



**REPUBLIC OF KENYA**

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

**CAUSE NO 685 OF 2013**

**ABUBAKAR ASLAM SHIKOLIO.....CLAIMANT**

**VS**

**SAVANNAH CEMENT (EPZ) LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 13th May and filed in Court on 15th May 2013 seeks compensation for unfair termination of employment. The Respondent filed a Statement of Defence on 13th August 2013 denying the Claimant's claim. The Claimant testified on his own behalf but the Respondent did not call any witnesses despite adequate opportunity to do so.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 2nd July 2012 in the position of Stock Controller at a monthly salary of Kshs.165,000.00. He was confirmed in his appointment on 19th December 2012.
3. On 26th March 2013, the Claimant was issued with a show cause notice on allegations of giving false information concerning transactions relating two companies viz; Vile and Blind General Suppliers and Jagesons Ventures. In his response dated 27th March 2013, the Claimant denied the allegations made against him and on 8th April 2013, he was issued with a letter backdating the termination of his employment to 4th April 2013.
4. It is the Claimant's case that the termination of his employment was unlawful and in contravention of the provisions of the Employment Act, 2007. He seeks the following remedies:
  - a. A declaration that the termination of his employment was unlawful and unfair;
  - b. Compensation equivalent of 12 months' salary of 165,000 per month;
  - c. Damages;
  - d. Costs.

**The Respondent's Case**

5. In its Statement of Defence filed on 13th August 2013, the Respondent admits having issued the Claimant with a show cause letter on conflict of interest regarding two of the Respondent's suppliers namely; Vile and Blind General Suppliers and Jagesons Ventures.
6. The Respondent states that following a report by its Internal Audit Manager, it commissioned an

investigation which revealed a conflict of interest between the Claimant and the two suppliers. In particular, the Claimant failed to disclose the close relationship and possible conflict of interest between the two suppliers and the fact that payment cheques for the suppliers were being collected by the same person, one Michael Kioko which information was well within the Claimant's knowledge as the Stock Controller.

7. Further, the Claimant failed to disclose to the Respondent that there had been a delivery of rubber stamps by Jagensons Ventures which were later found to be faulty and therefore rejected by the Claimant on grounds of poor quality. Upon termination, the Claimant was paid three months' salary in lieu of notice together with all his accrued benefits.

### **Findings and Determination**

8. The issues for determination in this case are:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in undertaking the termination the Respondent observed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

9. On 26th March 2013, the Claimant was issued with a show cause notice stating as follows:

*“Following an audit report presented to the Board Finance and Audit Committee and an investigation carried out thereafter it has been established that you presented false information to the investigation team concerning knowledge of the transactions relating to two companies viz Vile & Blind and Jagensons Ventures. Evidence available shows that you have been or ought to have been in the knowledge of the irregularities concerning these two companies, owing to your position as Stock Controller.*

*This is a serious issue as it indicates that you have not carried out your responsibilities in a manner consistent with the Policies and values of Savannah Cement Limited. Based on the foregoing, you are hereby required to show cause within three days as to why disciplinary action should not be taken against you.*

*Yours faithfully*

*(Signed)*

*Samson Shivina*

**Head of Finance”**

10. By his letter dated 27th March 2013, the Claimant denied knowledge of any irregularities relating to the two companies. He also pointed out that he had carried out his duties in accordance with the Respondent's standard operating procedures noting that identification of suppliers was not within his docket.

11. The Claimant's employment was terminated by letter dated 8th April 2013 which states as follows:

*“Dear Abubakar,*

**RE: TERMINATION OF CONTRACT**

*We acknowledge receipt of your letter dated March 28, 2013, in response to the show cause letter dated March 26, 2013 on matters raised during an audit investigation where your integrity was questioned. We have received your responses and regret that your explanations to the matters in question were unsatisfactory.*

*You have not carried out your responsibilities in a manner consistent with the policies and values of Savannah Cement Limited during this period and is a clear dereliction of duty. Consequently, your services are terminated with effect from April 4, 2013. You will be paid as follows:*

- 1) Three months' salary in lieu of notice*
- 2) Accrued benefits to your pension account*
- 3) Any accrued leave balance*

*You will be required to hand over your responsibilities and all Savannah Cement Limited property under your custody to the Head of Finance prior to your departure and complete your clearance form to facilitate timely payment of your dues. We also request that you kindly complete our exit form.*

*Please be advised that you have the right to appeal within seven (7) days from the date of termination.*

*Yours sincerely,*

*(Signed)*

*Linda Miano*

***Head of Human Resources”***

12. In the show cause notice, the Claimant was accused of failing to disclose some irregularities regarding two of the Respondent's suppliers; Vile & Blind and Jagensons Ventures. The subsequent termination letter dated 8th April 2013, accused him of failure to carry out his responsibilities in a manner consistent with the Respondent's policies.

13. Section 43 of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

14. In ***Maurice Kamwilwa v South Eastern University College [2015] eKLR***, Abuodha J held that an employer who terminates an employment contract is enjoined by law to provide a reason for the termination and the employee has the right to challenge the validity of such reason. Addressing itself to the same issue in ***John Ngatia Ndung'u v Kenya Commercial Bank Limited [2014] eKLR***, this court held that an employer is obligated to provide a clear statement of the exact offence(s) for which disciplinary action against an employee is taken.

15. The Claimant's letter of appointment dated 2nd May 2012 gave him the following job description:

*“Your main responsibility will be to maintain optimal stock holding for all stocks by ensuring proper control measures and procedures are maintained and that stocks are received and kept in safe custody. The jobholder has the overall responsibility of maintaining the company store and bulk stock of raw materials and finished products.”*

16. In light of the Claimant's job description as stated in his letter of appointment, the Court did not find a clear statement and proof of any act of commission or omission on his part that could be construed as breach of his employment contract.

17. It is not enough for an employer to simply state that an employee has failed to properly carry out his duties; the elements of failure must be stated and proved to the degree of balance of probability. Consequently, I find that the Respondent failed to demonstrate a valid reason for terminating the Claimant's employment and the termination was therefore substantively unfair.

### **Termination Procedure**

18. Section 41 of the Employment Act, 2007 sets out the following procedure for handling cases of misconduct, poor performance and physical incapacity:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

19. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

20. There was no evidence that in terminating the Claimant's employment, the Respondent followed the procedure set out in Section 41 of the Act or its own internal disciplinary procedure. Significantly, the Claimant was not given an opportunity to comment on the audit and investigation reports which formed the basis of the termination of his employment. The termination was therefore procedurally unfair as well.

### **Remedies**

21. Flowing from the foregoing findings, I award the Claimant six (6) months' salary in compensation for unfair termination of employment. In making this award, I have taken into account the Respondent's failure to demonstrate a valid reason for the termination together with its conduct in the internal disciplinary process. I have balanced this with the Claimant's rather short period of service.

22. I therefore make an award in favour of the Claimant in the sum of Kshs.990,000.00 being the equivalent of six (6) months' salary. The award amount shall attract interest at court rates from the date of the award until payment in full.

23. I further award the Claimant the costs of this case.

24. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF JULY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Bwire for the Claimant

Miss Komu for the Respondent