



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 1423 OF 2013**

**ISHMAEL OTIENO ONDIGO ..... CLAIMANT**

*VERSUS*

**AFRICAN PORTLAND CEMENT**

**COMPANY LIMITED ..... RESPONDENT**

Mr. Wesonga for the Claimant

M/S Oyombe for the Respondent

**JUDGMENT**

1. The suit was brought vide a Memorandum of Claim dated 3<sup>rd</sup> September 2013 seeking maximum compensation of twelve (12) months salary for alleged unlawful termination of employment and payment of terminal benefits to wit;

- i. two months' salary in lieu of notice in Kshs.302,000.00;
- ii. salary for the month of July to November 2010 – Kshs.755,000.00;
- iii. pay in lieu of leave days not taken for 10 years in Kshs.1,510,000.00;
- iv. gratuity at 25% of the monthly salary for ten years worked in the sum of Kshs.4,530,000.00; and
- v. certificate of service.

2. **Brief facts of the Claim**

The Claimant was first employed by the Respondent in 1999 as a casual, sales clerk, without any written contract. He worked in this capacity until the year 2007 in Kisumu.

3. From 5<sup>th</sup> December 2002 the Claimant worked on six months fixed contracts. The Claimant produced three fixed term letters of appointment dated 5<sup>th</sup> December 2002, 12<sup>th</sup> August 2003 and 9<sup>th</sup> December 2004.

4. By a letter dated 18<sup>th</sup> December 2008, the Claimant was deployed as a Depot Supervisor Kisumu.

5. By a letter dated 30<sup>th</sup> September 2009, the Claimant was appointed Regional sales

Representative for West / Central Nyanza in acting capacity. On 30<sup>th</sup> November 2009, the Claimant received a contract of employment as

Regional Sales Executive. The terms of the appointment included a gross salary of Kshs.151,000.00 comprising a basic monthly salary of Kshs.111,000.00 and house allowance of Kshs.40,000.00.

6. The Claimant reported to Sales Manager. The appointment was on two years contract to end on 30<sup>th</sup> November 2011 and was placed on three (3) months' probation.

7. Upon completion of probation period, termination of contract was by giving two (2) months' notice or payment of salary in lieu of notice.

8. The Claimant was entitled to thirty (30) working days leave per year and upon taking leave was entitled to 30% of the basic salary as leave travelling allowance.

9. By a letter dated 14<sup>th</sup> July 2010, the Claimant was suspended from employment with immediate effect on allegations that he had caused the Respondent loss of 11,173 bags of cement at Kisumu Depot valued at Kshs.9,357,406.00.

This followed close of year stock taking exercise conducted on 30<sup>th</sup> June 2010, which revealed that the Claimant had made unauthorized credit sales to non-guaranteed customers for 6,840 bags of OPC Cement valued at

Kshs.6,142,320.00 It was further noted that 4,333 bags of PPC cement valued at Kshs.3,215,806 could not be accounted for.

10. According to the Respondent, this liability and / or potential loss to the company was realized during the tenure of the Claimant as the Regional Sales Executive, based at Kisumu. The Claimant was held fully responsible and accountable

for the loss to the company.

11. Investigations followed the suspension and the Claimant was required to show cause within fourteen (14) days why stern disciplinary action should not be preferred against him and further Claimant was to demonstrate how

the company would recover this liability.

12. The Claimant was to keep away from the place of work during the period of suspension unless required to report by management.

13. The Claimant in his sworn testimony, admitted that he had sold cement on credit as alleged to boost regional sales. That he was aware of the policy not to sell to non-guaranteed customers on credit. But over the years he had made

such sales on credit without getting any objection from the Respondent. That instead he had gotten commendation and promotion for his good work in growing the cement sales in the region.

14. In his defence the Claimant stated that some customers who had taken cement on credit, reflected in the notice to show cause had already paid their debt. That upon receiving the notice he had collected outstanding debts of

over 6 million Kenya shillings. That he worked under great pressure and was inhibited from collecting the remaining debts because he was not allowed to go to the company premises and therefore

could not access the relevant

record while under suspension. The uncollected balance was approximately Kshs.3.2 million. The Claimant offered to pay the liability and gave personal cheques to the Respondent to cover the balance.

15. The Claimant stated that he had at all times acted in good faith and was working to meet the targets set for him by the Respondent. That his predecessors had also sold on credit to meet the target and he had only followed suit.

16. The Claimant admitted that cement was sold on cash basis and only on credit to guaranteed customers. However, in practice, the sales department made credit sales to customers who were well known to the Respondent.

17. The Claimant told the Court that he had a team of employees who consummated the sales and collected the money who included the Depot Sales Clerk who was answerable to the Finance Manager. At the time the Depot Sales

clerk was M/S Lucy Atieno. She oversaw the general operations of the Depot including stocking and delivery of cement in and from the depot or other sources.

18. The Claimant also stated that the Depot sales supervisor oversees sales in the sub-region and collected payments from customers. His name at the time was Mr. Andrew Omondi.

19. The Claimant said that he could not process the sales without the assistance and approval by the two employees. They worked as a team at the Kisumu Branch and the Respondent's head office was at all material times aware of

sales on credit to known, non- guaranteed customers.

20. The Claimant stated that he never had any intention to defraud the Respondent or cause any losses to the Respondent. That stock reconciliation was done on a daily basis and the team kept track of the sales.

Impromptu audits were also done to vet the procedures on a three (3) months basis by internal Auditors. External Audit was done annually.

21. The Claimant said that he did not deserve the dismissal because he had a good track record and would have been able to recover all credit sales had he been accorded opportunity.

22. By a letter dated 18<sup>th</sup> November, 2010, the Claimant was summarily dismissed. This followed a written explanation against the charges levelled against him in the notice to show cause dated 14<sup>th</sup> July 2010 and subsequently

attended hearing on diverse dates to make representations on the matter.

23. The Claimant was found guilty of making unauthorized sale of cement on credit worth Kshs.9,352,406.00 to non-guaranteed customers occasioning loss of revenue to the company.

24. The management noted that the Claimant was able to collect some money from the customers, but to date, a colossal amount still remained unaccounted for by the Claimant.

25. The summary dismissal was effective from 18<sup>th</sup> November 2010. Liabilities to the company were to be recovered from his terminal dues.

26. The Respondent did not state the amount of terminal dues owed to the Claimant.

27. The Claimant stated that in terms of the Respondent's disciplinary code Clause 10.2, the Claimant ought to have received a warning letter for "*failure to follow laid down policies, rules and procedures on operations*"

which offence he had admitted to with reasonable mitigating circumstances.

28. The Claimant aggrieved by the summary dismissal, instructed his Advocates to write a letter of demand dated 30<sup>th</sup> June 2013, followed by this suit.

### 29. **Reliefs sought**

The Claimant produced a payslip for the month of December 2009 indicating the gross pay of Kshs.151,000.00 which he earned monthly at the time of termination.

The Claimant told the Court that, due to the mitigating circumstances, at worst his employment ought to have been terminated normally as opposed to summary dismissal.

30. He therefore claims;

#### **Notice pay**

Two months' salary in lieu of notice, in terms of the contract of service which has no provision for summary dismissal in the sum of Kshs.302,000.00.

#### **Salary for July to November 2010**

During the time of suspension the Claimant was not paid any salary. The suspension started from 14<sup>th</sup> July 2010 to the date of dismissal, which was 18<sup>th</sup> November 2010.

This was a period of four (4) months and four (4) days. The Claimant seeks Kshs.755,000.00 salary for this period.

The Court notes that the letter of suspension did not state that the suspension was to be without pay.

The contract of employment was silent on this matter.

31. The Respondent however, relies on Clause 12.1 of the Respondent's Human Resource Policy which according to the Respondent provides that no salary is payable during the suspension period.

The manual is not referenced in the contract of employment and no evidence was tendered to show that the document was part and parcel of the Claimant's terms and conditions of service.

The provision provides for a maximum sixty (60) days period of suspension.

It also provided that suspension without pay was in respect of "*serious misconduct disciplinary cases which are criminal in nature*". No evidence was led to show that the charges levelled against the Claimant were criminal in nature.

To the contrary, all the evidence led by both parties indicate that the claimant had disregarded company credit policy with the sole purpose of achieving set sales targets. That this was a practice overlooked by the Respondent over a long

period of time and was not criminal in nature.

32. The Court finds that the Claimant's letter of suspension did not suspend him without pay; his contract of employment did not provide for suspension without pay, and the charges levelled against him

were not criminal in nature and therefore

he was entitled to payment of salary for the period of suspension in the sum of Kshs.755,000.00.

**33. Payment in lieu of leave for ten years**

It cannot be disputed that the Claimant served the Respondent in various capacities from early 1999 up to 18<sup>th</sup> November 2010 a period of more than ten (10) years. The Claimant was up to 2007, employed on short term contracts.

The written contracts presented before Court did not provide the terms and conditions of service.

34. However the Claimant told the Court that he was not granted annual leave for the entire period he served the Respondent.

35. Indeed, the Respondent in its Memorandum of Defence admits that the Claimant was not granted leave for the entire period he worked stating that the Claimant was not entitled to any payment in lieu of leave days not taken for ten (10) years because *“the Claimant was employed on a temporary basis by the Respondent intermittently and whenever he qualified for leave, it was paid to him or he availed it.”*

36. The Respondent did not provide any documentary evidence to show that the Claimant ever went on leave or was paid in lieu of leave. The employer is mandated under **Section 28** of the Employment Act, to give an

employee after every twelve consecutive months of service with the employer not less than twenty one working days of leave with full pay.

37. The contract of appointment dated 10<sup>th</sup> November 2009, provided the Claimant with thirty (30) working days leave.

38. The Claimant seeks payment of Kshs.1,510,000.00 for the entire period of ten (10) years as payment in lieu of leave days not taken.

39. The proviso to **Section 90** of the Employment Act provides that employment claims are time barred after three (3) years *“or in the case of continuing injury or damage within twelve (12) months next after cessation thereof.”*

40. Failure to grant the Claimant annual leave which is a statutory obligation constitutes a continuing injury for the entire period the employee is at work and therefore, the claim is not time barred.

41. The Claimant having proved on a balance of probabilities that he was not granted any leave days, the Court awards him payment in lieu of leave as prayed in the sum of Kshs.1,510,000.00.

**42. Gratuity at 25% for the ten (10) years worked.**

The Claimant relies on the Employee Handbook page 17 and The Human Resource manual produced as Appendix 3(1) at page 12 of the statement of Claim.

Although the Claimant was registered with NSSF and contributions were made, the Claimant submitted that this was an additional benefit given to all employees on contracts. Indeed at

the time of termination the Claimant was on a two years contract.

Clause 2.0.6.2 titled contract of employment provides inter alia *“All employees on contract will be paid gratuity at the end of contract period.”*

43. Clause 4.1 of the Human Resource Manual titled pension / gratuity provides “*All employees on fixed term contract shall be paid gratuity as per their contract of employment in line with labour laws.*”

44. The contract of employment, is silent on this matter. The Respondent while admitting that the Human Resource Policy provided for payment of gratuity to employees on contract, qualifies that provision in that Clause 11.6.13 of the same policy

document, excluded employees who had been summarily dismissed from getting gratuity. The Respondent further states that, the Claimant is excluded from gratuity payment by dint of **Section 35(5) and 6(d)** of the Employment Act,

because he was registered with NSSF and the Respondent contributed to the fund on his behalf.

45. The Court finds that, the Claimant is not entitled to payment of gratuity because it was not provided for in his contract of employment, he was a member of NSSF and the employer contributed to the fund on his behalf.

**46. Leave Allowance for ten (10) years.**

This allowance was provided for travel purposes, upon taking leave. It is clear that the Claimant was not granted leave for the ten (10) years he worked for the Respondent. This claim does not arise and same is dismissed.

**47. Damages for unfair termination.**

The Claimant admitted that he had flouted company policy though he justified the deviation on the basis that;

- i. it was a practice by his predecessors with a view to meet set sales targets;
- ii. this practice was in respect of known customers and he had done it in good faith with the sole aim of boosting targets;
- iii. he had collected substantial portion of the uncollected debts and would have collected the balance if he had been afforded humble opportunity;
- iv. he had taken personal liability and offered his personal postdated cheques to cover the uncollected balance;
- v. he had a very good track record for the period of ten (10) years, hence the promotions he had received.

48. The Employment Act provides for minimum terms of employment to all employees. However, where a contract of employment provides superior terms to an employee to those provided by the Act, the parties are bound by the terms of

the written contract. Accordingly, the Respondent was bound to terminate the employment of the Claimant in terms of the contract of employment and not to summarily dismiss him.

49. As a matter of fact, there was no immediate cessation of employment as is contemplated in a summary dismissal. The Claimant was subjected to disciplinary process that took four (4) months to complete.

50. The Court therefore commutes the summary dismissal to normal termination of employment in terms of the contract of employment dated 30<sup>th</sup> November 2009. The Claimant is therefore entitled to payment of two (2) months’

salary in lieu of notice in the sum of Kshs.302,000.00.

The Claim for compensation does not arise following this finding by the Court.

51. In the final analysis, the Court awards the Claimant as against the Respondent;

1. two months' salary in lieu of notice in the sum of Kshs.302,000.00;
2. salary for the period of suspension from the month of July to November 2010 in the sum of Kshs.755,000.00;
3. payment in lieu of leave for ten (10) years in the sum of Kshs.1,510,000.00;

**total award Kshs.2,567,000.00;**

4. the award is payable with interest at Court rates from date of this judgment till payment in full;
5. the Claimant is to be paid costs of the suit;
6. the Respondent to provide the Claimant, certificate of service within thirty (30) days from date of this judgment.

**Dated and Delivered at Nairobi this 19<sup>th</sup> day of June, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**