



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 1081 OF 2010

STANSLAUS G. MOTTE CLAIMANT

VERSUS

BAMBURI CEMENT LIMITED RESPONDENT

M/S. Omondi for Claimant

Mr. Ohenga for Respondent

JUDGMENT

1. This suit was brought by way of statement of claim dated 26th August 2010 and filed on 17th September 2010.

2. The Respondent filed a statement of defence dated 5th October 2010.

3. The Claimant testified in support of its case, however, the Respondent was unable to call any witness in support of its case.

Both parties filed bundle of documents and written submissions in support of their respective positions in this matter.

4. Brief facts of the case

The Claimant was employed by the Respondent on 24th April 2002 in the position of Commercial Statistics Clerk earning a consolidated gross salary of Kshs. 454, 142/= per annum, inclusive of a 13th month pay.

The salary was paid monthly in arrears.

5. In terms of a payslip for the month of February 2009, the gross pay for the month was Kshs. 75,782 and the same was subjected to statutory deductions including NHIF, NSSF and PAYE.

6. The Claimant served the Respondent until the 7th April 2009, when he was summarily dismissed from service by the Respondent.

7. According to the letter of dismissal produced in Court, the reason for the dismissal was;

i. failure to report correct levels of stocks at the depots leading to issuance of ATs for non-existent

stocks;

ii. negligence in handling stocks by failure to update promptly.

8. He was given a notice to show cause following a suspension on 20th March, 2009 and the Respondent found his responses inadequate.

His employment was terminated with immediate effect. He was informed of a right to appeal the decision to terminate within 14 days.

9. The Claimant denies all the allegations made against him in the memorandum of Claim and in his sworn testimony before Court and states that the termination was wrongful and unfair.

10. The Claimant therefore seeks the following reliefs:

- a. reinstatement to his previous job without any loss of benefits;
- b. salary arrears for the entire period the Claimant has been out of employment;
- c. severance pay for 6 years at 15 days' salary for each completed year of service;
- d. refund of Kshs. 20,000 deposit;
- e. payment in lieu of notice ;
- f. compensation for the wrongful and unfair termination of employment.

11. In his sworn testimony the Claimant reiterated the particulars of the wrongful and unfair termination stating that during the entire period he served the Respondent, he had a good record and relationship with the Respondent.

That he did not have a single warning letter.

That he was not asked to respond to the letter of suspension nor was he given the outcome of the alleged investigations.

That at the meeting of 6th March 2009, he was only told he would receive a letter of termination and no hearing took place at all.

The report of investigation was not given to him.

The termination was therefore wrongful and unfair.

12. The Claimant denies that he failed on his duties as alleged or at all.

The Claimant told the Court that the Respondent kept Ksh. 20,000 security for losses incurred by the employee and demands the amount back.

The Claimant was paid upon termination Kshs. 232,525/= being his pension.

13. The Claimant was closely, cross-examined by Advocate Ohenga for the Respondent and withstood the questioning well. He denied there was any good reason to terminate his services.

14. The Claimant did not appeal to the managing Director, because, he had already been told by the Directors that his services would be terminated.

He vehemently denied advantaging one customer by allowing him several loads of cement in one day to avoid incurring transport costs which had been introduced by the Respondent but had not yet taken effect on the material day.

15. The Respondent did not present any oral evidence to refute the evidence by the Claimant. The bundle of documents filed by the Respondent on 12th November 2012, did not benefit the Respondent's case, as no witness introduced them to Court giving relevant information regarding each one of them.

The Claimant's case therefore remains largely uncontroverted since the averments in the statement of defence do not amount to evidence.

16. The Claimant made a *prima facie* case that his employment was terminated wrongfully and unfairly and the onus fell on the Respondent in terms of *Section 37(5)* to justify the termination.

By failing to call any witness to justify the termination, the Respondent failed to discharge the evidential burden of rebuttal placed on it by the *employment Act*.

17. Accordingly, the Claimant has established on a balance of probability that the termination of his employment was:

- i. not for a valid reason;
- ii. was not done in terms of a fair procedure

18. The same was therefore substantially unlawful and procedurally unfair and the Claimant is entitled to the following terminal benefits and compensation:

- i. one month salary in lieu of notice in the sum of Ksh. 69,782/=;
- ii. refund of Ksh. 20,000/= deposit left with the Respondent;
- iii. ten months salary being compensation for the unlawful and unfair termination in the sum of Ksh. 690,782/=.

19. The Court in awarding this amount has taken into account the length of service by the Claimant, the good record he had kept during this period; the summary nature of the termination and the unreasonable conduct by the Respondent.

20. The total award by the Court to the Claimant as against the Respondent is Kshs. 780,564/=.

21. The amount is payable with interest at Court rates from the date of this judgment to payment in full.

The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 4th day of April, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE