



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT NAIROBI  
 CAUSE NUMBER 2177 OF 2012

**BETWEEN**

MAINA MWANGI.....  
 CLAIMANT

**VERSUS**

THIKA COFFEE MILLS LIMITED .....  
 RESPONDENT

*Rika J*

CC. Mr. Kidemi

*Mr. Odongo instructed by Ameli Inyangu & Partners, Advocates for the Claimant*

*Ms. Mumo instructed by Mbugwa, Atudo & Macharia Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> October 2012. The Respondent filed a Statement of Response on 20<sup>th</sup> November 2012. The Claimant gave evidence, and closed his case on 2<sup>nd</sup> April 2013. The Respondent called its Technician Mr. Hosea Njenga Muiru and Accountant Josphat Maigua, on the 23<sup>rd</sup> July 2013, when the hearing closed. The dispute was last mentioned before the Court on 17<sup>th</sup> September 2013, when the Parties confirmed the filing of their Closing Submissions and were advised by the Court Award would be delivered on notice.
2. The Claimant’s position is that he was employed as a Driver by the Respondent’s Subsidiary Company Kenya Nut Company Limited on 28<sup>th</sup> January 2002. He was transferred to the Kenya Nut Company Branch at Meru on 14<sup>th</sup> February 2004. He was later transferred to the Parent Company and worked diligently until 18<sup>th</sup> January 2012 when his contract of employment was terminated. He was earning a monthly salary of Kshs. 29,696 on termination.
3. The Respondent alleged to have reviewed the Claimant’s job performance and found it below the expected standard. He states the Respondent’s decision was not based on valid grounds, and did not honour the procedure set out under the Employment Act 2007. He seeks from the Respondent-

- a. Unpaid salary from 1<sup>st</sup> January 2012 to 18<sup>th</sup> January 2012 at Kshs.17,243;
- b. Unpaid leave days at Kshs. 11,899;
- c. Leave travel allowance at Kshs. 2,400;
- d. Unpaid overtime at Kshs. 40,000;
- e. Unpaid imprest at Kshs. 20,000;
- f. 12 months' salary in compensation for unfair termination at Kshs. 356,352; and
- g. One month salary in lieu of notice at Kshs. 29,696

Total ..... Kshs. 475,190

Mwangi also seeks costs, interest and certificate of service.

4. The Claimant testified he was called after work on 18<sup>th</sup> January 2012 by the Administrative Manager Evans Njenga. He was issued with the letter of termination. The letter states:

*“The Management of Thika Coffee Mills has reviewed your job performance and has noted that it is below the expected standard of performance as per your letter of appointment. You are hereby informed that your services have been terminated with immediate effect, effective from 18<sup>th</sup> January 2012. Please handover all company property in your possession to the Garage-In- Charge. Upon clearing, liaise with finance department for your final dues.”*

5. There was no performance appraisal carried out prior to the termination. There was no letter cautioning the Claimant to pull up his socks. Termination was unfair. He has not secured alternative employment. He was not paid salary for 18 days worked in January 2012; leave days; leave traveling allowance; and notice. He asks the Court to find termination unfair, and order he is compensated the equivalent of 12 months' gross salary. He issued demand for redress to the Respondent through his Advocates. There was no compliance.

6. On being cross-examined, the Claimant testified that his performance was alright. It was normal to have motor vehicle accident. He could not remember being involved in an accident with a Bicyclist. He denied being involved in siphoning of fuel from the Motor Vehicle which was assigned to him. The Vehicle's fuel seal was not broken. His leave forms indicated there were unutilized leave days. Traveling allowance was indicated in the pay slip, but was not paid. Overtime was paid upon the Employee lodging a Claims Form with the Employer. Mwangi did not make this Form available for the scrutiny of the Court. He similarly seeks refund of cash used, but did not have the Claims Form seeking recovery. He cleared with all the Departmental Heads, except for the Head of Finance, who was unavailable at the time of the clearance. The Claimant did not have any outstanding obligations with the Finance Department. He explained on redirection that he could not be granted access after termination, and was unable to clear with Finance and receive his terminal benefits. The letter of termination did not mention that the Claimant was involved in an accident, or that he siphoned fuel. The Claimant prays the Court to uphold the Claim.

7. The Respondent replies that termination of the Claimant's contract was in accordance with the law and the terms of employment. It was fair and lawful. He was the author of his own misfortune, and is not entitled to any of the prayers.

8. Hosea Njenga Muiro testified he works for the Respondent as a Technician, involved in fabrications and mechanical repairs of the Respondent's fleet of Vehicles. He was instructed by his Employer to install perforated seals on the Vehicles' fuel tanks. This seal was in the form of a pipe with holes drilled in it. Its purpose was to prevent fuel siphoning. He repaired and / or installed the gadgets in February 2012, on the Respondent's Heavy Commercial Vehicles and some Light Vehicles. He performed the work under his Technical Supervisor. In cross-examination, Muiro testified he did not ordinarily repair Vehicles, but Factory Machines. He was a General Fitter.

9. Josphat Maigua stated his role was to do Financial Accounting. On 6<sup>th</sup> December 2011, the Owner of the Respondent raised the issue for Drivers' siphoning of fuel. Management called the Staff to a meeting. It was chaired by CEO Pius Ngugi. It was determined that each Driver makes report about his car. Some

seals were broken using heavy metal, with the intention of siphoning of fuel. Disciplinary action was taken after the Drivers gave their defences.

10. Upon inspection by the Technical Manager, the Lorry assigned to the Claimant registration KAA 440 T was found to have a broken seal. On checking the work ticket, it was observed that this Lorry had drawn 1063 litres of diesel for 1 month, and covered 1,891 Kilometres, translating to 1.77 Kilometres for 1 litre of diesel. The normal consumption is 2.5 Kilometre for 1 litre of diesel. The Claimant overshot consumption by Kshs. 33,726 per month. The Respondent therefore lost Kshs. 33,726 per month. The Claimant had the Vehicle for about 8.5 months, bringing the total loss incurred by the Respondent to about Kshs 260,000.

11. The Drivers who were able to explain themselves were retained. Performance appraisal was carried out in 2004, and 2012. Maigua carried out the 1<sup>st</sup> appraisal and determined that the Claimant was not fit to continue serving the Respondent. The letter of termination followed. He was advised on the reason for termination on handover. He failed to clear with the Finance Department and could not be paid his terminal dues. The exercise would ordinarily take about 1 hour. Certificate of service could only issue on demand. His terminal dues amounted to Kshs. 52,391. Traveling allowance was paid when one traveled on leave at Kshs. 2,400, while approved overtime was paid with the rest of the salary at the end of the month. He did not lodge any claim for overtime. Imprest was given to buy something in advance. The Respondent requires receipts to support expenditure of imprest money. He was paid lump sum pension under the staff life assurance and pension scheme administered by Jubilee Insurance. He is free to collect his certificate of service any time. He was not unfairly dismissed; siphoning of the fuel was damaging to the company.

12. Maigua stated on cross-examination that he was the Finance Manager between August 2011 and June 2012. He carried out the appraisal of the Claimant's performance because Human Resource Department was not established. The termination letter was signed by the Administration Manager who was senior to Maigua. The Claimant was appraised internally. Maigua was aware the Claimant should have been called and given a hearing. There was no hearing regarding performance. The minutes of the CEO's meeting with the Drivers do not show the Drivers were asked to make their representations. Maigua testified he is not a Motor-technician, and would not tell if odometer was functional. The Claimant's assigned Motor Vehicle was over 10 years old. It would not have been expected to function as a new vehicle. It must have aged. There were comparisons with other months. The worksheet stated the Pump Attendant would sign. He signed only once. Appraisal of 2012 was meant for Drivers alone. The persons who hand-delivered the letter of termination explained to the Claimant the reason for the decision. Redirected, the Witness testified that the Drivers were required to make written explanation. Those who did so were retained. The Vehicles are company maintained. The Claimant's Vehicle should have done at least 2.5 Kilometre per litre of diesel. The appraisal was meant for internal use. The Respondent asks the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

13. Kenya Nut Company Limited, a Subsidiary of the Respondent Thika Coffee Mills Limited, employed the Claimant as a Driver on 28<sup>th</sup> January 2002. He was transferred to the Kenya Nut Company Limited Meru Branch, where he worked in the same capacity, before eventually being assigned duties at the Parent Company in Thika. This was his last station, for on 18<sup>th</sup> January 2012, the Respondent terminated the Claimant's contract of employment.

14. The Respondent justified its decision in the following words: “ *Thika Coffee Mills has reviewed your job performance and noted that it is below the expected standard of performance as per your letter of appointment.*” According the Respondent's Witness Number 2 Mr. Maigua, the Claimant was informed his performance was below standard. He and other Drivers were suspected of fuel siphoning. The Claimant occasioned the Respondent loss of Kshs. 33,726 per month in fuel cost.

15. Were these valid grounds for termination, and was the decision carried out fairly? Is the Claimant entitled to the prayers sought?

16. Performance Management at the workplace involves the planning of work by the Employer; setting of expectation; continued monitoring of performance; building the Employee's capacity to perform; periodically rating the performance; and rewarding of good performance. Performance standards and elements must be reasonable, understandable, verifiable, measurable, equitable and achievable. The standards must be made clear to the Employee, if he is to be held accountable and responsible for non-attainment of the standards.

17. Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has fallen below the set standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow the Employee time to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At investigation, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the Employment Act 2007, must come into play.

18. Specific charges must be put to the Employee; opportunity to defend given to the Employee; and the Employee allowed the assistance or presence of a fellow Employee or Trade Union Representative at the hearing.

19. It is not clear from the evidence given by the Respondent if it had in place a clear performance management policy. The document relied on in determining that the Claimant was not fit for his job based on the performance indicators, is the Appraisal Report Form prepared by Maigua, dated 5<sup>th</sup> January 2012. This was 2 weeks to the termination of 18<sup>th</sup> January 2012.

20. It was an appraisal carried out specifically on a section of the Employees, and which was stated by Maigua to be for internal use. The appraisal was not discussed between the Employee and the Reporting Officer. There were no specific standards and elements in the appraisal that could meet the criteria of being reasonable, measurable, understandable, verifiable, and achievable. The Employee is not shown to have participated in the formulation of the Report.

21. Surprisingly, the format used was the appraisal format on completion of probation period. The Claimant had worked for over 10 years on this date, and was not just graduated from probation. Recommendations by Maigua make no sense and undermine the purpose of a fair appraisal exercise. He recommended that the Claimant should not be confirmed to permanent terms, and that he should not be granted further training. Affirmative recommendations were that the Claimant be invited to a disciplinary interview, and that his contract be terminated. The Reporting Officer lastly recommended that the Employee was not fit for the job.

22. These actions by the Respondent did not conform to the procedure in assessing performance, and disciplining an Employee on poor performance, explained in the previous paragraphs above. The appraisal of 5<sup>th</sup> January 2012 was a colourable exercise.

23. It was aimed at giving weight to the next justification; that the Claimant and other Drivers were involved in siphoning of fuel. In the meeting of 6<sup>th</sup> December 2011, the Senior Management had met with the Drivers. The CEO of the Respondent had raised complaints that the Drivers were not performing to the expected standards. He complained the Drivers were coming to work late and deviating from their designated routes. These two complaints were different from the allegation of fuel siphoning, and are not shown to have been put to the Claimant specifically.

24. The CEO told the Drivers at the meeting that most Vehicles had broken fuel seals. It was said only 1 Vehicle had its seal intact. The Drivers were asked to write statements why their fuel seals were broken failing which they would have disciplinary action taken against them.

25. According to Maigua some of the Drivers wrote statements and were retained, while others were dismissed, presumably after failing to write statements. The recommendations in the appraisal form, that the Claimant's contract be terminated, that he was not fit to continue working and that he should neither be trained further, nor confirmed in employment after 10 years of confirmed service, came against his background.

26. The evidence on poor use of the Vehicle by the Claimant was equally wobbly. Mr. Maigua confirmed he did not have specialized knowledge about Motor Vehicles, could not tell if the odometer was in good working condition, and conceded the Claimant's assigned Motor Vehicle was over 10 years old. It was not expected to function as a new Vehicle. The Worksheets given to the Drivers were to be signed by the Pump Attendant. The conclusion that the Claimant lost the Respondent fuel worth Kshs. 33,726 was not reached through reasonable or specialized motor vehicle knowledge; it was merely a conclusion made following a rule of thumb. These are not figures that could be adopted by an Employer in justifying dismissal of an Employee with over 10 years' standing.

27. The facts may have crystallized if the Respondent had adhered to a fair disciplinary procedure and heard the Claimant, before making the decision to terminate. The generalized allegations and hasty conclusions`` could have been avoided through a structured interrogation of the facts. Maigua testified that Drivers who gave statements at the meeting called by the CEO were retained. A disciplinary hearing is not about taking mass statements in a meeting called by the CEO of the Company; a disciplinary process is more of an individual exercise, where the Employee is given specific charges relating to his individual employment offences. He must be heard, accompanied by a fellow Employee, or Trade Union Representative at the Shop Floor level. In this dispute there was no hearing at all. Mr. Maigua told the Court that the reasons for termination were communicated to the Claimant by the person who delivered the letter of termination. This was a cavalier treatment of the elaborate procedural protections, afforded to Employees by the law on termination.

28. The Court finds that there were no valid reasons advanced by the Respondent in justifying termination. The termination was not preceded by a fair procedure. The Claimant has established his claim for 18 days' worked in January 2012; 1 month salary in lieu of notice; 18 days' of leave; leave traveling allowance; and compensation. There is no proper basis to allow the Claim for overtime and unpaid imprest. He is granted the following prayers:-

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

***[b] The Respondent shall pay to the Claimant within 30 days of the delivery of this Award, 18 days' salary for work done in January 2012 at Kshs. 20,558; 1 month salary in lieu of notice at Kshs. 29,696; 18 days of annual leave at Kshs. 20,558; Kshs. 2,400 in leave traveling allowance; and 10 months' salary in compensation for unfair termination at Kshs. 296,960- total Kshs. 370,172;***

***[c] Certificate of service be issued to the Claimant forthwith; and***

***[d] No order on the costs.***

Dated and delivered at Nairobi this 7<sup>th</sup> day of March 2014

James Rika

Judge