



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 362 OF 2013

ALEX SEMUTWA.....CLAIMANT

- VERSUS -

KENYA SEED COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th June, 2014)

JUDGMENT

The claimant **Alex Semutwa** filed the memorandum of claim on 24.10.2013 through Gitonga Mureithi & Company Advocates. The claimant prayed that the respondent be found to have unfairly terminated his services and be compelled to compensate him as follows:

- a. 12 months' salary for unfair termination being $12 \times 21,500.00$ being Kshs.258,000.00.
- b. Unpaid salary during suspension to dismissal Kshs.21,500.00 x 9 months being Kshs.193,000.000.
- c. Service gratuity for one year being $31\% \times 43,000.00$ making Kshs.13,330.00.
- d. Interest at court rates.
- e. Costs of the suit any other relief as the court may deem fit and just to grant.

The respondent **Kenya Seed Company Limited** filed the response on 26.11.2013 through Kidiavai & Company Advocates. The respondent prayed that the honourable court finds that the claimant's services were lawfully and fairly terminated in accordance with the law; and the claimant's claim be dismissed with costs.

The claimant was employed as a graduate management trainee for a period of one year by the respondent's letter dated 26.08.2009. The appointment was extended for another one year by the contract letter dated 14.12.2010. The claimant was subsequently promoted effective 1.07.2011 to permanent and pensionable basis to the position of a Sales Representative II, Job Group KSC 06 by the respondent's letter dated 5.08.2011.

The claimant's case was that he was dismissed by the respondent on 12.11.2012. The allegations were that the claimant had participated in fraudulent transaction involving a pretentious customer styling itself as the Catholic Diocese Secretariat. The claimant's job entailed being in-charge of the respondent's maize seed dispatch store, preparing seed dispatch documents, preparing relevant reports, and managing customer documents against relevant bank guarantees. The claimant was suspended by the letter dated 12.03.2012 addressed to him and stating as follows:

“SUSPENSION

We have received a report on fraudulent transactions to Catholic Secretariat – Nairobi on 15th February, 2012 leading to loss of seed worth Kshs.4,563,250.00.

Investigations into this loss reveal that you are culpable. This is an offense against the Company and you are thus liable to disciplinary action as detailed in clause 15.1 of the Human Resource Policy and Procedures Manual.

Management has consequently decided that you be suspended from duty with immediate effect pending appearance before the Staff Disciplinary Committee.

You are therefore required to hand over all company property under your care to the Sales & Marketing Manager or his appointee.

While on suspension, you are expected to keep off company premises unless advised otherwise. Please furnish this office with your cell-phone number and physical address before you leave.

During the period of suspension, you will not be entitled to any pay or benefits.

Yours sincerely,

Signed

K.S. Malakwen

For: Managing Director”

The claimant was invited by respondent’s letter dated 7.09.2012 to appear before the Staff Disciplinary Committee on 11.09.2012 at 9.30 am. The appearance was pushed to 2.10.2012 by the respondent’s letter dated 21.09.2012.

It was the claimant’s case that about the suspension’s time he cooperated as the police witness and he recorded statements with the police investigating officers but the police never went back to him again. It was his evidence that the police did not charge him because the information available to the police did not disclose any wrongdoing on the claimant’s part.

Subsequently, the claimant was dismissed from the respondent’s employment by the letter of summary dismissal dated 12.11.2012. The reason for dismissal was on account of the alleged fraudulent transactions to Catholic Secretariat – Nairobi on 15th February, 2012 leading to loss of seed worth Kshs.4,563,250.00 and as earlier conveyed in the suspension letter. The dismissal letter further informed the claimant to note that he was expected to pay the respondent a total of Kshs.4,563,250.00 being the value of the lost seed.

The issues for determination in the case are whether the termination was unfair; and whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

The allegations leveled against the claimant are that he failed to verify the banking slips from the said fictitious Catholic Secretariat and which the claimant stated was not his job but that of the finance and accounts department. The relevant loading slip is dated 15.2.2012. The court has carefully considered the facts and evidence on record. The evidence by Stephen Kibet Malakwen (**RW1**) was that the claimant was required to receive a confirmation from finance that the money was at the bank before authorizing the loading of the seeds.

The respondent’s accountant Edwin Ruto (**RW2**) testified that the claimant had to forward the bank slip to accounts for verification. Priscah Chemtai Maiyo (**RW3**) was the respondent’s officer who effectively

caused the loading of the seed in issue on 15.2.2012. She was the supervisor at the respondent's seeds' stores. Her job was to receive and dispatch seed in stores 1 and 2. Her testimony was that she was given loading instructions with respect to the said Catholic Secretariat by the claimant. The loading took place at about 5.15 pm as it was usual to work beyond 5.00 pm where the customer had paid for the seed and there was work to be done like in that instance.

Once she received the loading instructions and a cash sale receipt, then she complied by loading. After the loading, she raised the relevant delivery note and two weeks later, she was asked to record a statement about that transaction.

The crucial evidence by RW3 was that before loading the seeds, she had to satisfy herself that it was signed by the claimant and for the chief finance officer or accountant. In the instant case, it had been signed by the claimant and by one Plapan for the chief accountant.

The evidence is clear. The claimant approved loading instructions against the confirmation by the chief accountant as prescribed on the loading instructions form and against the relevant receipt. In the opinion of the court, it was for the chief accountant or his representative to confirm the payments at the bank. The respondent's exhibit 4 is the investigation report by the respondent. The person who signed in this case for the chief accountant was Plapan Rotich and the report shows that his duties included reconciliation of agent accounts, maintaining bank guarantees and signing loading instructions.

He saw the receipt from a teller from the seed shop showing seed was for sale but does not state that he did anything to verify the pay before signing the loading instructions. The report is clear that the claimant asked Serem of the seed shop to enquire about the documents and the claimant also received the confirmation of the order from Daniel Nyaberi. The said Daniel Nyaberi, the report shows had elaborate communication with the supposed client but the report does not make any conclusive findings and role he may have played in the scandal.

The court has revisited and reconsidered the evidence. The standard operating manual is elaborate on the roles of staff and steps in dispatch of seeds. The counter sales clerk receives orders, confirms availability of seed and receives payments per the order. Clause 6.4 is clear that confirmation of payment was by till operator, cashier and regional officer. The court finds that the claimant was not any of the three officers.

Working instructions for finance department are clear. Under revenue collection, paragraph 13 states that for new customer accounts (like the fictitious customer in the case), requisitions are made by the marketing department for approval by the finance manager and subsequent creation of the customer account from accounts receivable module. The court has found that the investigation report showed that the claimant made the necessary steps for a new customer as required. The court finds that it was for the finance department to act in accordance with the standing procedures.

As for verification of payments against the bank slip, it was for the accountant to confirm clearance by calling the bank or checking the bank statement and the court finds that the claimant was not any of the accountants or the officers in the finance and accounts department. The court further finds that the document for generating the cash sale was picked from the marketing manager's car by his driver called Benard Wambua as per the investigation report but the same report has not provided for the role or involvement of the marketing manager in the transaction and in particular how the document came to be found in the car.

In view of the relevant material on record, the court finds that the claimant was not culpable as alleged. The court finds that at the time of the dismissal, the respondent cannot be said to have genuinely established that the claimant had occasioned the loss to the respondent as leveled against him.

The court finds that the fact that the police investigations did not result in any criminal charges being preferred against the claimant, further shows that the claimant was not culpable as alleged. The court finds that the termination was unfair under section 43 of the Employment Act because the reason for the termination was not valid.

The court has considered that the claimant had served the respondent for three years of which one was on permanent and pensionable terms. He had expectations for a long service with the respondent but the court considers that subsequent to the termination, he obtained alternative employment. In the circumstances, the court considers that pay of **six months' gross** salaries as at termination will meet ends of justice in this suit. Thus, the respondent will pay the claimant at Kshs.60,000.00 by six months making **Kshs.360,000.00** for the unfair termination under the provisions of section 49 of the Employment Act, 2007.

The next issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows.

The claimant has prayed for unpaid salary during suspension to dismissal Kshs.21,500.00 x 9 months being Kshs.193,000.000. The court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus,

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”

The court further upholds the opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited [2013]eKLR**, where this court stated thus,

“The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

Accordingly, the court finds that the claimant is entitled to the **Kshs.193,000.000** as prayed for in view of

the court's finding that the claimant's termination and the suspension was based on an invalid reason and was therefore unfair.

The claimant prayed for service gratuity for one year being 31% x 43,000.00 making Kshs.13,330.00. The basis of the prayer has not been established and the court finds that the prayer will fail.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.553,000.00** by 1.7.2014, in default, interest at court rates to be payable from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 6th June, 2014.**

BYRAM ONGAYA

JUDGE