges the Court to uphold the Claim.

15. Salome Chelagat managed people and packing operations. She managed Leja. On 22nd November 2011, a Truck was loaded 30 underweight bags and 5 extra bags. In total it was loaded with 555 bags. It ought to have had a total of 550 bags. 30 were underweight. A normal bag was 50 kgs. Underweight bags ranged from 40 to 50 kgs. The allowable margin of error was 0.5 kg. A bag could be accepted at 49.5 kgs.

16. The Truck carrying the bags passed the weighbridge undetected. The bags went into the market undetected. The Customer complained because he could not sell these bags. The Respondent initiated investigations. The outcome was that there was manipulation of the weights, in order to accommodate extra bags.

17. Leja as the Foreman had the System to monitor loading. He ought to have detected underweight bags through the DPS. Bags off the green band would indicate there was a problem. It would go red because the bags were not within the allowable margin of 0.5 kg. The Officers in the Section had been trained and sensitized. They had been issued a cautionary letter. The image, license and reputation of the Company were at risk.

18. A disciplinary hearing against the Claimant ensued. The Claimant noted he did not run the report. He would have noted the mistake during his shift. The situation could have been arrested. Only the Claimant could have arrested the situation.

19. Salome told the Court on cross-examination that the Claimant was in charge of safety of People and Equipment; in charge of loading controls; and was to ensure Trucks weight was taken before loading. DPS was to monitor actual weight of each bag. There were 3 packing lines, and 1 computer serving all the lines. All lines could not be monitored on 1 line at the same time.

20. It would take 30 minutes to load 500 bags. The Claimant should have been checking each line, every 1 hour. 3 Trucks could be loaded in 1 hour.

21. A complaint from the Customer was received on 22nd November 2011. Underweight resulted from manipulation by the Packers. Leja worked in an Office 8 to 10 metres from the loading bay. The machine showed 45kg bags were loaded. A total of 72 bags are shown in Respondent's annexure 4. The Customer sampled 72 bags. It was not possible the weights were manipulated without the Claimant's concurrence. Annexure 4 was downloadable from the System. It was extracted in readable form. Salome was not able to say if the Customer returned all the bags. A Company representative was sent to the Customer and verified the bags were underweight. This representative was not called during the disciplinary hearing. The cautionary letter issued to all the Section Employees. The Claimant was not overwhelmed by the duties assigned to him. Redirected, Salome testified that Leja was given the Investigation Report. He did not deny that there were underweight bags. He did not ask for any documents from the Respondent. He instead asked the Respondent to pardon him.

22. Naibo told the Court, she received information in the first week of December 2011 that, a Customer had complained about underweight bags. She advised the Company to investigate. A decision was made to suspend with full pay, Leja during the investigation. The Claimant was involved at every turn of the investigation.

23. After the investigation the Claimant was notified he would be taken through a disciplinary hearing. He was given the charges and advised on the procedure. All documents were availed to him. He was told he could request for any more assistance he needed from the Respondent. All procedural rights were explained to the Claimant. He could even change the timing. He appeared in the company of a workmate Zachary Masinza, who spoke on the Claimant's behalf.

24. The charges were read to the Claimant. He was asked if he understood the charges. He affirmed. At the hearing the Claimant requested to be given alternative work, because he realized he made a mistake in his role as the loading Foreman. He was given the full opportunity to speak.

25. Leja confirmed he did not check his DPS Report of the day. He could have prevented the underweight bags reaching the Customer. The Respondent's reputation suffered. The problem also affected the Respondent's cement Distributors. The Claimant did not deny responsibility; what he said was that it was difficult to work, and he was ready to work in another department. He also used someone else's password without logging out. He accepted he was running the shift, but forgot to log out, explaining that he was under pressure.

26. After the hearing, he was invited for a notification meeting. The Respondent concluded the Claimant was involved in an act of gross misconduct. He was dismissed. He was advised of his right of appeal to the Plant Manager. He wrote an appeal, which was unsuccessful. He was later on advised he could appeal to Mr. Xavier, the Industrial Director. Naibo was not aware if the Claimant did so. Her conclusion was that Leja received a fair hearing.

27. Naibo was privy to the letter of investigation. She saw the Investigation Report. The whole Truck was recalled. She was however not sure about this, and admitted she could have been wrong. It was probable there were 30 underweight bags. The letter inviting the Claimant to the hearing, gave the Claimant the possible sanctions- dismissal with notice, or pay in lieu of notice.

28. In every shift, the Claimant was to do 2 spot checks. There was to be no sharing of passwords. The Claimant's colleague Jackson did not log out. He was taken through a disciplinary process. He received a warning. The Claimant was advised to appeal to the Industrial Director. Naibo was not able to say if the Claimant appealed. This was another level in the disciplinary process. The initial decision was subject to this other level. The Claimant's e-mail dated 23rd December 2011 to the Manager however was, copied to the Industrial Director Xavier. The decision made was summary dismissal. Naibo was not sure if certificate of service issued.

29. The Claimant submits his services were terminated without any colour of right, on unfounded allegations, and without notice. No valid reason was demonstrated by the Respondent to justify its decision. There was no financial or reputational loss. The DPS had serious limitations. It was not shown that the Claimant was culpable in the loading of underweight bags. The Claimant submits the procedure fell short of the standards set under the Employment Act 2007. Crucial documents including the Investigations Report were not supplied to the Claimant. The cautionary note issued to all Section Staff. No notice of termination issued. Under Section 35 [1] [c] of the Employment Act, a written notice must issue, in the termination of the contract of employment. The Claimant relies on the cases of ***Elizabeth Ngina v. East Africa Safari Air Express Limited [2013] e-KLR*** and ***Njonjo M. Itotia v. Kenya Chamber of Commerce and Industry [2013] e-KLR***, both from the Industrial Court at Nairobi, in buttressing this submission. The Respondent failed to issue the Claimant the certificate of service.

30. On remedies, the Claimant submits he merits all the pleaded remedies, except for severance pay, acknowledging his position was not declared redundant. Although not pleaded, the Claimant urges the Court to grant compensation for unfair termination the equivalent of 12 months' gross salary under Section 49 of the Employment Act 2007. He argues the Court is seized with the discretion to grant what is not pleaded. The prayer for accrued annual leave days, computed at 46.2 days worth Kshs. 219,423, has according to the Claimant, been conceded by the Respondent. The Claimant did not authorize any of his dues to be paid to his Sacco. The Claimant submits he is entitled to costs and interest.

31. The Respondent submits the Claimant was validly and fairly dismissed. He failed to monitor the loading of cement to a Customer's Truck, which resulted in the loading of 30 underweight bags. He had previously been cautioned about such loading. He was the overall in-charge of the loading. The summary dismissal decision was well-founded under Section 44[4] [g] of the Employment Act and the Respondent's Employees Handbook. The Claimant was granted a fair hearing. The Respondent relies on 3 Industrial Court of Kenya at Mombasa cases- ***Cause No. 105 of 2012, KUDHEIHA v. Pwani University College; Cause No. 1050 of 2011, Loice Otieno v. K.C.B; and Cause No. 117 of 2013, Thomas Nzivo v. Bamburi Cement Limited***- in establishing the fairness of the hearing.

32. On the remedies the Respondent holds the position that the Claimant was summarily dismissed; he is not entitled to notice pay. Severance pay is not available to the Claimant as his position was not declared redundant; he was summarily dismissed. The balance of pension is a deferred benefit. The Claimant was entitled to 6 days of annual leave, computed at Kshs. 12,765, which was applied in redressing his Sacco loan obligation. The Claim should therefore be dismissed with costs to the Respondent.

33. From the pleadings, evidence and submissions above, the issues arising in this dispute are:-

- a. Whether the Claimant's contract was terminated for valid ground or grounds as required under Section 43 and 45 of the Employment Act 2007.
- b. Whether the procedure was fair as required under Section 41 of the Employment Act 2007.
- c. Whether the remedies sought are merited.

The Court Finds:-

34. The employment history of the Claimant comprising date of recruitment; position held; terms and conditions of employment; and date of termination, are not contested. It is agreed the Employer initiated termination alleging the Claimant was involved in gross misconduct.

Validity of reason

35. The Respondent's position is that the Claimant was the Foreman, overall responsible for the monitoring of cement packing and loading. He was to monitor cement leaving the Nairobi Grinding Plant, NGP. He did the monitoring through the Data Processing System. The System would show red, if the bags of cement loaded, went beyond the allowable margin of 0.5 kg.

36. According to the Respondent's Witness Salome, 30 bags were, on 22nd November 2011 found to have been underweight. Each bag should have been 50kgs, with the margin error of 0.5 kg. Underweight bags sampled, ranged from 45kgs to 49kgs. The Truck was overall supposed to ferry 550 bags of 50kgs each. On this day, there were 30 underweight bags, and the Truck ferried 555 bags. There were 5 extra bags. The Respondent thought the weight manipulation was aimed at allowing the carriage of the 5 extra bags into the market for illegal use.

37. The Claimant, if the Court understood him properly, did not deny that there were underweight bags carried out of the factory. It was suggested that the packing, loading and dispersal of the cement may have taken place without the participation of the Claimant. It was also suggested that the Claimant may have been overwhelmed in his role, and that the DPS was not up-to-date. The Claimant complained the System was served by a single Computer and could only monitor 1 plant out of 3, at any given time.

38. Weighing the evidence given by the Respondent against that of the Claimant, the Court is persuaded the Respondent demonstrated valid reason as required by Section 43 and 45 of the Employment Act, in terminating the Claimant's contract of employment.

39. There was no evidence that the Claimant was overworked, as to be inattentive to the manipulation of weight in cement packing and loading. He did not at any time complain in the performance of his role, that the DPS was faulty. He had worked from March 2009, and did not register any complaint on the tools of his work. He instead owed up at the disciplinary hearing that he did not run the report on shift; asked to be pardoned; and asked for alternative assignment of role.

40. The Respondent had valid reason, and acted within Section 44[4] [c] and [g] of the Employment Act 2007. The Court does not think it was proper for the Respondent to cite the Employees' Handbook in its Closing Submissions, as this document was never exhibited at the hearing.

Fair procedure

41. On procedure the Court is again unable to find major fault with the process adopted by the Respondent. The Claimant was informed of the specific charges under investigation. These were restated in the notice of the disciplinary hearing. He was given adequate time to prepare for the hearing, and assured he would be accorded any assistance he needed by the Respondent. The composition of the Panel to hear him was revealed in advance. He was advised on all his procedural rights. He attended the hearing in the presence of his workmate Zachary Masinza; was again read the charges; and understood those charges. He was advised he could call any Witness. He did not request for any document to assist in his defence.

42. There was adequate opportunity given to the Claimant to appeal, first to the Factory Manager, and secondly to the Industrial Director. He wrote to the Manager through the e-mail dated 23rd December 2011. There is no clear record that the Claimant was heard after appealing to the Manager. He was however invited for a notification meeting on 27th December 2011, where he was informed the Company had confirmed its intention to summarily dismiss the Claimant. The procedure was by and large fair, in conformity to the standards of fairness adopted by the Industrial Court in the cases of **Kudheiha, Otieno and Nzivo** cited in paragraph 31 of this Award.

43. The minor fault in this procedure lies in the lack of a proper appeal hearing. In the absence of the Employees' Handbook, it was not understood by the Court exactly how the appellate procedure worked, but it was the position of the Respondent that the Claimant was to be heard separately on appeal; by the

Manager and the Industrial Director. He wrote to both. There is nothing to show there was a consideration of the appeal made, particularly by the ultimate appellate organ in the form of the Industrial Director. To this extent, procedure was unfair. ***The Claimant is granted compensation the equivalent of 3 months' gross salary at the rate of Kshs. 129,049 per month, at Kshs. 387,147.***

44. The second minor fault is located in the punishment. The punishment for gross misconduct under Section 44 [4], is summary dismissal. An Employer is however not tied down to meting out summary dismissal in all cases of gross misconduct. This form of punishment is the equivalent of maximum punishment meted in criminal matters. The Employer, like the Institution of the Criminal Court, is free to consider other forms of lesser punishment.

45. In the notice of the disciplinary hearing dated 14th December 2011, the Respondent informed the Claimant that “ *If you are found guilty of misconduct, the Company may decide to dismiss you with notice or pay in lieu of notice.*” Summary dismissal, which is defined under Section 44[1] of the Employment Act as termination without notice, or with less notice than granted under the law or contract, was not a punishment promised to the Claimant in the notice of the disciplinary hearing. He was told in event of being found guilty of misconduct he would be dismissed through notice, or notice pay. The Claimant legitimately expected this as the form of punishment in case he was found guilty of misconduct. Instead, the Respondent found him guilty of misconduct, imposing the graver penalty of summary dismissal.

46. The Claimant is entitled therefore to 3 months' salary in lieu of notice, under Clause 3 of the employment letter. The Court allows this at Kshs. 313,326 as pleaded.

47. The Court is satisfied that although the Claimant failed to expressly plead compensation for unfair termination, employment remedies are not limited by the pleadings, and the Court has the discretion to grant that which is just and equitable upon evaluation of evidence. The Claimant also mitigated his lack of express pleading under unfair termination, with the blanket prayer for any other suitable relief, making it unnecessary for the Court to justify further, its grant of compensation.

48. There is no merit in the prayer for the balance of the Claimant's pension. There was sufficient evidence this was a deferred benefit, which, if the Claimant has reason to demand it should be released to him whole, should seek orders for such release against the Scheme Administrators, in accordance with the rules of the particular Scheme. This prayer is rejected.

46. The prayer for severance pay was correctly withdrawn by the Claimant in the Closing Submissions. Termination had nothing to do with redundancy under Section 40 of the Employment Act.

49. The Claimant pleaded for 6 months of pending annual leave at Kshs. 12,765. This related to the year 2011. He submits that what is owed is 46.2 days of annual leave, and that the Respondent conceded this in its annexure 11. The Respondent submits Kshs. 12,765 in annual leave pay was owed to the Claimant as pleaded, and was applied in redressing his Sacco loan.

50. The Court was not satisfied with the records supplied to it on annual leave. It does seem the Respondent acknowledged owing Kshs. 219,423 in the annexure 11. There is an indication this was applied in redressing the Claimant's loan obligation.

51. The Claimant did his claim for annual leave pay little good, by prevaricating between the pleadings and the submissions. His argument about not having authorized the Respondent to apply annual leave pay to the Sacco loan has no merit. The Employer was entitled to deduct any outstanding obligations owed by the Employee upon termination. The Claimant did not in any event suggest, or lead evidence to show, that the deduction was not occasioned by a valid debt owed to the Employer or Institutions associated with the Employer. The claim for annual leave pay is declined.

52. The certificate of service is merited under Section 51 of the Employment Act. The Respondent shall release this to the Claimant forthwith.

In Sum, IT IS ORDERED:-

- a. *Termination was on valid ground, but procedurally flawed.*
- b. *The Respondent shall pay to the Claimant 3 months' gross salary at Kshs. 387,247 and 3 months' basic pay in notice pay at Kshs. 313,326- total Kshs. 700,473. The full amount shall be paid within 30 days of the delivery of this Award.*
- c. *Certificate of Service shall be released to the Claimant by the Respondent forthwith.*
- d. *No order on the costs and interest.*

Dated and delivered at Mombasa this 13th day of May 2015

James Rika

Judge