



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 50 OF 2014

CHARLES MOSIGISI ABERE

CLAIMANT

v

NATIONAL CEREALS AND PRODUCE BOARD

RESPONDENT

JUDGEMENT

1. Charles Mosigisi (Claimant) was appointed by the National Cereals and Produce Board (Respondent) as a Depot Manager (Trainee) through a letter dated 26 March 2007.
2. On 16 November 2011, the Respondent terminated his employment and the reason given was negligence in performance of duties (he was acting Depot Manager at the time). The Claimant appealed but the appeal was unsuccessful and on 5 March 2014 he commenced legal proceedings against the Respondent alleging unlawful termination of employment and, he also sought *3 months pay in lieu of notice, accrued leave, unpaid wages and compensation for unfair termination of employment.*
3. The Respondent filed a Response on 6 June 2014 and List of Documents on 23 June 2014. The Claimant filed a Supplementary List of Documents on 26 May 2015 and the Cause was heard on 24 February 2015 and 26 May 2015.
4. After close of hearing, the Claimant filed his submissions on 11 June 2015 while the Respondent's submissions were filed on 29 June 2015.
5. In the submissions, the Claimant identified and addressed some 5 issues while the Respondent identified and addressed some 3 issues.
6. The Court has considered the pleadings, evidence and submissions and identified 2 principal issues for determination. These are, *whether the termination of the Claimant's employment was unfair* and if so, *appropriate remedies* including *entitlements* accruing to the Claimant from the employment relationship.

Whether termination of employment was unfair

Procedural fairness

7. The Claimant pleaded that the Respondent did not comply with section 40 of the Employment Act, 2007 in carrying out the termination of employment.
8. Section 40 of the Employment Act, 2007 deals with termination of employment through redundancy.
9. In testimony, the Claimant stated that he was suspended on 3 August 2011 while on his annual leave which had commenced on 4 July 2011.
10. Prior to the suspension, he stated that he had been called on phone by the Respondent's Regional

- Manager to report back to work wherein he was arrested by the Police on 1 August 2011 and charged in Court on 3 August 2011.
11. He stated that the suspension letter asked him to show cause why disciplinary action should not be taken against him. He responded to the suspension/show cause through a letter dated 9 August 2011.
 12. He also stated that he was later invited to appear before the Respondent's Regional Disciplinary Committee for a hearing on 12 September 2011 and 15 September 2011 (minutes were produced).
 13. While the criminal proceedings were pending, the Respondent terminated his services on 28 November 2011, but he was eventually acquitted on 4 October 2012.
 14. In the testimony, the Claimant challenged the termination of his services on the basis that he was not given 3 months notice of termination, and because the Regional Disciplinary Committee had recommended that the ruling of the criminal Court be awaited pending further disciplinary action.
 15. The Claimant stated that he was not invited to appear before the Respondent's Central Disciplinary Committee.
 16. The Respondent called 3 witnesses. The second witness was the Regional Manager. He confirmed that he chaired the Regional Disciplinary Committee hearing on 12 September 2011. He confirmed that the Claimant was heard and that after the hearing, the Committee recommended that the Respondent await the outcome of the criminal case facing the Claimant.
 17. However, the Claimant was called before the Respondent's Central Staff Advisory Committee on 15 September 2011 where the recommendation to terminate his services was taken.
 18. The facts as to the process followed therefore is largely undisputed. The Court in the case needs to examine if the process was in compliance with the statutory requirements.
 19. But first the issue of pleadings. Although the Claimant's pleaded case was anchored on redundancy, the evidence led was on *normal* unfair termination of employment. The Respondent did not object either during the hearing or in the submissions.
 20. The Court would therefore take it that the parties left it to it to consider the issue based on the evidence. Ordinarily, an inconsistency between the pleadings and testimony would lead to the collapse of a cause of action.
 21. Section 41 of the Employment Act, 2007 is therefore the relevant provision in the instant case and not section 40.
 22. I have heard occasion to discuss the essentials of statutory procedural fairness of section 41.
 23. In *Antony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR I observed that

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

24. In the present case, the Claimant was informed of the allegations to confront in the suspension letter. He was given time to make written representations, which he did. Thereafter, he was called to an oral hearing which he attended and made further representations.
25. The Claimant knew the allegations to confront and he confronted them both in writing and at an oral hearing. The Claimant did not complain that he was prejudiced by the way the hearing was conducted because he was not accompanied.
26. The process was substantially carried out in compliance with the requirements of the statute.
27. But there is one issue which has bothered the Court. And the Claimant raised the issue.
28. The Regional Disciplinary Committee had recommended that the outcome of the criminal

- proceedings be awaited but this recommendation was ignored.
29. The Respondent did not address the Court on the interplay between the 2 Committees and whether it was open to the Respondent's Central Staff Advisory Committee to ignore the recommendations of the Regional Disciplinary Committee. No reasons were also tendered as to why the recommendations were ignored.
 30. Without the explanation, the Court is of the view that the process was tainted and/or flawed and for this reason it would find that the termination of employment was procedurally unfair.
 31. Further, the Claimant testified that he was not invited to appear before the Central Disciplinary Committee. The Respondent's second witness however contended that the Claimant appeared before the Central Disciplinary Committee on 15 September 2011.
 32. The minutes do not indicate that the Claimant was present. No invitation letter was produced.
 33. The Court therefore finds that the Claimant did not attend before the Central Disciplinary Committee.
 34. Closely related to the role of the 2 Committees is the legal issue of whether an employer either directly or through another internal entity can alter the findings and decision of a disciplinary panel without hearing the employee.
 35. This legal issue was not directly addressed but it is doubtful in my view whether such a finding or decision can be altered unilaterally.
 36. Despite this finding, the Court out of abundance of caution will proceed to examine whether the termination of employment was substantively fair.

Substantive fairness

37. The reason given for the Claimant's termination of employment was negligence in performance of duties.
38. Pursuant to section 43 of the Employment Act, 2007, the Respondent had the statutory obligation to prove this reason. But that is not all that was required of the Respondent. By dint of section 45 of the same Act, it had to prove the reason as valid and fair.
39. The Claimant testified that he commenced his annual leave on 4 July 2011. He produced a duly approved leave application form (Claimant's exhibit 3).
40. During the leave, the Respondent appointed an Acting Depot Manager for Kapenguria Depot. The incident which precipitated the termination of the Claimant's employment was release of relief maize on 29 July 2011. The Sales Order for the maize was prepared on 5 July 2011 when the Claimant was already on leave.
41. There were stringent procedures to be followed before maize stocks could be released from the depot.
42. The responsibility of ensuring that the procedures were followed fell upon the Acting Depot Manager and the staff in place at the material time who was serving under her. The documentation was not in order.
43. Despite the documentation not being in order, the maize was released.
44. It could as well be that the Claimant was part of a syndicate to release the maize unprocedurally but the burden was on the shoulders of the Acting Depot Manager to ensure the documentation was in order.
45. It was not suggested that the Claimant induced her (Ag. Depot Manager), coerced her or forced her to release the maize. The Claimant was miles away and the responsibility to secure the maize stocks rested with the in charge, the Acting Depot Manager. The blame should be placed on her. The buck stopped with her and not the Claimant.
46. In the humble view of the Court, and considering the material placed before it, the Respondent has failed to prove the reason for the termination of the employment of the Claimant or that the reasons were valid and fair.

Appropriate relief

3 months pay in lieu of notice

47. The Claimant sought Kshs 218,724/- being 3 months pay in lieu of notice (based on gross pay).

- The appointment letter provided for 3 months notice of termination or pay in lieu on either side.
48. The final Dues Computation produced in Court indicate the Respondent had offered to pay the 3 months notice of Kshs 207,000/-.
49. The Claimant is entitled to this head of claim based on the basic pay.

Leave

50. Under this head of claim, the Claimant sought Kshs 98,145/-. Correspondence from the Respondent just before the termination show the Claimant had about 68 accumulated leave days.
51. The Claimant was recalled around 1 August 2011 and was arrested. It is probable he had 35 leave days. The computation of final dues by the Respondent did not indicate how much the balance of the leave was.
52. Considering section 10(3) and (7) of the Employment Act, 2007, the Court finds for the Claimant.

Unpaid wages

53. Under this head, the Claimant sought Kshs 1,093,620/- being wages from 3 August 2011 to 4 October 2012 when he was acquitted.
54. The Claimant would be entitled to wages upto the date of termination of employment on 16 November 2011. The Respondent computed the same as Kshs 207,000/-.
55. This is what legally is due to the Claimant.

Compensation

56. The Claimant sought the maximum compensation which he computed as Kshs 874,896/-. The Respondent had offered 6 months wages of Kshs 414,000/- as compensation.
57. Compensation is a primary though discretionary remedy. Section 49(4) of the Employment Act, 2007 has set out the factors the Court ought to consider.
58. The Claimant served the Respondent for some 4 years.
59. Considering the length of service, and the offer which had been made by the Respondent, the Court would award him the equivalent of 6 months gross wages as compensation.

Conclusion and Orders

60. From the foregoing, the Court finds that the termination of employment of the Claimant was unfair and awards him and orders the Respondent to pay him

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|-----------------------------------|----------------|
| a. 3 months pay in lieu of notice | Kshs 207,000/- |
| b. Accrued leave | Kshs 98,145/- |
| c. Unpaid wages | Kshs 207,000/- |
| d. 6 months wages as compensation | Kshs 414,000/- |

TOTAL	Kshs 926,145/-
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61. The award should be subject to tax and payment after the Claimant has cleared with the Respondent
62. The Respondent had offered to compromise the Cause, but the Claimant did not disclose why he rejected the offer. He did not serve his submissions on time as directed. He is denied costs. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 30th day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bichanga instructed by Chepkwony & Co. Advocates

For Respondent Ms. Kavangi instructed by Lutta & Co. Advocates

Court Assistant Nixon