



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 1536 OF 2010

**BETWEEN**

CHARLES MUNYIRI WANDERI ..... CLAIMANT

**VERSUS**

UNGA FARM CARE [E.A.] LIMITED ..... RESPONDENT

*Rika J*

*CC. Jane Sikulu*

*Mr. Wangalwa instructed by Wangalwa Oundo & Company Advocates for the Claimant*

*Mr. Abisai Ambenge instructed by the Federation of Kenya Employers for the Respondent*

ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

1. The Statement of Claim was filed on 21<sup>st</sup> December 2010. The Parties unsuccessfully negotiated voluntary settlement from then. On 8<sup>th</sup> July 2013, the Parties informed the Court they had failed to find settlement, and had filed submissions. They asked the Court to determine the dispute on the strength of the pleadings and submissions on the record, pursuant to Rule 21 of the Industrial Court [Procedure] Rules 2010. The Court advised Award would be delivered on notice.
2. The Claimant states he was employed by the Respondent as its Plant Accountant with effect from 24<sup>th</sup> April 2009. He was given a letter of employment of the same date. His salary was increased from Kshs. 63,249 per month to Kshs. 68,309 per month, under the Respondent's 'Pay for Performance' variable pay program. On 9<sup>th</sup> September 2009, his performance was evaluated and rated as 'Very Good,' subject to a few areas of improvement. He was summarily dismissed on 16<sup>th</sup> June 2010, on the allegations that the Respondent had lost Kshs. 1,717,276, in a fraudulent transaction that took place between 14<sup>th</sup> September 2009 and 14<sup>th</sup> March 2010. The Claimant prays for General Damages, costs, interest and any other remedies the Court may deem fit to grant.
3. The Respondent concedes the Claimant was its Employee on the terms and conditions stated in the Claim. He was dismissed on the date given in the Claim, on the ground that between 14<sup>th</sup> September 2009 and 14<sup>th</sup> March 2010, there occurred fraud relating to inter-company transfers, between Nakuru Feeds Limited and Dakar Road Limited which went undetected. It was only uncovered after a thorough audit,

which confirmed the fraud happened because of incorrect accounting. The Respondent incurred loss in the amount of Kshs. 1,717,275. The Claimant acted negligently and was properly, lawfully and fairly dismissed. He was asked to explain himself before termination, but failed to do so. He appealed the decision, which appeal was rejected. His Claim offends Rule 4 of the Industrial Court [Procedure] Rules 2010. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

*The Court Finds and Awards-:*

4. There is adequate material filed to show that the Claimant was employed by the Respondent Company as the Plant Accountant on 27<sup>th</sup> April 2009. He was summarily dismissed on 15<sup>th</sup> June 2010. The Respondent justified its action on the ground that the Claimant, as the Plant Accountant, failed to make correct or timely balancing of inter-company accounts between Nakuru Feeds Limited and Dakar Road Limited. The Respondent consequently lost Kshs. 1,717,275. The Claimant was given a chance to explain himself, wrote an explanation, was dismissed, appealed, and appeal was rejected. There was valid reason in justifying termination and the decision was arrived at fairly.

5 The Respondent had the onus of showing to the Court that indeed, there was valid reason and fair procedure, preceding termination. Regrettably, there was little material supplied to the Court to lead to the conclusion that the Respondent discharged this responsibility. There was no Report by any Auditor filed, or evidence in any other form availed to the Court, to substantiate the claim that there was fraud, in which the Respondent lost Kshs. 1,717,275 or any other sum. The only material availed to the Court by the Respondent suggesting there was fraud of the nature, is a Statement said to have been recorded by the Claimant, in which he appears to say he was asked by the Finance Director to investigate the underhand dealings between Nakuru Feeds Limited and Dakar Road Limited. He elaborates the steps he undertook in the exercise. There is nothing showing any other investigations, or thorough audit as the Respondent calls it, beyond the report of the Claimant contained in his statement, ever took place. What material then would the Court base its conclusion on, if it was to find that there was fraud in which the Respondent lost Kshs. 1,717,275? Should it be the sketchy investigations report based on the Claimant's own work? The Respondent had the time, from 2010 to file in Court proper evidential material that would be considered as valid reason justifying its termination decision.

6. There is similarly no material demonstrating fair procedure was followed before termination. There is no letter informing the Claimant of any investigations against him; calling on him to show cause why disciplinary action should not be taken against him; communicating specific charges; inviting him to attend a disciplinary hearing; and no record of a disciplinary hearing as contemplated under Section 41 and 45 of the Employment Act 2007. The letter of summary dismissal told the Claimant '*investigation is still going on.*' Why would the Respondent dismiss the Claimant while investigation was still going on, and without the benefit of the other minimum statutory disciplinary procedures? The only investigation brought to the attention of the Court was carried out by the Claimant himself. The Respondent alleges that the Claimant appealed against summary dismissal. There is no record of a first hearing, or second hearing. There are no minutes showing a hearing at primary or secondary level. The Respondent failed in its obligation to accord the Claimant a fair procedure, in as much as it totally failed, to show substantive justification in the termination process.

7. Rule 4 of the Industrial Court [Procedure] Rules 2010 has not been violated by the Claimant in the filing of his Claim. The Rule calls for details of the parties, and the Claim to be captured in the Statement of Claim. It is difficult to see in which way the Claimant's Statement does not fall within Rule 4, as submitted by the Respondent. The Award given by this Court ***in Cause Number 171 of 2011 between Okhaalo Otioka Osman v. Universal Corporation Limited*** has no application or relevance to the current dispute. The Claimant has not pleaded or submitted that he wished to go on working until he attained the age of 60 years; all he has stated is that he was unfairly and unlawfully dismissed, and wishes the Court to order the wrong is remedied, by an order for damages. Rule 4 and the Award mentioned above have no relevance in this dispute.

8. In the end, the *Court Orders-*:

***[a] Termination of the Claimant's contract of employment was unfair;***

***[b] The Respondent shall pay to the Claimant 7 months' gross salary calculated at Kshs. 478,163, within 30 days of the delivery of this Award; and***

***[c] No order on the costs and interest***

Dated and delivered at Nairobi this 25<sup>th</sup> day of February 2014

James Rika

Judge